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Mediator's Proposals After ABA Opinion 518: Ethics, Effectiveness, and the Reality of Breaking Impasse

By Noah Hanft
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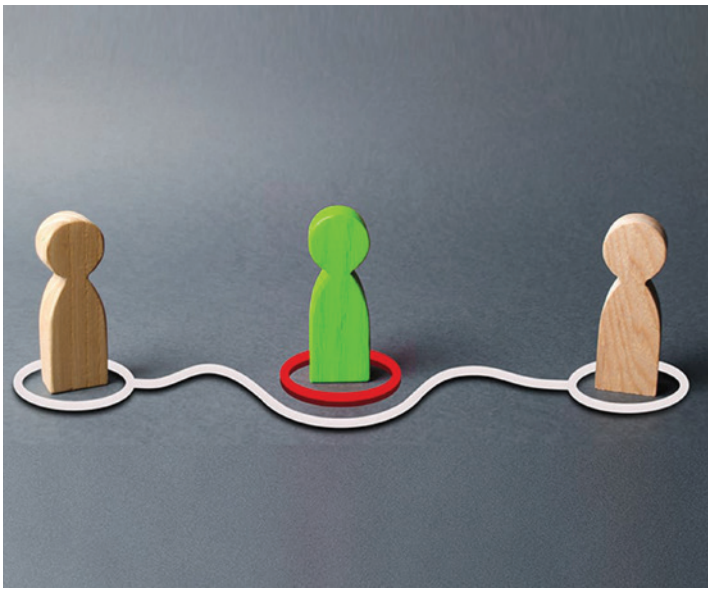
Mediator's proposals have long occupied a contested space in mediation practice. For some neutrals, they are an indispensable tool for breaking impasse; for others, they raise concerns about neutrality, coercion, and ethics. With the American Bar Association's issuance of Formal Opinion 518, the debate has sharpened—particularly around how mediators derive and frame proposals and how the delivery of those statements align with ethical obligations.

Opinion 518 addresses misleading statements made by mediators, including exaggerations about the strengths or weaknesses of a party's case or false representations about what other parties might accept. While in this regard the opinion reinforces fundamental ethical guardrails, some of its language has also sparked questions about whether it unduly constrains one of the most effective tools mediators have: the mediator's proposal.

From the perspective of mediators, like myself, who regularly and successfully use proposals, Opinion 518 does not eliminate the practice—but it does invite a closer look at how proposals are framed, authorized, and delivered.



mediation referee

Why Mediator's Proposals Work

Mediator's proposals are generally most effective when traditional negotiation stalls. Persistent gaps, large and small, between positions can breed frustration, fatigue, and disengagement. At that point, where the parties are stuck continuing to shuttle numbers back and forth, where there is little to no movement, may only entrench positions rather than move parties toward resolution.

One of the less discussed, but critically important reasons mediator's proposals succeed is authority. In many mediations, the individuals at the table are not the ultimate decision-makers. Even when they want to settle, they may lack the internal authority to close the deal. A mediator's proposal can serve as a neutral recommendation that allows parties to "take it upstairs" without appearing to concede or weaken their negotiating posture. Also, often counsel

articulate a hard line that they would never agree to a certain number or range.

However, when a plaintiff is presented with a reasonable number, and can spend a bit of time thinking about whether they want to go ahead through the seemingly endless litigation process, they opt to accept the proposal. And defendants, also looking ahead, recognize that, by accepting a proposal, they can put an end to legal fees, avoid the uncertainty of litigation and end the distraction that legal disputes bring. In such cases they are inclined to pay a bit more than they thought they ultimately would when given the time to evaluate the alternative.

In practice, success rates for mediator's proposals can be remarkably high, often well over 90 percent. I find that success is not limited to cases where parties are already close to resolution. While conventional wisdom suggests proposals should be used only when the gap is narrow, experience suggests otherwise. Taking calculated risks—particularly after a clear impasse—can unlock resolutions that would otherwise be unreachable.

Importantly, a mediator's proposal is not meant to replace negotiation. If parties are continuing to negotiate and, say the gap is $50,000, they likely do not need a mediator to find the midpoint. The paramount goal of a mediator is to lead the parties to reach a resolution without intervention. But that does not always happen, and proposals are designed for moments when negotiation has truly run its course.

