Improving Your Mediation

I have been mediating legal disputes, pre- and post-suit, privately for over two years now and have a number of observations on how lawyers can improve their and their clients' mediation experience and probably their results.

Although grateful to the first few attorneys who took a chance hiring a retired judge to mediate their cases without knowing much about my abilities or approach to mediation, as time has passed I have been surprised by how little attention attorneys apparently give to the selection of a mediator. And these are the same lawyers who carefully evaluate judges, and although eschew "judge-shopping", still pray that their case ends up in a certain judge's courtroom. However, when it comes to selecting a mediator and a mediation approach, in my experience attorneys, who have these elections under their control, seem to pay scant attention. It is my hope that this article will afford counsel some factors to weigh in deciding how to choose a mediation style and select a mediator.

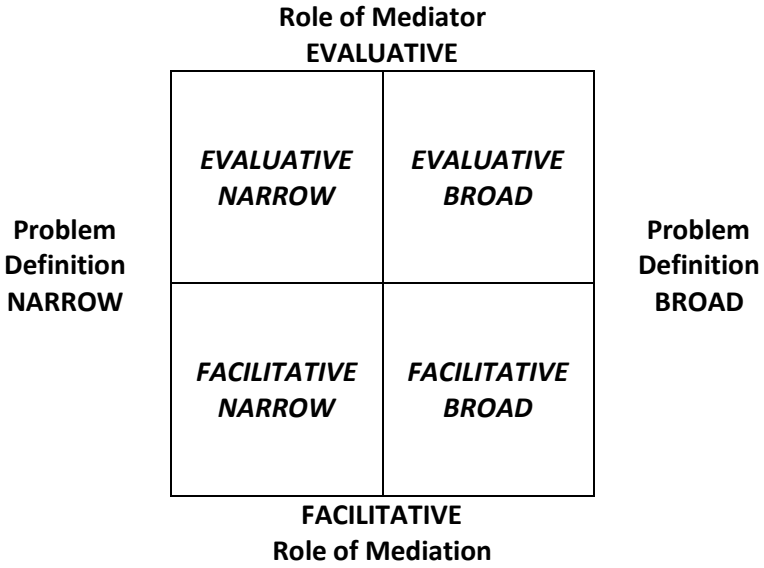
By now most attorneys understand the difference between a facilitative and an evaluative mediation.[1] For those who do not and for those who need a brief refresher, in a facilitative mediation the mediator offers no opinions on the settlement value of a case, no predictions on outcomes of various issues, and no affirmation or disapproval of demands and offers. In many cases the session would be joint, that is all parties and their counsel would be in the same room with short absences for private caucuses. Instead of the mediator carrying offers and counter-offers, the parties themselves or their attorneys would present and justify their proposals. The mediator facilitates the discussion/negotiation without expressing her views.

The best example of a purely facilitative mediation is the transformative mediation process utilized by the United States Postal Service for employee disputes. In these mediations the mediator does not insert her recommendation on even trivial, procedural issues, such as the location and starting time. Rather, with the mediator's assistance, the parties, before the actual mediation session, must agree on issues, location, attendees, seating arrangements, etc. Thus, when the mediation begins, the parties have already established a kernel of trust and consensus.[2]

In an evaluative mediation the mediator is free to add information and express his opinions on likely outcomes, settlement value, and offers and demands. A presiding judge telling a party in a pre-trial settlement conference that he should take the defendant's offer is powerfully evaluative.[3] At the opposite end of the spectrum would be a mediator expressing his belief that a completed settlement is fair.

Both mediation approaches have advantages and disadvantages. Studies have shown that facilitative mediations result in greater participant satisfaction, improved post-mediation relationships, and are more likely to uncover new value (i.e., a dispute over trade secrets concluding in mutually rewarding partnership).[4] However, facilitative mediations are generally more time-consuming, while evaluative mediations are shorter and, in my experience, more likely to achieve resolution. Both styles

have supporters and critics. Some experienced academics dismiss evaluative mediation as an oxymoron.[5] While others find the "facilitative" purists idealistic and unrealistic.[6] As a practical matter most mediators use a blended approach, their mix a function of their mediation philosophy and what approach the case calls for. The following grid illustrates this blending.[7]



"Narrow" defines disputes that have a single or limited focus, such as a personal injury case. "Broad" encompasses disagreements involving numerous issues or overlapping interests, such as the break-up of a legal partnership or heirs wrestling with how to manage a family summer home.

