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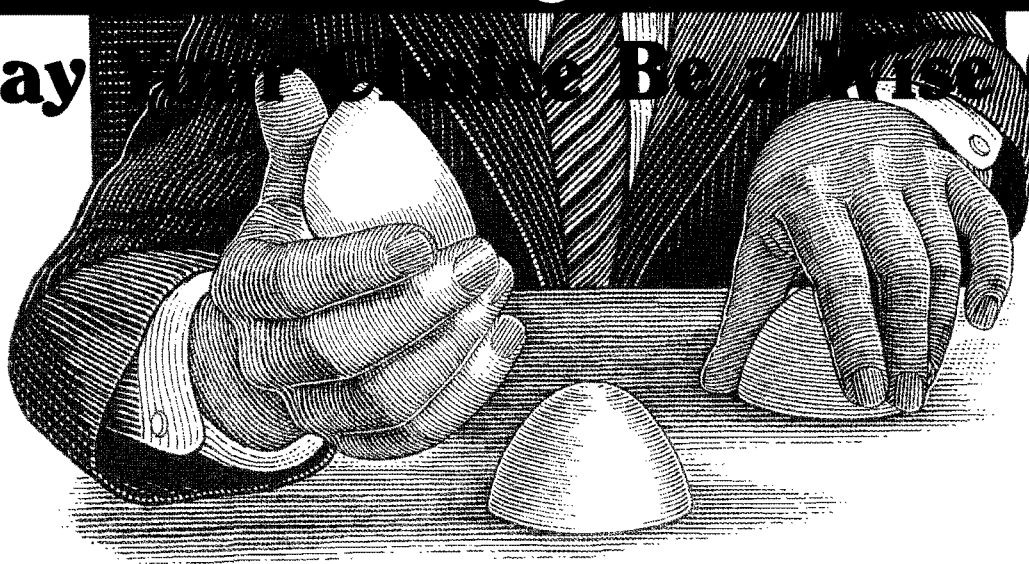
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FACILITATIVE MEDIATION **OR** EVALUATIVE MEDIATION:

May We Be of Use One



*By Scott H. Hughes, assistant professor of law and director of clinical education,
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Asking attorneys to describe mediation is like asking a group of visually impaired individuals to define an elephant; each defines the pachyderm based on the part they hold in their hand and each is certain that they know the "true" animal. "[M]ediation' is a term used in an 'extraordinary variety of ways.'" ¹ Consequently, attorneys and parties often do not know what to expect.²

This conundrum is no more apparent than in the furious debate between the proponents of facilitative and evaluative mediation.³ Since the two styles are very different in their approaches to and underlying assumptions about mediation, it is important that attorneys fully understand each in order to adequately counsel their clients when deciding on the use of mediation and the selection of an appropriate mediator. As a disclosure of personal bias, I am an unrepentant apologist for facilitative mediation and an ardent opponent of evaluative mediation. With that in mind, I will attempt to be as objective as possible in my analysis of these two styles of mediation.

The Facilitative/Evaluative Debate

In facilitative mediation, which is seen by its supporters as the traditional or "pure" mediation,⁴ the role of the

mediator is to assist the disputing parties in evaluating their own situations instead of evaluating the disputes for them.⁵ The parties participate in problem-solving activities in a manner that features party choice.⁶ The principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.⁷

The facilitative mediator does not give advice, legal or otherwise; does not provide opinions on the relative value of a parties case or individual issues within the matter; and does not make predictions on the possible outcome of the action should the parties fail to reach agreement and proceed to litigation or arbitration.⁸

Facilitative mediation is based upon three fundamental assumptions: first, the disputants are reasonably intelligent and potentially able to work with each other if placed in a neutral and safe environment. Second, the parties, after being properly counseled by their attorneys are, "capable of understanding their situations better than the mediator and, perhaps, better than their lawyers."⁹ And, third, the clients, "can develop better solutions than any mediator might create."¹⁰

In evaluative mediation, the mediator does what the facilitative mediator does not; she may give advice, make assess-

ments, propose fair and workable resolutions to one or more issues, press the parties to accept a particular resolution, and state opinions, including opinions on the likely outcome.¹¹ This manner of dispute resolution has several other labels: neutral evaluation (or, early neutral evaluation depending upon its timing), settlement conference, and settlement-oriented mediation.

