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ADR Toolbox: The Highwire Art of Evaluation

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By Marjorie Corman Aaron

Many mediators are uncomfortable with the idea of discussing or presenting evaluations. However, when parties reach an impasse, they often want the mediator to play an active role. In these cases, responsible use of evaluation is completely consistent with the goals of mediation.

Mediators should provide an evaluation only if there is an insurmountable settlement gap that arises from the parties' widely divergent views of what will happen if the case doesn't settle. Evaluation is not a substitute for other essential mediation tools. It is a last step, but in many cases skipping that step means missing the sole opportunity for settlement.

The primary risk of evaluation is the potential loss of perceived neutrality: the party who is the "loser" in the evaluation may come to view the mediator as an adversary. Mediators who offer evaluations need to be careful and skillful. Here are some strategies mediators can use to reduce the risks of evaluation and increase the parties' receptiveness.

Meet in Private Sessions

Private sessions, typically held after a joint session, enable the mediator to choose the best style for delivering the message. The participants may hail from different corporate or national cultures. Their basic personalities may be radically different. They will have idiosyncratic interests, goals, flexibilities, and constraints. Given these differences, the mediator may communicate the same evaluation in different ways to each side. Ideally, the mediator will tailor the presentation to preserve egos and respond to the perspectives of each side, even if the content of the evaluation disappoints them.

Private sessions also reduce the likelihood that the recipient of the less favorable evaluation will be resistant to it. This is particularly true where an evaluation seems weighted significantly toward one side. When that occurs in joint session, the perceived "loser" suffers a public loss of face, positions tend to become polarized, and the party resisting the evaluation just stops listening. The potential power of the evaluation to influence that party diminishes.

Experienced participants in mediation often say that a mediator "just tells both sides that their case is lousy." This suspicion undermines the credibility and impact of an evaluation. A mediator can address this suspicion head-on by assuring the parties that the mediator is providing consistent numerical analysis to both sides—and they are welcome to compare notes at any time. The mediator can remind them that, if this is not true, his or her reputation would suffer greatly, and reputation is the mediator's guarantee of future business.

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Establish Empathy and Trust

If the preceding joint session ended on a particularly difficult emotional note (perhaps the mediator decided to separate the parties after an uncomfortable "attack"), the mediator might start the private session by acknowledging what's going on emotionally. To the party "attacked," the mediator might say, "Hats off to you for keeping your cool. You must have felt like slugging someone after that." To the other side, the mediator might say: "I can see that the case runs deeper than money [or whatever the stakes seem to be]."

Under more usual circumstances, the mediator might open the conversation by asking if there is anything the party or counsel would like to say and hesitated to say in the preceding joint session. This can elicit valuable information on the merits, the relationship or the emotional dynamics.

Identify the Settlement "Problem"

During the first phase of a private session, parties often are caught up with convincing the mediator of right and wrong: their own nobility and the other side's duplicity, for example. The mediator must remind them that in order to settle the case, both parties need to believe that the settlement terms are better for them than pursuing trial. Therefore, in order to find a settlement that will be acceptable to both parties, it may be necessary to evaluate what is likely to happen at trial.

Build an Information Base

To be persuasive, an evaluation of what is likely to occur at trial must include an assessment of central elements of the case. Mediation presentations should not replicate the trial, but a mediator's neutral evaluation is powerful precisely because it is based upon the same important evidence as each side would marshall in court. Therefore, if both sides agree that a particular witness will "make or break" the case, but disagree about how the witness will "play," it may be necessary to bring the witness into the mediation, whether by appearance, videotape, or deposition transcript.

Neutralize Enemy Perspectives

A mediated case is likely to include at least one proverbial "difficult person" as a key player. And sometimes, in order to help the parties move toward settlement, it is necessary in private session to accept their demonization of the other side. Imagine a difficult senior vice president who views his counterpart as Darth Vader. You will encounter resistance and lose credibility by suggesting innocent reasons for Darth Vader's behavior. If instead you accept the senior vice president's view, you can then neutralize it for settlement purposes.

You might say, "Maybe Mr. X is Darth Vader, and he did this to sabotage your company, but let's focus on how that affects your choices. The last thing you want to do is to let Darth Vader maneuver you into a position that is less than optimal

for your company." This strategy is somewhat inconsistent with a mediation paradigm, but it may be essential for moving a difficult person toward a reasonable settlement position.

