

Mediation: Three ways of getting to "yes"

Understanding facilitative, evaluative and directive approaches to a negotiated settlement

By Doug deVries

Mediation, the use of a neutral third-party to facilitate negotiation, was utilized throughout the ancient world, and continues to be used today in varying forms in almost all cultures of the world with great success.[1] As a result, both negotiation and mediation have been extensively studied and much is known about how people negotiate and how mediators function, including how skilled mediators can positively affect the process and outcome.

The different styles or approaches utilized by mediators may be divided for convenient reference into three general categories – facilitative, evaluative and directive. The first two are standard accepted approaches; the third is not. While each approach is discussed separately, some mediators try to adhere to one style or another, and others do not. One, two or all three approaches may be used by a mediator during the course of a single mediation. Overlapping of approaches may be a function of the mediator's style, the nature of the negotiation or the parties' wishes.

This article discusses the approaches in the context of mediations that are conducted between litigating parties engaged in negotiating primarily about money, a process known as competitive or distributive bargaining.[2] This process is sometimes distinguished from interest-based negotiation in which obtaining money may not be the primary objective, a process known as cooperative or integrative bargaining.[3] This is not to say that these differing types of negotiation are mutually exclusive; to the contrary, negotiations that are primarily about money generally involve non-monetary interests that motivate the parties, which can create not only obstacles to dispute resolution, but can also provide an impetus for resolution.

Facilitative approach

Facilitation is the heart of the mediation process. Facilitation means helping, as in helping the process and the people involved in the process, achieve a mutually agreeable result. It is a purposefully structured process through which a facilitative mediator guides the negotiation. In its simplest and most often ineffective iteration, facilitation involves little more than a mediator's hands-off shuttling of demands and offers back and forth between the parties (often accompanied in practice by the telling of time-consuming "war stories"). This hands-off approach will frequently lead to impasse, not agreement, especially in more complex cases. While it is true that a facilitative mediator's goal as a neutral is to help the parties negotiate, not negotiate for the parties, the fact is that effective facilitative mediators are not merely passive participants; far from it.

In order to have a positive effect on the mediation process, a skilled mediator applying a facilitative approach engages in a highly active and integrative process that involves gaining trust, engendering hope, assuring confidentiality, gleaning information, making astute observations, identifying issues and interests, analyzing participants' traits, detecting important indicators for success, identifying potential obstacles and opportunities, and consciously implementing strategic influences on the process and the parties in a timely manner. Negotiating counsel and parties rarely perceive or appreciate all that the facilitative mediator is doing as the negotiation progresses, and this is as it should be; the facilitative approach to negotiation is not intended to be outwardly mediator-centered, but rather counsel and party-centered.

Mediations conducted according to the facilitative approach generally follow a well-established agenda or progression, which may be briefly outlined as follows:

• ***Pre-mediation: Convening.*** Mediators may try to contact counsel in advance of the mediation session for purposes of introduction and preliminary discussion (ideally after receiving and reviewing counsel's mediation brief or statement). The mediator begins to build rapport and trust as well as nurturing counsel's confidence in the process, assuring confidentiality and clarifying the structure and scope of the mediation. The mediator seeks to gain useful information about the participants, including any perceived problems that might interfere with communication and negotiation; this includes inquiring to be sure that the right people will be participating, especially the necessary authorized decision-makers. The mediator does not inquire about the party's positions at this stage, but listens and takes note if counsel volunteers their viewpoint on the issues in dispute or the parties (as often occurs).

• ***Phase 1 – Welcome: Opening.*** Once the parties convene, the mediator explains the process, assures confidentiality and emphasizes the well-established success of mediation as a process that resolves disputes. The aim is to build rapport and a sense of optimism as well as an expectation of success. The

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mediator seeks to gain trust and instill a sense of confidence and calm, part of which involves reinforcing the role of the parties' counsel as knowledgeable, competent representatives of the parties' best interests (care is taken not to devalue any participant or their role in the negotiating process). This phase may be conducted in joint session or in separate caucuses; the preference and practice varies widely. The trend over the years in litigated cases has been to abandon joint sessions at the beginning of mediations, a development not necessarily embraced by facilitative mediators.

• ***Phase 2 – Opening Discussion: Understanding Issues and Views.*** The mediator seeks, through interaction with counsel and the parties, to gain a genuine understanding of the participants, issues, problems and points of view. In order to do so, the mediator uses techniques that open up communication, including "empathetic listening" and "mirroring," the art of gaining information and insight while interacting with and validating the person without asking questions. When posing questions, facilitative mediators take care to ask open-ended and non-judgmental questions (for instance, asking what, where and how questions, not why questions). The mediator usually does not raise new substantive issues that the parties are not presenting; the basic goal is to resolve known disputes, not create new ones. Sometimes, however, in the give and take that occurs in discussing the parties' positions, new issues may be identified, especially ones that bear on contested issues and underscore positional uncertainty or risk.

The mediator begins much of their unseen and unappreciated work in this phase – for instance, gaining a sense of what types of personalities are involved and what communication and decision-making dynamics are involved in each room and between the rooms. Some people are passive (or perhaps they only appear so because they are initially shy or they have passive-aggressive manipulative tendencies, or they are just following counsel's admonition to "put on your game face"). Others are aggressive (or they are using aggression to hide insecurity). Some are outwardly emotional while others are not (or are inwardly emotional, but try to hide it). Some people are truly angry while others who appear to be angry are actually expressing loss and sadness. Parties need to feel that they are being heard and recognized; for many, the mediation constructively becomes, in effect, their "day in court."