Evaluative mediation rests upon two fundamental premises: first, parties want and need the mediator to provide guidance on the law and the relative merits and values of their respective positions, and second, the mediator, "is qualified to give such guidance by virtue of training, experience, and objectivity."¹²

An analysis of the relative merits and demerits of the two processes runs parallel to a more generalized view of alternative dispute resolution. Evaluative mediation is seen as more adversarial than facilitative mediation. The former is thought to be more distributive, where the emphasis is on deciding how much of the pie each gets, while the latter is thought to be more integrative where the emphasis is on expanding the size of the pie and allowing each side to get more. In evaluative mediation the parties tend to focus on positions, arguments and compromise, while in facili-

tative mediation the parties focus on interests, win-win solutions, and collaboration.¹³ Although it is true that in all mediations the parties make the final decision, one crucial difference between the two styles of mediation is the source of options and potential solutions to the dispute. In facilitative mediation, these come from the parties themselves, while in evaluative mediation, the parties look to the mediator for the answers to their problems.

The academic debate over the two styles coalesced after a 1994 article by Len Riskin¹⁴ and a follow-up piece two years later.¹⁵ In this turf battle over the heart and soul of mediation, the proponents of facilitative mediation decry that the facilitative definition was originally intended to be the definition for "all" of mediation and not just a portion of it. Evaluative mediation is an oxymoron because, by definition the mediator should not interject her own values into the dispute between the parties.¹⁶ On the other hand, the term facilitative mediation is redundant because the mediator's role is to be facilitative.¹⁷ Evaluative mediation "is both conceptually different from, and operationally inconsistent with, the values and goals characteristically ascribed to the mediation process."¹⁸ "[M]ediation is not a process designed for having an expert apply some external criteria to assess the strengths and weaknesses of the parties' cases,"¹⁹ but is a process for orienting the parties toward each other.²⁰

Two principal criticisms of evaluative mediation include the parties' loss of self determination and the mediator's loss of impartiality.²¹ First, although the parties in mediation always retain the ultimate authority to settle or not, critics assert that the ability to fashion a resolution based upon their own needs and interests may be compromised by a natural tendency to rely on the ideas, options, opinions and predictions from the mediator who is a person with expertise and authority. However, the mediator brings only apparent and not actual expertise. The parties (with the help of their attorneys) have greater expertise than the mediator. They have lived with the dispute for months, if not years, have slept on it, sweated over it,

and cried about it. The mediator has, at most, a few hours of exposure to the dispute and cannot be expected to know more than the parties.

Second, any opinions or valuations threaten the mediator's impartiality. Any opinion or evaluation will favor one side and disfavor the other. The natural tendency of those whose "ox is being gored" by a mediator opinion is to discount its validity and to attribute it to mediator bias. Such circumstances could severely threaten the mediator's ability to function.

On the other hand, evaluative mediation falls within the generally defined limits of mediation.²² In one of the seminal texts in the field, Chris Moore defines mediation as:

...the intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to *assist* disputing parties in voluntarily reaching their own mutually acceptable settle-

ment of issues in dispute.²³

The rub in the whole debate, then, is the nature and the breadth of the term, "assist." Should the mediator just assist in a way that guarantees complete self-determination? Or, does this assistance extend to opinions about the merits of each parties case?

Proponents of evaluative mediation assert the desire of the parties for help in understanding the law and how their cases are impacted by the law. Further, the "expert" mediator can help the parties to determine what is fair so that neither leaves the table only to find out later that they "got taken."

Understanding how the law might vindicate their rights and avoiding an unfair result are two legitimate interests of parties to mediation.

Proponents of facilitative mediation respond that parties bargain under the shadow of the law, not within the control of it. Although the law may have some impact on the final resolution, mediation allows parties to fashion a set-

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tlement which comports with the law, disregards the law or resides somewhere in between, but which meets the unique needs of the parties to the dispute. Any settlement may parallel the relief that would be fashioned by a court or not, as the case may be. Use of evaluative mediation with its emphasis on comparing the case to potential outcomes in litigation or to the mediator's expert guidelines of similar cases, opponents believe, would tend to circumscribe the creative ability of the parties to resolve the matter in a manner which meets their interests, but which might be outside the realm of normal court-fashioned relief.

Unfortunately, since labeling is also defining, the structure of the debate has been too compartmentalized resulting in a false dichotomy between the terms.²⁴ Facilitative and evaluative mediation are not separate and distinct categories. No mediator is purely facilitative. Even the staunchest facilitative mediator will, from time to time, utilize tools which can be considered evaluative. Even a decision to raise an issue or ask a question can be seen as evaluative in nature. Nor is an evaluative mediator without facilitative tools which are used to create a neutral and safe environment for the parties to discuss alternative solutions. Further, many evaluative mediators will not immediately jump into rendering opinions and evaluations until the appropriate atmosphere has been developed. Instead of looking at the two as separate and distinct orientations, it is more productive to look at the two as resting at the opposite ends of a continuum.²⁵

Choosing a Mediation Style

Assuming that mediators tend toward one end of the continuum or the other, how do you and your client choose the appropriate style for the mediation? What follows is a short list of considerations, none of which is absolute or controlling, but only suggestive. At the end of the discussion of each consideration I have a added personal comment intended to generate some reflection on the two mediation styles.

