

When (and How) Should a Mediator Evaluate the Case?

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In today's complex business environment, occasional disputes are inevitable. It's no secret that protracted disputes can distract management, destroy relationships, and damage the bottom line. Mediation can help resolve business disputes quickly and cost-effectively while minimizing damage to relationships. Selecting the right mediator can significantly increase the likelihood of a successful mediation.

As a young litigator in the late 1980s, I was taught to screen potential mediators by asking whether they were "facilitative" or "evaluative" in their approach. Facilitative mediators focus on the mediation process and the parties' underlying interests (think "win/win" and "expanding the pie"). Typically, facilitative mediators guide the communications, ask questions, and shuttle the parties' offers and counter-offers back and forth but do not evaluate the strengths and weaknesses, or dollar value, of the claims. By contrast, evaluative mediators, sometimes called directive mediators, focus more on the substance of the case and the parties' competing legal rights. Evaluative mediators will provide substantive feedback on the issues and may even offer predictions regarding likely outcomes at trial.

While the "facilitative versus evaluative" question is still a valid one, a deeper dive may be helpful when considering potential mediators. Many mediators will employ both facilitative and evaluative techniques. Since some evaluating by the mediator is probably expected and necessary in most mediations of business disputes – especially typical disputes involving money claims – it may be useful to ask proposed mediators when, how and under what circumstances they typically offer their opinions during the mediation process.

Benefits and Risks of Evaluation

In my experience, most parties and attorneys want and expect the mediator to provide some evaluative feedback on the merits of the

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dispute. That is the main reason parties and attorneys often seek mediators with substantive experience in the industry or subject matter involved such as construction, employment, medical malpractice or divorce. Also, many parties, especially those new to litigation, feel a need to tell their story and have their "day in court." This psychological need can often be satisfied through a more evaluative mediation process, particularly one that includes an opportunity for the parties to present a brief summary of their "case" to the mediator and the other side in the opening joint session.

When there is an overly-optimistic case assessment by the parties and their attorneys, a mediator's objective evaluation can also be a "reality check," influencing them to adjust their settlement positions. An evaluative mediator can also help "take the heat off" an attorney by helping convey difficult assessments to a stubborn client without fear that the attorney will look "weak" or less committed to the client's cause. Finally, the mediator's evaluation can help the party's representative at the mediation "sell" or justify the settlement to management and other constituents who did not attend the mediation.

Evaluation by the mediator also carries risks. By evaluating, mediators risk alienating one of the parties, damaging their credibility as neutrals, or appearing to undercut the advice provided by counsel. Once an evaluation is presented, it almost always becomes the focus of the mediation and may practically become a take-it-or-leave it proposition that stifles further negotiation. These risks can be mitigated if the evaluation is done effectively and at the right time.

When to Evaluate

While evaluations are often expected and helpful, they are not always necessary. In some cases, the parties may assess the case similarly but simply need the structure and "motivation" of a mediation to negotiate a settlement. This is especially true with experienced parties like insurance adjusters and attorneys who regularly handle similar types of claims; they know what the claim is "worth" and may not need a mediator's evaluation.

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More broadly, if the parties are making good progress, there is no reason for the mediator to give an evaluation. My experience is that while parties and their attorneys appreciate receiving a thoughtful mediator's informed evaluation after negotiations have bogged down, they can be turned off by mediators who jump to an early or premature conclusion, then spend most of the mediation trying to drive the parties to their number. I have found the best mediators give the parties reasonable time to argue their cases, exchange information, and do some haggling before offering explicit opinions on pivotal issues in the case. Of course, a mediator also needs to keep an eye on the clock — if it's getting late and the parties are still far apart, the mediator is probably going to have to put on the evaluator's hat or propose extending the mediation.

How to Evaluate

The most effective mediators treat evaluation as a progression. Early in the mediation, they reserve judgment as they guide the process, listen to the parties, learn about the case, and build rapport. After the initial phases or when the negotiations lose momentum, they begin to pivot subtlety toward evaluation, often first by questioning the parties and their counsel about the strength and weakness of both sides' cases. They may begin to challenge those assessments by calling attention to key omitted points or by questioning overly-optimistic assumptions. At an appropriate time, they may lead the parties and counsel through an analysis of the likely outcomes and costs of each stage of litigation if the case is not settled. These steps are typically done one-on-one in private caucus sessions to avoid embarrassing a party or its counsel in front of the other party and to prevent appearing biased.

If the subtler evaluation techniques do not result in a settlement, the mediator may consider suggesting a narrower "bracketed range" for further negotiations, a more direct evaluation of key issues or, perhaps, a prediction of the likely results at trial. Most mediators will check with both parties before offering an opinion on the overall case since it likely will have a big impact on the mediation. I have been in mediations where the parties asked the mediator to delay providing an evaluation while the parties jump-

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started their bargaining.

There are many formats for evaluations. A mediator may provide a simple settlement figure, a range of potential outcomes at trial, a decision-tree analysis, or a more comprehensive written analysis of the case. Another common technique is to provide a "mediator's proposal" after an impasse is reached. There, the mediator proposes settlement terms to both parties that they must either accept or reject in-full. Each party responds to the mediator confidentially without knowing the other side's response. The mediator then determines if there is a settlement or, if not, whether the matter could either benefit from further mediation or is at an impasse and should therefore be terminated.

If done effectively, thoughtful evaluation by a skilled mediator at the right time can help break an impasse during mediation and increase the likelihood of a settlement.

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