I believe that practitioners can make mediations more beneficial and productive by matching their case to an appropriate mediation style and/or the mediator. The following provides some suggestions on how to select the mediation approach that will be more advantageous.

1. Analyze your case

Is your dispute "narrow" or "broad"? This distinction is touched on above, but you should not assume that because your case is merely a personal injury case, it falls under the "narrow" rubric. In a well-chronicled, birth-defects, medical malpractice case in Connecticut, two mediation sessions, which ultimately led to a settlement, did nothing to address the parents' non-financial needs (explanation of what happened, understanding, affirmation) and may have even worsened them.[8] Professor Risken in an analysis of the mediation sessions in that case believes that the counsel and mediators, all of whom were experienced and skilled, overlooked the parents' non-financial needs by defining the mediations' scope as "narrow," focusing only on a financial settlement.

On the other hand, just because a case involves a number of issues and parties does not necessarily dictate that it belongs in the "broad" category. For example, a dispute over multiple claims

of poor workmanship in a newly constructed building with numerous defendants and cross-claimants may not be appropriate for a facilitative mediation. The parties may want to put the dispute behind them as inexpensively and expeditiously as possible and are uninterested in creating new value or trust.

One way to categorize a case is to consider the relationship of the parties. Are they related? For example, a personal injury case may involve relatives or friends, which may remove the case from the "narrow" category. Recently, I mediated a wrongful death case where the plaintiff administrator and defendant were children of the decedent. Not surprisingly a number of other issues besides money manifested during the mediation.

Another question to ask yourself is whether the relationship between the parties will continue after the case is resolved? The best example of this is a divorce involving children, where the parents will be dealing with each other for years to come.[9] A commercial dispute between a contractor and subcontractor or lender and developer who, because they have other on-going connections and do not wish to close the book on their business relationship, will continue to have mutual dealings and interests is probably best served by an evaluative approach. An employee-employer/ee disagreement provides another illustration. Is the employee still employed or has he been terminated or quit? Obviously, the former scenario suggests a facilitative mediation, while the latter tilts toward an evaluative mediation.

2. Assess Your Client

Your client's needs merit serious consideration when selecting a mediation style. The first factor to weigh is whether your client is a regular or a one-case client? Since studies have shown that facilitative mediation results in higher party satisfaction,[10] you may wish to lean towards a facilitative approach, depending again on the type of case and the client. For example, a businessman, who likes to be in the driver's seat and whose company is a steady client, may be more satisfied with facilitative mediation.

Second, what is your client like? Is he unreasonable, angry, inflexible or all three? If that is the situation, an evaluative mediation may allow the mediator to educate, disarm, and admonish your client privately. Do you have good control over your client and her expectations? In my mediation practice, I have encountered a number of situations where a lawyer has had difficulty in lowering the client's expectations. For a variety of reasons, the client had an inflated view of the value of her case or the strength of her legal position. In those situations having an evaluative mediator may assist you in giving the client a dose of reality.

3. Evaluate Your Own Style

Some lawyers are aggressive and blunt, whether naturally or because they are comfortable with that professional persona and it works for them. Others are tough and inflexible. If either of these admittedly broad depictions happens to describe your professional character, breaking into private caucuses early may be the preferable route. I have witnessed a number of lawyers start an opening mediation statement with a couple of sincere-sounding conciliatory remarks and then proceed to sledgehammer the opposing party and his case. It sometimes takes a lot of effort and persuasion to

undo the harm an attorney has caused in her opening statement. Likewise, if you tend toward stubbornness, it may assist the mediation if you wrangle with the mediator over your position than with the opposing party and counsel. If you recognize yourself in any of these generalizations, do yourself and your client a favor and move to private sessions. On the other hand, if you are a peacemaker and have a low-keyed personality, a facilitative mediation in joint session affords you the opportunity to shine.