What role does your client want or need to play in the settlement process? The place of the client in mediation is

fundamental to the distinction between the two alternative approaches. Does your client want to have a part in creating her own solutions or does she wish to take a less active role during mediation? Facilitative mediation calls upon the parties to create options, explore alternatives, brainstorm possibilities and think laterally to fashion a resolution to the dispute. In facilitative mediation, the emphasis is on self-determination.

If your client does not desire to actively participate or appears to lack the ability to do so, then evaluative mediation may be in order. With this model, parties may take a more passive role, merely having to respond to the opinions, valuations and predictions of the mediator and the positions of the other parties. In evaluative mediation, the emphasis is on settlement.

Since evaluative mediation looks more like litigation than facilitative mediation, lawyers appear to favor the former over the latter. It is only natural for this prejudice to occur. The principles behind evaluative methods are familiar, comfortable and tested while the principles behind facilitative methods are new, different and untried. Evaluative methods are easy, even enticing while facilitative methods are difficult and require some risk-taking. Attorneys' predisposition for evaluative mediation may not be shared by their clients. Attorneys have to guard against disregarding or underestimating their client's need for a self-determinative process or their ability to participate meaningfully in facilitative mediation.

Is money an adequate proxy for the problems that exist? Since evaluative mediation calls upon the mediator to render opinions on the value of cases and to possibly predict the outcome of a dispute at trial, the natural medium of such discussions is money. "*How much will I get if I go to court?*" "*What is my case worth?*" Perhaps evaluative mediation may provide the best fit if money is the sole issue or the bargaining will be purely distributive (dividing the pie) as opposed to integrative (expanding the size of the pie), as in some contract cases or in simple personal injury or property damage cases.

With most cases, though, money is a poor proxy for the issues which the parties bring to the table. Would an apology be in order? Does your client need to vent? How important is it that your client get to tell her side of the story, whether it be to the mediator or to the other side? Will your client not sleep at night unless they receive even the slightest recognition of their plight from the other side? Does pain and suffering play a major role in your client's daily life? Is some sense of closure key to helping your client move on? If any of these questions ring true, evaluative mediation and its use of money to solve most ills may not benefit your client. On the other hand, facilitative mediation can provide the environment and the facilitative mediator can provide the encouragement for the parties to explore these questions.

Too many attorneys cannot, or chose not, to see the extent to which these issues permeate their clients' needs. Although the money is always nice and sometimes crucial, pure pocketbook justice does little, if nothing, to resolve these other matters. The idea of money is frequently trumped by these other concerns in the mind of the client. When these issues surface, facilitative mediation will provide the best chances of resolving all of the issues and not just the monetary one.

Is the dispute susceptible to collaborative, win-win solutions? Do opportunities exist for the parties to expand the pie instead of focusing merely on how much of the pie each will receive? Expanding the pie is the epitome of facilitative mediation. Are there things that one side can do or provide which have greater value for the plaintiff than the defendant? Are there services or goods that the defendant can provide more cheaply than the plaintiff can purchase? Facilitative mediation provides the opportunity to create ingenious combinations of options for resolution, none of which may have been apparent to the parties beforehand.

While this can occur in evaluative mediation, the orientation of this style reduces the opportunity for such creativity to take place. Evaluative media-

tion is one-dimensional. It frequently relies upon the payment of money as the only medium of exchange. If the only thing that the defendant can do is pay money, the size of the pie is irrelevant. Each additional dollar for one side is one less dollar for the other. If this is the case, perhaps evaluative mediation may be beneficial.

However, attorneys must avoid automatically dismissing any given case as merely a distributive dispute. Even in insurance defense cases possibilities may arise. Does the plaintiff have special needs which can be provided for with a low-cost annuity? Can an apology be tied to a memorial donation to a church or charity? In business-to-business cases, what synergistic possibilities exist between the parties? Facilitative mediation, with its focus on interests and collaborative problem-solving, is best situated to explore the myriad possibilities which may develop.

