

NOTES ON EVALUATIVE SKILLS FOR MEDIATION

The Theoretical Framework & Cautionary Concerns By David Levin

An old dog has a new bark. Best practices, court-connect program policies and procedures, legislation, and court rules are tackling a new iteration of a traditional question: “*May a mediator tell people what to do?*” This is not an academic issue.

For example, many courts are now requiring attorney mediators to have a 40 hour mediation training, generally based upon a facilitative, non-evaluative, mediation model. On the other hand, evaluative mediation is the norm for practicing attorney mediators, where the attorney typically conducts shuttle diplomacy, offers a private reality check to each party of the strengths and weakness of their respective cases, and may recommend options for resolution. See attached chart, “Is It ‘Mediation’ or What?”

How practitioners and programs address this issue has immediate practical implications.

Evaluative Techniques

The form of being evaluative may range from informative to directive. Examples of injecting an evaluative component, listed in order of increasing probable directiveness (and this list is not an endorsement of using the most directive techniques) are:

- Asking questions which open a topic area;
- Providing general subject matter information and sources for additional knowledge;
- Providing sample solutions or ideas;
- Assessing the strengths and weaknesses of a participant’s position;
- Suggesting options for resolution;
- Recommending a resolution;
- Telling what the applicable authority would decide;
- Telling the participants what to do.

To inject an evaluative component during a mediation, at least one of the neutrals must have subject matter expertise. The neutral injects information and opinion, based upon a knowledge of the dispute, the participants, and the subject matter.

Facilitative Foundation

Facilitative mediation is the foundation of dispute resolution, particularly the communication skills. A basic 40 hour mediation training should be a pre-requisite for evaluative mediation training and practice. In the facilitative model, parties generally meet together. The conflict and “the anger” are in the room, a circumstance many evaluative mediators avoid, and the training participants learn how to work constructively through the conflict.

“Pure” mediation is a facilitative process, where the neutral guides the process and does not make substantive suggestions. Self-determination is the keystone, based upon mutual discovery by the participants of needs, interests, options, and resolution. Facilitative mediators are trained to assist the parties to solve their own problems. This process also enhances working relationships, builds communication skills, and increases dispute resolution skills.

Essential Considerations

There are essential considerations for being evaluative as a neutral:

- Understand the expectations of the participants regarding the process they are in, and how injecting an evaluative component will impact that expectation and process;
- Be transparent in explaining the evaluative component before using the particular technique. Better yet, have the participants agree to using the evaluative technique;
- Determine when to use an evaluative technique, which one to use, and how to use it;
- Determine how to use an evaluative technique without unnecessarily contaminating self-determination;
- Determine what limits to respect while being evaluative.

An evaluative technique shifts the focus to the neutral as a source of information and ideas. In contrast, facilitative processes focus on the participants as the sources. The neutral must be mindful of how being evaluative may shift who owns the problem and who is responsible for solving it.

Tips and Traps

Mediation is both a skill set and an art form. Knowing when and how to inject an evaluative technique within a mediation is both as well. Best practice suggests the following tips and traps:

- Avoid being evaluative until both positions *and* interests have been explored;
- Avoid being evaluative as a substitute for using mediation skills to work through a difficult situation;
- Avoid being determinative which undermines participants' self-determination and which studies suggest diminish participant satisfaction;
- Emphasize being informative, and support what the participants may do to educate themselves;
- Emphasize that predicting what a third party decision maker may do, such as a judge or an arbitrator, rather than offering a range of possible results, is generally foolish.
- Emphasize that for the parties to find their own way, rather than to watch how creative the neutral may be in designing solutions, generally makes for the best results.

The choice to inject being evaluative is *not* a reason to change the nature of the process, from a facilitated self-determination dispute resolution method to a form of arbitration or trial. If the parties want to be told what to do, then sign them up for a different process.

The positive side is that information may spark movement. The synergy between people may benefit from additional ideas and perspectives. So, if you elect to be evaluative, support and do not contaminate the process. Start with a minimally intrusive step. Monitor the impact. Remember that a dispute resolution opportunity is always a work in progress.

Additional Issues

There are two common characteristics of evaluative mediation which should be at least be noted here and which should be elaborated elsewhere: shuttle diplomacy and jumping to options.

- **Shuttle Diplomacy.** The issue is whether the practice of regularly separating the parties unnecessarily removes the advantages of working with conflict and of problem solving with both parties in the room.
- **Jumping to Options** The issue is whether the tendency to jump to prescribing solution options immediately after hearing the respective positions of the parties unnecessarily removes the benefits of learning more about the situation and of surfacing interests.

Disclosure

To be clear, my own strong preference is to be facilitative with both parties together. The evaluative or shuttle diplomacy methods are second choices which I use only when necessary. I avoid the determinative forms of mediation.

My own evaluative interventions are limited to being informative and hopefully are not determinative. I try to avoid being evaluative, using shuttle diplomacy, and jumping to options as easy ways out. My preference is to invite the conflict into the room and to work with it.

Finally, I believe that no formulaic approach to dispute resolution is possible. The technique chosen for each stage of every case must be individually made.

Is It “Mediation” or What?

ADR (Alternative to Trial Methods of Dispute Resolution) includes a wide range of overlapping processes. Understanding the differences is more important than technically labeling the specific process. “Mediation” is a popular term with many meanings. This table illustrates two of the most common forms of ADR called “Mediation”. The purpose here is to provide an aid for selecting the form that best fits a given circumstance.

Simplified Characteristics	“Facilitative” Mediation	“Evaluative” Mediation
When	Any Time	Near Trial
Who	Parties	Attorneys & Parties
Who Talks	Parties Talk with Each Other	Parties Talk with Mediator
Why Talk	Find Common Ground	Find Strengths & Weaknesses
How Long	Series of Sessions	One Long Day
Common Format	Together, Face to Face, Joint Session	One Side at a Time, Shuttle Diplomacy
Additional Format	Individual Sessions, i.e. “Caucus”	Joint Session
Neutral’s Process Role	Facilitates Process	Facilitates Process
Neutral’s Content Role	Stays Neutral	Evaluates Positions
A Key Consideration	Mutual Benefit	Best Alternative to Trial & “Cut Your Losses”
A Key Characteristic	Being Heard: “An Opportunity for People to Process Together with a Guide Who Listens with Interest.”	Hearing Reality: “An Opportunity for People with Advice of Counsel to Select an Available Outcome.”
Legal Advice	Legal Counsel may be on-call and is available before or after session.	Legal counsel is generally present during session.
Power	Parties Decide	Parties Decide
Goal	An Informed Agreement That Will Stick	An Informed Agreement That Will Stick
Best Use	Work Through a Difficult Situation	“Cut to the Chase”