

EVALUATIVE MEDIATION

Introduction

Evaluative mediation means, for the purpose of this paper, the mediator expressing an opinion. That opinion could be on merits, possible settlement or some other area where the mediator makes a conscious step from facilitation to evaluation.

Mediators, particularly lawyer mediators, are often put under great pressure to be evaluative in civil and commercial mediation. There appears to be a definite move in the UK by appointing lawyers towards mediators who are prepared to express an opinion on merits or relevant law. Indeed, one Barrister who is now a full-time mediator/arbitrator, acknowledges quite openly that he is often chosen as a mediator because he is prepared to express an opinion during the mediation. The unfortunate fact is that some parties do not want to take responsibility for accepting one of the key advantages of mediation - that it returns power and control to them. Some parties want to be told the answer to their dispute. Others, such as government or local authority employees, may require the cushion of an evaluation from the mediator in order to make the outcome palatable to their superiors. Often, when times get tough in the mediation, parties will look to the mediator to unblock the negotiations and they may suggest that a mediator's opinion would be acceptable.

As a non-lawyer mediator I am fortunately never asked to give an opinion. As a non-lawyer my settlement rates are no worse than lawyer mediators. That tends to indicate that lawyer-mediators who do give an opinion when the going gets tough are taking the easy way out. Avoiding evaluation and keeping the parties working until a settlement appears is that much harder. But it is also that much richer as a result.

Whatever the reason, the first rule is **try everything else first**, there is almost always a better alternative. The responsibility for the problem, and the solution, lies with the parties. The mediator is there to give them the best shot at finding that solution by, amongst other things, creating the right environment, opening the lines of communication, keeping the parties focussed on the key issues and using information to best effect.

However, if all else fails, and an evaluation is to be given or a recommendation written, the ground should be prepared fully beforehand.

Preparing

Parties need to be prepared for an evaluation:

- they should all agree that an evaluation should be made
- it should be made as late as possible after all non-evaluative alternatives have been exhausted and to ensure that the mediator's knowledge of the case is greatest
- the form of the evaluation – verbally or in writing – must be agreed
- parties need to be aware of the implications, particularly the dangers, of an evaluation being given
- a reassessment of the strengths and weaknesses and the no-settlement alternatives should be made with each party in private.

Having prepared the ground, the evaluation may be delivered.

Delivering

The evaluation should be:

- preceded by emphasising the neutrality of the mediator
- delivered in private to each party
- relayed as the best commercial solution, **given the facts and opinions revealed in the mediation**, and the limitations of the mediator's briefing on the case
- non-binding
- identical to both parties (although there may be a different emphasis according to the party's position)
- without blame or judgement
- mindful of potential injury to the party/lawyer relationship
- worded so as to avoid, or reduce, loss of face to the party or advisors
- giving a settlement range to encourage further negotiation (and therefore ownership by the parties)
- honest
- impersonal
- given without justification or detailed reasons (to avoid parties being diverted from the settlement into discussing the basis of the evaluation).

What happens next is critical to the success of the evaluation.

Following

After delivering the evaluation, the mediator should:

- give parties time to consider and reassess their position
- help parties to devise strategies that avoid entrenchment or loss of face
- encourage the parties into co-operative problem solving
- encourage the parties to see the evaluation as impartial data for them to use as a foundation for settlement
- leave the door open for the mediation to continue, or for a further day of mediation to be arranged in the future.

Post-script to evaluation

Evaluative mediation demands a calculated decision on the part of the mediator, and should never be something that happens by default. To be productive rather than destructive, it requires a delicate balance of role and relationship with the parties for, once started, there is no going back.

The dangers of becoming an evaluative mediator

Following the guidelines above will reduce some of the dangers of becoming an evaluative mediator. But the dangers still exist, particularly:

- **loss of neutrality.** It is unlikely that an evaluation will please both parties, and it is quite possible that it will please neither. The result may be that at least one of the parties will see the mediator as partial to the other side and that, in their perception, the mediator will no longer be able to fulfil a neutral role.
- **loss of confidentiality.** The mediator is in the privileged position of knowing confidential information and the evaluation will be made using that knowledge. There is a danger that confidentiality will be breached by the information revealed in the evaluation.

- **loss of ownership by the parties.** One of the key benefits of mediation is that it returns control to the parties. Mediator evaluation challenges that benefit.
- **entrenchment.** Although evaluation may overcome a deadlock it may create entrenchment by one or all parties on their new position.
- **collusion.** A party may adopt the evaluation, perhaps insist that it vindicates their position, and try to enlist the mediator's help in persuading the other side to agree.
- **loss of face.** A party who has been committed to a position may not find it easy to 'decommit'. This may cause loss of personal or professional face.
- **injury to client/lawyer relationship.** If the lawyer has been advising an outcome that significantly differs from that proposed by the mediator the evaluation may cause a problem between them. It may also cause a problem between the lawyer and the mediator!

The guidelines above will help to reduce the dangers of evaluation, but the only way those dangers will be totally avoided will be not to evaluate in the first place! It will be tough, but most facilitative mediations do settle, and the result will be far better if the parties find their solution themselves.

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