4. Selecting Your Mediator

There is no point in going through the analysis described above, if you do not select the right mediator. Like attorneys, mediators come with a wide variety of approaches. Some are evaluative right out of the box. Others are nearly always facilitative, and some adapt their style to match the situation. Personally, my style tends toward the evaluative, although I have conducted what I subjectively thought were primarily facilitative mediations. Generally, I begin in a facilitative fashion since for me this seems to be the best method of assessing the case. Depending on my perceptions of the parties, counsel, and their dispute, I may continue with that approach until resolution. However, if the mediation calls for it, I may separate the parties and gradually become more evaluative as I try to urge the parties to resolution.

Most widely-used mediators are recognized as having a particular style. Once you have settled on a mediation approach, match the mediator to your case. There is no point in hiring a mediator renowned for her facilitative approach if you are looking for an evaluative mediation and vice-versa. If you are not familiar with a mediator's style, ask around or call the mediator, discuss her approach and ask for references.

Most good mediators can readily adapt their approach to what the mediation requires. However, it can be very helpful to you and the mediator to discuss this beforehand. Some mediators conduct screenings of a mediation with counsel for exactly this reason. If the mediator you selected does not do pre-mediation screening, and your case calls for a particular approach, let the mediator know. In a few mediations I have conducted counsel agreed to dispense with the joint session, either because it was unnecessary or the parties could not bear to be in the same room with one another. I have also had a situation where I was reproached after a mediation for not staying in joint session longer. Clearly, those are issues that you want to clear up with the mediator prior to the mediation. Remember, it is your mediation.

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[1] For an excellent discussion of different mediation styles, see Leonard I. Risken, *Understanding Mediators' Operations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

[2] Thanks to Esther Tardy-Wolfe, Round Table Mediation and Conflict Management Consultants, a U.S. Postal Service REDRES Program Mediator, for an explanation of this process.

[3] My own experience as a judge illustrates this example. I frequently utilized "Yankee Auctions" to settle cases. For an explanation of Yankee Auctions, see http://bobmorrill.com/Documents/YankeeAuction.pdf. When conducting them, I was always careful to say that the "auction" number or proposal selected was not my opinion of the likely result. Rather it was a number or proposal that I believed both sides might settle on. To my dismay, since retiring

to senior active status, several attorneys have commented to me on how successful the technique was, particularly after they told their clients that the number or proposal was the judge's recommendation!

[4] Robert A. Baruch Bush, *What Do We Need a Mediator For: Mediation's Value-Added for Negotiators,* 12 OHIO ST. J. ON DISP. RESOL. 1 (1996).

[5] Kimberly K. Kovach & Lela P. Love, *"Evaluative" Mediation is an Oxymoron,* 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996).

[6] 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 (1997).

[7] Leonard I. Risken, *Mediators' Operations, Strategies, and Techniques,* 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994). Having found this grid to be somewhat limited and leading to misunderstanding, Risken has more recently refined and supplemented it. For instance, he substituted the words "directive" and "elicitive" for "evaluative" and "facilitative", as more accurate and descriptive. Risken, *Decisionmaking in Mediation:The New Old Grid and the New, New Grid,* 79 NOTRE DAME L. REV. 1 (2003). For simplicity and for the purposes of this article, I have used the "old" grid since most mediators were trained with it and understand it.

[8] Leonard I. Risken & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Ordered Mediation,* 15:4 GEO. MASON L. REV. 863, 877-84 (2008), commenting on the Sabia family's lawsuit experience as detailed in BARRY WERTH, DAMAGES: ONE FAMILY'S LEGAL STRUGGLES IN THE WORLD OF MEDICINE (1998).

[9] Recognizing divorce mediation as an area where special expertise and training are critical, New Hampshire statutorily sets for minimum training and experience for certification as a marital mediator. RSA ch. 328-C.

[10] Chris Guthrie & James Levin, *A Party Satisfaction Perspective on a Comprehensive Mediation Statute,* 13 OHIO ST. J. ON DISP. RESOL. 885 (1998); E. Patrick McDermott & Ruth Obar, *What's going on in mediation? An empirical analysis of the influence of mediator's style on party satisfaction and monetary benefit*." 9 Harv. Negot. L. Rev. 75 (1996).