

# MEDIATOR'S PROPOSALS – IF, WHEN, HOW

By Matthew J. Geyer

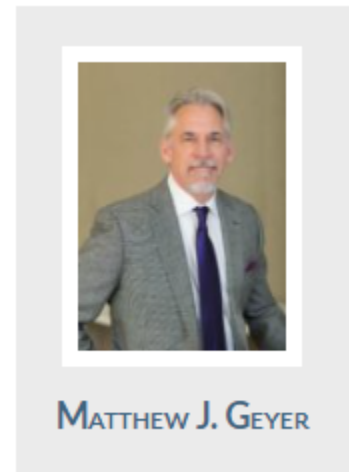
In my capacity as the new editor of this little piece of cyber real estate, and in the absence of any ready submissions in the queue, I offer some thoughts on a matter of common interest – the use, misuse and overuse of mediator's proposals.

First, the target: What number is the right number? The moniker we use for this process implies to some that the number (and/or other terms) represent the mediator's own sense as to an appropriate outcome, given her view of the strengths and weaknesses in liability and damages proofs. Others view the proposal as an endorsement, a resolution the mediator deems fair and reasonable under a wider range of circumstances. To me it's neither of these, and both: It's the number that has the most likelihood of settling the case . . . without shocking my conscience either way.

Second, timing: What's the right time to do a mediator's proposal? *Not too early* is one important answer. This is because (a) one can't gauge the likelihood of mutual acceptance of any number until he's heard several passed back and forth between the parties; and (b) the parties won't be ready for the final compromise a mediator's proposal requires, until they've wrapped their heads around a few compromises of their own position through the course of the shuttle diplomacy phase. *Not until impasse* is another important answer. The old fashioned way is the best way to negotiate while progress is being made, for two reasons: It often works, if followed all the way to settlement; and it keeps the potential outcome in the parties' hands, which is where it ought to be.

Third, process: Another answer to the timing question is more of a process issue. *Not until you ask if they want one*. Because they will be ceding some significant measure of control over the negotiations, I believe both sides should be asked if they want a mediator's proposal, and I take both their answers confidentially. Only if I get two affirmative responses do I make a substantive proposal (and anyone who didn't want one doesn't know if the other side did). This also adds a measure of "buy-in" to the change in process.

Fourth, don't forget the menu: Through the shuttle diplomacy phase you've been working through a menu of resolution items. If possible, they should all go into the proposal – the



money changing hands, and when; the scope of the release; confidentiality, non-disparagement and the like; attorneys' fees and costs; the parties' relationship going forward, if any; ownership of the trade name or other intellectual property. If you've hammered all these other items out, at least for the most part, consider including them in the mediator's proposal if they were sufficiently resolved in prior negotiations. This way they don't linger into the documentation phase.

Fifth, the end game: How long should you give the parties to respond to your proposal? *Until five o'clock on a Friday afternoon* is the best answer to this question. The psychology of a Friday afternoon is such that, other things being equal, it's the best time to settle a case. I learned this as a first-year associate from a senior partner, and I didn't have to ask him to explain, so I won't belabor the point here. Of course, in many cases you can take the answers a few minutes after delivering the proposal, while you're all still together, and move on to documenting the agreement; while in other cases one or more parties need time to get input from geographically dispersed decision-makers.

Finally, a word on mediator's *range* proposals: *Don't*. Ok, that's a little overstated; they're useful on occasion. But don't expect easy going thereafter, even if they're accepted – nobody wants to make the next move. As often as not, the only next move they'll entertain is another mediator's proposal.

Feel free to disagree. Shoot me an email at [mjg@GeyerLawandADR.com](mailto:mjg@GeyerLawandADR.com), including with any ideas you may have for content here at the Mediators' Corner.

\* Mr. Geyer's practice focuses primarily on service as a neutral arbitrator and mediator. He is a member of the AAA's National Roster of Commercial Arbitrators, as well as its Large Complex Case Panel, its Securities Panel and its Mediation Panel.