The "Best Interest" Debate

One of the more controversial aspects of Opinion 518 is its caution against mediators making statements that a particular settlement is "in a party's best interest." Critics argue that such statements may cross the line into coercion or misrepresentation.

But this concern, I believe, overlooks the reality of mediation practice. Mediators routinely spend hours—often days—discussing with parties the strengths and weaknesses of their cases, each side's interests often going beyond money considerations, best- and worst-case scenarios, litigation risks and costs. These conversations are, at their core, discussions about what is in a party's best interest.

A mediator would not—and should not—make a proposal if they believe it is averse to the best interest of either party. Moreover, there are circumstances where parties expressly want an evaluative proposal. Sophisticated parties often authorize a mediator to assess their case and factor perceived strengths and weaknesses into a proposal. In those situations, an evaluative proposal can be appropriate and highly effective. Such proposals need not be mathematical midpoints, nor must they be constrained by rigid formulas.

Consent, Transparency, and Process

One area of near-universal agreement is consent. A mediator's proposal should never be made without the authorization of both parties. Equally important, parties should understand what kind of proposal they are seeking.

Is it a proposal designed to maximize the chances of acceptance based on the mediator's perception of what each side would accept, taking into consideration their negotiating posture and other information gleaned from discussions with each side? Is it evaluative, grounded in legal analysis, consideration of who the judge is (if it's post initiation of litigation), and other factors? Is it a hybrid, informed by risk analysis as well as pragmatic considerations? These distinctions matter, and they should be discussed explicitly before any proposal is made.

Transparency at the front end protects both the mediator and the process. It ensures parties are not surprised by the nature of the proposal and reinforces the mediator's neutrality.

Another critical best practice is utilizing the double-blind structure. Parties should respond independently and confidentially, with acceptance binding only if both sides agree. This protects against strategic behavior and preserves trust in the process. A party that rejects a proposal does not get to know if the counterparty accepts it.

Timing also matters. Particularly in complex matters or cases involving large organizations, parties may

need days, not just hours, to evaluate a proposal and obtain certain internal approvals. Mediators should account for these realities rather than imposing unnecessarily short deadlines that could undermine the proposal's effectiveness. Of course, there must be a definitive deadline which should be discussed with the parties before setting it.

Written Rationale and Tailored Messaging

Some mediators, when they believe it will be effective, enhance proposals by providing side-specific explanations, sometimes through confidential addenda, articulating why acceptance serves that party's interests. This approach does not require misrepresenting facts or overstating risks. Rather, it reflects the mediator's informed judgment after extensive engagement with both sides.

When done carefully, this practice reinforces the proposal's legitimacy and gives parties a framework for explaining acceptance internally. It also underscores that the proposal is not arbitrary but grounded in the mediator's understanding of the dispute.

Opinion 518's Ethical Guardrails

ABA Opinion 518 rightly prohibits mediators from making false or misleading statements, such as mischaracterizing evidence, misstating legal risks, or fabricating the other side's position. Few practitioners would dispute these prohibitions.

The tension arises when ethical guidance is interpreted too broadly, potentially discouraging mediators from expressing professional judgment at all. Mediation is an art and not a purely mechanical process. It relies on trust, experience, and the mediator's ability to synthesize complex information into practical recommendations.

Opinion 518 should be read as reinforcing honesty and transparency, not as banning mediator insight or judgment. A mediator can believe and say that settlement is in the parties' best interest without misleading anyone, provided that belief is genuine, grounded and consistent with the process the parties have authorized.

A Tool Worth Preserving

Mediator's proposals are not appropriate in every case. They require skill, timing, and judgment. Used prematurely or without consent, they can backfire. Used thoughtfully, they can transform stalemate into resolution.

As mediation continues to evolve, Opinion 518 should provide an opportunity—not a prohibition—to refine best practices. By emphasizing consent, clarity, and candor, mediators can continue to use proposals ethically and effectively.

It is important to remember that mediator's proposals are not the only impasse breaking tool available. Bracketing has become a commonly used device to reduce gaps between parties and introduce an agreed-upon zone of negotiation. Similar concerns to mediator's proposals could be raised when a mediator suggests or recommends a bracket.

In the end, mediator's proposals or mediator's bracket proposals are about helping parties do what they came to mediation to do: resolve disputes they cannot resolve on their own. When deployed with care and integrity, they remain one of the most powerful tools in a mediator's toolbox.

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