Ask Permission

Before presenting an evaluation, the mediator should ask the parties and counsel in private session whether they would like an evaluation of issues. Let the parties know that you also will be bound to offer a consistent evaluation to the other side, if they want to hear it.

Discuss the Evaluation

Before presenting an evaluation, the mediator should discuss its purpose: to predict and weigh what might happen at trial. The mediator might begin by asking the parties and counsel what they view as the strengths and weaknesses of their case, or by asking what will happen if they do not settle.

Let's say the mediator turns first to the strengths and weaknesses. After listening to each party's perspective and acknowledging it, the mediator might tactfully expose any inconsistencies. The mediator might point out serious weaknesses in the case, taking every opportunity to protect the parties' and counsel's egos. Generally, it is not helpful or necessary to point to every area of disagreement, but rather to focus on those that drive the overall evaluation.

Occasionally, the mediator will find a party or counsel who is completely unwilling to acknowledge any weakness—either because they see none, or as a matter of strategy. In such cases, it is best not to argue. Instead, move to a discussion of the steps in litigation of the case.

After that, you'll want to discuss settlement ranges. If, over all, a party has a realistic assessment of its case, but names an unrealistic settlement range, it is best to "pass lightly" over the number mentioned. The mediator's task is to show why the party's assessment of its strengths and weaknesses points to a different settlement range. If the other side sees the case just as realistically, you will be hard-pressed to convince them to pay (or accept) a settlement which is far from this range.

Look for Ways to Piggyback

Most people would have trouble accepting the idea that their view of a case was entirely misguided. However, they may be ready to concede that personal involvement in the case could have influenced their view of one or two issues, and that the neutral's assessment may be more accurate. Therefore, whenever possible, it's best to "piggyback" your evaluation to that of the parties. Where accurate, state that the party's assessment on various elements is the same as your own. Otherwise, say that you are willing to accept the party's assessment of a particular issue for argument's sake, or focus the discussion on where and why you differ.

For example, the mediator usually agrees with at least one party's assessment of liability, but may find tremendous weakness in that party's damages case. The mediator can then demonstrate how weaknesses in evidence or case law on damages affect the value of the case.

Create and Maintain Distance

It is critical for the mediator to create and maintain distance from the evaluation. A mediator who says: "I think there should be a liability finding here," has expressed his or her judgment of what is right. From that moment on, the participants who disagree strongly on the liability issue will view the mediator as their adversary. To remain neutral, the mediator could say, "I might agree with you that the scientific evidence is weak, but I predict that a jury will find liability here, for the following reasons..."

Ideally, the parties should feel that they can accept the mediator's evaluation without sacrificing their own perspective. The parties need only be convinced that the fact-finder (a much-maligned arbitrator, judge, or jury) is unlikely to adopt that contrary perspective. For instance, the mediator may be able to point to the technical complexity of the case, the out-of-town defendant playing to a local audience, the unfortunate motive and demeanor of a key witness, or the lack of precise records that would establish the party's case. The parties must come to feel that accepting an unfavorable evaluation does not require acknowledging that the other side's position is fair or right.

Invoke the Power of Neutrality

As long as the mediator has no personal or professional reason for wanting a particular outcome, the evaluation is inherently credible. Still, it can be helpful to preface the evaluation by reminding the parties of your neutrality.

You could say: "I am not smarter or more expert, and while I have reviewed all of the information and listened carefully in this process, I do not know this case as well as you do. The value I can add here is neutrality. What I present as my opinion of what the jury will do on a particular issue may be right or wrong,

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A Mediator's Soliloquy

To evaluate, or not to evaluate: that is the question.
Whether 'tis wiser to let all hope of settlement sink,
Or to neutrally evaluate and change
what the parties think,
Mediators who evaluate must be very cautious,
For it can alienate the parties and to the process be noxious.
Evaluation can turn them away and spur a court fight
To the detriment of all, no matter who is right.
On the other hand, evaluation can save the day,
Enlightening the partisan to what lies in the way.
Mediator evaluation can be a weapon of great might,
But it should be used last and it must be done right.

