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ADR SERVICES

ABA Formal Opinion 518 and the attack on evaluative “lawyer-mediator” proposals

UNDERSTANDING THE INTENT BEHIND A MEDIATOR’S PROPOSAL

A “mediator’s proposal” is commonly used in mediations where the parties have reached an impasse in their negotiations. Experience shows that many attorneys expect mediator proposals to be used as a matter of course.

Mediators can be facilitative, evaluative, or both. Retired judges, with years of experience and scores of trials, tend to be more evaluative. Some mediators have argued that an evaluative mediator’s proposal, where the mediator proposes a settlement number, is unethical. They argue that mediators should only be facilitative. In support of this position, they cite to the American Bar Association’s Formal Opinion 518. This argument is misguided.

Basics of a mediator proposal

When the parties are at an impasse, a mediator proposes a settlement amount, and the parties can privately inform the mediator whether they accept it. If both sides accept, the mediator announces that the case has settled. If either party does not accept, the mediator states that the case has not settled, and the rejecting party does not know whether the opposing party accepted the mediator’s settlement proposal.

Vetted mediator proposal

Sometimes, before a mediator proposes a settlement number, the mediator separately meets with counsel to determine a settlement amount counsel will recommend to their clients. If all counsel agree to the amount, the mediator then proposes that amount. This proposal is referred to as a “vetted” proposal. The agreement of counsel increases the likelihood of acceptance by the clients.

Unvetted mediator proposal

Sometimes, however, counsel do not agree on a number they would recommend to their client. The lack of agreement may be genuine or posturing. Nevertheless, counsel may agree that the mediator can choose a number on their own. This proposal is referred to as an “unvetted” proposal.

It is this second, “unvetted” proposal, whose ethical use has been questioned as a result of the ABA ethics opinion. By “unvetted,” what they really mean is “evaluative.”

ABA Formal Opinion 518 regarding “lawyer mediators”

On October 15, 2025, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 518. It is summarized, as follows:

Section II addresses “The Lawyer-Mediator’s Duty to Avoid Statements that Imply that the Lawyer-Mediator is not Neutral but is Seeking to Achieve a Party’s Best Interest.”

Section II says that a lawyer representing a client has a duty to act in the client’s interest. In contrast, a lawyer-mediator’s role is to assist the parties in resolving their dispute, regardless of where the interests of a party may lie. The lawyer-mediator must be vigilant in conducting the mediation to avoid creating the impression that the lawyer-mediator has an attorney-client relationship with a party.

Fair enough. A mediator should never interfere with the attorney-client relationship and should not convey the impression that the mediator is giving legal advice or acting in the client’s best interest. That shouldn’t be debatable.

The opinion then applies that principle to the conduct of the mediation: “The obligation to avoid misleading the parties about the lawyer-mediator’s role also means that, in conducting the mediation, *the lawyer should not state that the lawyer-mediator is acting to achieve a party’s best interest or that a proposed settlement is in a party’s best interest.* Otherwise, the party may rely on the lawyer-mediator’s assurance, mistakenly believing that the lawyer-mediator is acting in the party’s best interest as the party’s lawyer.” (Emphasis added).

Essentially, lawyer-mediators are advised to “stay in your lane. You are not the attorney for a client in the mediation,

and you should leave the attorney-client relationship to the client’s attorney.”

The argument against “unvetted” mediator proposals

ABA codes and rules are not binding in California (See Cal. State Bar Form. Opn. 1983-71), and the term “mediator’s proposal” does not appear anywhere in the ABA opinion. Nevertheless, some have argued that pursuant to the opinion, “vetted” mediator’s proposals (where counsel agree on a number) are ethical, but “unvetted” mediator proposals (where counsel don’t agree on a number) are unethical unless the mediator proposes the mid-point between the last demand and offer. The reasoning is that when a mediator proposes a number that is not the midpoint, the mediator is implicitly telling the parties that accepting the mediator’s number is in their best interest.

Since the mediator has a duty of neutrality, once a mediator chooses a non-midpoint number, neutrality is supposedly gone. The mediator is therefore seen as favoring one side over the other, and, therefore, the mediator undermines the parties’ right to self-determination. It conveys to the parties that “this is the best you can do in this mediation,” and that the proposal is in the client’s “best interest.” The reasoning is that the attorney failed to act competently, because it delegates to the mediator the attorney’s duty to advise their client as to what is in the client’s best interest.

A mediator acts ethically when asked to be evaluative

When requested to do so by the parties, a mediator does not violate the duty of neutrality when the mediator selects a settlement proposal number. ABA Formal Opinion 518 does not say otherwise.

Imagine the following scenario. The mediator is a retired judge. Despite the mediator’s attempts to facilitate a settlement, the parties are at an impasse. They cannot agree to a number. The mediator

has suggested a settlement at the midpoint of the last demand and offer, and neither side will give an inch. Other than everyone throwing up their hands and preparing for trial or arbitration, what is to be done?

Although the midpoint has already been rejected by both sides, the parties ask the mediator to consider issuing a mediator's proposal. The mediator would choose his own number, and the parties, with the assistance of counsel, would decide whether to accept it.

Why would the parties make that request? They want to get the mediator's *evaluation*. Presumably, they were diligent in selecting a mediator. One consideration in selecting a mediator is the mediator's ability to facilitate settlements. Another consideration, however, is the mediator's courtroom experience. They want to benefit from that experience. The mediator gives them that opportunity.

What's unethical about that? The parties and their counsel make the request voluntarily and fully informed. The attorneys recommended the mediator, in this case a retired judge, based on their own experience appearing before the judge, or the judge's reputation, or both. The judge may have presided over hun-

dreds of trials. The parties have interacted with the mediator for hours and have confidence that the mediator will fairly exercise his judgment.

Mediators can be both facilitative and evaluative. In this example, the parties are asking the mediator to be *evaluative*. To suggest that an "unvetted" mediator's proposal is unethical is to discount the evaluative qualities that a mediator can bring to the negotiations, qualities that are based on actual courtroom experience.

So long as the mediator exercises judgment honestly, the mediator has not violated the duty of neutrality with a settlement proposal. Quite the opposite. When a judge conducts a bench trial and issues a judgment, the judge doesn't violate the duty of neutrality! Similarly, during the mediation, the parties have presented their cases, albeit in an abbreviated manner. By doing what the parties have asked, and evaluating the case, the mediator has remained neutral.

Conclusion

ABA Formal Opinion 518 is a useful reminder to mediators that they should remain neutral, and not give the impression that they are acting in the best interest

of any party. A mediator remains neutral when agreeing to the parties' request that they be given the benefit of the mediator's evaluation. Nothing in ABA Formal Opinion 518 says otherwise.



Hon. Steven J. Kleinfeld (Ret.) currently serves as a mediator, arbitrator, and referee with ADR Services, Inc. Before becoming a neutral, he served for over 20 years as a Los Angeles Superior Court judge. He has authored four other articles for the Advocate Magazine, including his most recent article entitled, "You're thinking about applying to be a judge." In his prior private practice before becoming a jurist, he primarily represented plaintiffs. Before his appointment to the bench, he was a board member emeritus with the Consumer Attorneys Association of Los Angeles and a member of the Consumer Attorneys of California's amicus committee. Judge Kleinfeld can be contacted at judgekleinfeld.com.