What is the nature of the relationship? Do the parties have an ongoing relationship or is this a one-time incident in which the parties were, and will continue to be, strangers? If there is a relationship, facilitative mediation, with its collaborative and interest-based orientation, will better help the parties to repair the relationship, work that is crucial to solidify any resolution of the dispute. A typical example would be an employer-employee dispute where the employee still works for the employer or a contractual dispute between two companies that have continuing business relations. Relatedly, if the parties are stuck in a relationship against their will, such as a divorced couple with continuing child custody and visitation dealings, facilitative mediation is better situated to provide an environment for the parties to learn dispute resolution skills by witnessing the skills modeled by the mediator and by actually resolving their own dispute in a safe, hands-on manner.

However, disputing strangers may see more benefit from an evaluative model. This may be especially true in automobile personal injury cases in which the defendant is represented at mediation by an insurance adjuster.

Caveat: Even where it appears that no current relationship exists, there may be a lot of baggage from a prior relationship with which the parties need to deal. For instance, in a medical malpractice action involving the former family doctor, both sides may have significant personal issues other than the pure monetary compensation. This may be true for the doctor, as well, even though the insurance company will pay any settlement and, since doctors are not experience-rated, any loss will not affect the premiums. If this is the case, facilitative mediation can provide a significant opportunity for healing to begin.

Picking a Mediator

Since mediation styles differ from mediator to mediator, ask each potential mediator to generally describe his or her style. Then, proceed to more specific questions: Will you evaluate my client's case? If so, under what circumstances will you provide such evaluation? Do you consider yourself a facilitative or an evaluative mediator? Without breaching any confidences, can you describe a few situations in which you felt your style of mediation worked well?

Conclusion

Each attorney should fully understand potential mediator styles and fully explore the facilitative/evaluative choice with the client before the client makes a decision about how to proceed. When it comes to choosing a form of mediation or mediator, make sure that your client can see the "whole elephant," and not just depend on the portion that you may be holding at the time, to make their decision. ■

Endnotes

1. Lela P. Love, "The Top Ten Reasons Why Mediators Should Not Evaluate," 24 *Fla. St. U. L. Rev.* 937, 946 (1997) quoting Chief Judge's N.Y. State Court Alternative Disp. Resol. Project, Court-Referred ADR in N.Y. State 7 (1996).
2. See *id.* at 947.
3. Carrie Menkel-Meadow, "When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals," 44 *UCLA L. Rev.* 1871, 1887 (1997).
4. *Id.*

5. See Love, *supra* note 1, at 939.
6. Joseph B. Stulberg, "Facilitative Versus Evaluative Mediator Orientations: Piercing the 'Grid' Lock," 24 *Fla. St. U. L. Rev.* 985, 990 (1997).
7. *Id.* at 996.
8. Leonard L. Riskin, "Understanding Mediator Orientations, Strategies, and Techniques," 12 *Alternatives to High Cost Litig.*, 111 (1994).
9. Stulberg, *supra* note 6 at 995.
10. *Id.*
11. See Love, *supra* note 1, at 938.
12. Stulberg, *supra* note 6 at 995.
13. *Id.* at 1000.
14. Riskin, *supra* note 8.
15. Leonard L. Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed," 1 *Harv. Negotiation L. Rev.* 7, 23-24 (1996); see Stulberg, *supra* note 6 at 985.
16. Kimberlee K. Kovach & Lela P. Love, "Evaluative Mediation Is an Oxymoron," 14 *Alternatives to High Cost Litig.*, 31 (1994).
17. *Id.*
18. Stulberg, *supra* note 6 at 986.
19. Stulberg, *supra* note 6 at 1001.
20. Lon L. Fuller, "Mediation - Its Forms and Functions," 44 *S. Cal. L. Rev.* 305, 325 (1971).
21. Robert B. Moberly, "Mediator Gag Rules: Is it Ethical for Mediators to Evaluate or Advise?," 38 *S. Tex. L. Rev.* 669, 672 (1997), see Love, *supra* note 1, at 939; Stulberg, *supra* note 6 at 986. Even the facilitative camp is not homogeneous; should mediators seek settlement or should they attempt to transform the parties to better understand and value themselves and the other side. Carrie Menkel-Meadow, *supra* note 3, at 1887-88. Unfortunately, since labeling of ideas is also defining, this dichotomous debate over these two principals totally forecloses any discussion of transformative mediation. See generally Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*.
22. See, Riskin, *supra* note 15, at 12-13, 40; Stulberg, *supra* note 6 at 988.
23. Christopher W. Moore, "The Mediation Process: Practical Strategies for Resolving Disputes" 14 (1986).
24. Jeffrey W. Stempel, "Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role," 24 *Fla. St. U. L. Rev.* 949, 951-52 (1997).
25. James H. Stark, "The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, From an Evaluative Lawyer Mediator," 38 *S. Tex. L. Rev.* 769, 774 (1997), see Carrie Menkel-Meadow, *supra* note 3, at 1887.