—Marjorie Corman Aaron,
with apologies to William Shakespeare

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but it is uncolored by any past investment or future stake in the outcome of the case." Invoking your neutrality helps prevent the parties from taking an adversarial stance against the evaluation as if it were another participant's position.

Acknowledge Limits

In most instances, the mediator need not have deep technical or scientific expertise, but only be able to predict how a jury or other fact-finder will understand any technical or scientific evidence. By acknowledging his or her own limits, the mediator reminds both sides of the greater limitations of the ultimate fact-finder.

Still, the parties are more apt to listen if the mediator has demonstrated that "you can't pull the wool over his [or her] eyes." Where a mediator has any relevant experience or expertise, it can be extremely helpful to refer to it. When this background is the framework for probing questions or observation that a particular point is weak, the mediator's approach may seem less aggressive. When the mediator agrees with a party's construction of an issue, reference to past experience confirms the mediator's credibility and independent basis for analyzing the case. If the mediator later provides unfavorable feedback to the same party on another point, it will be more difficult to ignore.

Structure the Presentation

While tact, diplomacy and maintaining distance are critical, they should never overshadow the mediator's obligation to be honest—to state his or her evaluation, and the reasoning and observations upon which it is based. It is best to simply march through it in some logical fashion. You may wish to begin with the strengths, complementing the parties and counsel on their thoroughness and skill. Or, you may begin by summarizing your understanding of that party's theory and assessment of the case.

How much detail to offer when providing your own neutral analysis of the issues involves a judgment call. The answer depends on: What issues drive the outcome and thus must be evaluated to affect the parties' divergent settlement positions? What level of detail will have a positive or negative impact on the parties' willingness to accept the evaluation? For some parties, analysis must be thorough and exact, covering all issues. Others will view minute analysis as distracting, and will prefer to focus on the few major points of divergence. Either way, you'll need to link the evaluation to what might be considered a reasonable settlement value.

Step Back from the Evaluation

Having presented an evaluation, the mediator is often wise to put it in context—to note that it does not incorporate all of the positive or negative settlement value for a particular party. For example, one corporate executive may worry about the implications for other similar cases, and be highly resistant to pay as much as the analysis would indicate. Another may be concerned about a trial's drain on top management time and energy, or about market effects of an adverse verdict. Yet another may be unwilling to tolerate even a minimal risk of a verdict which would bankrupt the enterprise; the executive might prefer to pay somewhat more to avoid that risk.

One party may wish to avoid the emotional impact of testifying at trial. Another may be unable to take the risk of a no-liability verdict, and be willing to accept a lower settlement to avoid this possibility.

As a practical matter, one side sometimes has to pay more to settle the case because the other side simply will not move close to the settlement range. Therefore, the mediator's evaluation is not a final answer; it marks a range within which an intelligent, neutral, fair-minded person would find it reasonable for the parties to settle.

After the mediator has presented the evaluation to one side, it makes sense to give that side some "breathing space"—an opportunity to reflect on the evaluation. The mediator might suggest that the parties and counsel think it through, perhaps reassess their position, and consider what settlement offer or demand they would put on the table next. Occasionally, they will be ready to make a significant adjustment in offer or demand right away. More often, the mediator is wise to take a short break or move to a private session with the other side, promising to ask for a sense of the parties' settlement position at the next round.

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The language of ADR continues to evolve. Mary P. Rowe, of the Massachusetts Institute of Technology, proposes a change to the definition of "ombudsperson" in CPR's Dispute Resolution Glossary (See *Alternatives*, November 1995 at p. 147). This is how Ms. Rowe, special assistant to the president, ombudsperson, and adjunct professor of management at MIT's Sloan School of Management defines the term:

Ombudsperson: An organizational dispute resolution person. The ombudsperson is designated as a neutral. Most report to the CEO, COO or a relevant board committee. Most practice according to standards set by an ombudsperson association, such as The Ombudsman Association Standards of Practice and TOA's Code of Ethics. An organizational ombudsperson may help a disputant deal directly with a problem, coach, mediate (formally or informally), provide informal early neutral evaluation, facilitate generic solutions to a problem and work for systems change. Ombudspeople are not formal investigators or arbitrators, but otherwise perform within an organization all the functions of a professional neutral.