People also process information differently; some visual-receptive (50 percent), some auditory-receptive (25 percent), some kinesthetic (20 percent) and others audio-digital or a combination (5 percent).[4] Some people are linear thinkers and some are non-linear thinkers; the former tending to focus primarily on implementing solutions in the face of conflict, and the latter primarily on options and avoiding decision-making. Some people are risk averse while others are risk takers. Having an appreciation of such factors and dynamics enhances the ability of the skillful mediator to more effectively communicate and interact with all counsel and parties. One way of effectively communicating and interacting may work well with one participant or in one room, but be highly ineffective with the others; flexibility and adaptability are keys to successful facilitation.

• ***Phase 3 – Defining Problems: Organizing For Resolution.*** A natural and seamless transition takes place between phases of the mediation. In this phase the mediator, while continuing to flesh out the parties' positions on issues and problems, may begin to develop an agenda or plan for successful resolution, a process referred to as "mapping." In doing so, the mediator guides the parties through a transition from focusing on the past (issues and problems) to focusing on the future (negotiation and successful resolution). The mediator internally organizes the information they have gained about what non-monetary interests may be at play between and among the parties that could be affecting the process as potential obstacles or as potential motivations for reaching an agreement. It is difficult to achieve success in mediation by convincing the parties to abandon their respective positions or to accept their opponents' positions, and pure facilitators tend not to focus their efforts on doing so. Rather, they assist the parties in gaining an understanding that an agreed resolution will be in their mutual interest or in their separate best interests. This is of heightened importance in cases involving established relationships between the parties (as well as opposing counsel) that will continue after the case is settled.

A skilled mediator begins early in the negotiation to anticipate where a future impasse may occur and to start developing possible alternative strategies for use in overcoming impasse. Counsel and parties typically provide signals, by their attitudes, expressions and bargaining positions and tactics, that an impasse in the negotiation will occur, and when it is likely to occur. Impasse in competitive or distributive bargaining is common and is best viewed as an inherent part of the process to be managed, not merely an event that signals a failed negotiation.[5]

• ***Phase 4 – Overcoming Problems: Seeking Resolution.*** As with the prior transition in the mediation, there is no bright line between phases. Negotiation has begun in earnest and the mediator continues to explore and assess the parties' respective positions and interests while managing the process. The impediments to negotiation identified in Phase 2 are meaningfully addressed in order to reduce or remove obstacles to communication and decision-making. For instance, venting of pent up anger may be encouraged because anger can interfere with or prevent the receipt and processing of unwelcome information and even the ability to make a decision that serves one's own best interest. The mediator also implements adaptive strategies to convey information in a manner tailored for each party's particular style, personality, mindset, etc.

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It is during this bargaining phase that the facilitative mediator employs a variety of techniques that have as their primary goal continuing the exchange of demands and offers and avoiding impasse. These techniques include reframing of issues and positions, redirecting of expectations, posing questions that expose unrealistic positions and encourage realistic reassessments, educating about the effect of risk on value (which may include illustrating risk-assessed valuations), value creation and exploring alternatives to agreement (so-called "BATNA" analysis).

BATNA is an acronym for "Best Alternative To Negotiated Agreement" which is shorthand for a process by which the mediator guides the parties through a form of reality testing that focuses on what could happen if the case does not settle. This can involve a wide-ranging discussion of events that represent future uncertainty, such as adverse motions, trial and appeal, as well as increased litigation costs and attorney fees. It can also involve addressing other interest-based considerations, such as a party's monetary needs, the emotional toll of litigation, benefits of closure and the like. As part of BATNA discussions, the parties are asked in one form or another to also consider and assess their WATNA ("Worst Alternative To Negotiated Agreement") and MLATNA ("Most Likely Alternative To Negotiated Agreement"); the latter promotes consideration of risk-based valuation (using decision analysis to mathematically illustrate a realistic assessment of a case's potential value that incorporates and reflects the impact of the obstacles standing in the way of recovery). Risk-assessed valuation involves simple mathematics and logic, but it can be cumbersome to generate and present it in the midst of a heated negotiation.[6] And it may also not be the best way to get a value message across to some people; for instance, an auditory-receptive, non-linear thinker.

The facilitative mediator may encourage counsel to provide information supporting demands and offers as they are "shuttled" between the parties so the rationale for a move can be shared with the recipient as part of "pre-rating" or softening the communication of demands and offers. As negotiation progresses, the impact of the participants' personal tendencies plays out; for instance, at the outset of a negotiation people tend to place greater value on their own proposals than they do on proposals made by others (reactive devaluation), but as the gap between proposals narrows, the attractiveness of offers that could be lost if not accepted increases (dissonance reduction). Pre-rating demands and offers when communicating them tends to reduce resistance on the part of the recipient to ascribe value to them. In the end, people tend to place greater value on what they have agreed to than they placed on their own prior proposals (dissonance avoidance).[7]

A facilitative mediator may use different methods to help close a gap or overcome an impasse resulting from stalled distributive negotiating (exchange of demands and offers).The role of the mediator in this respect has been described as helping construct a bridge to span the chasm between the parties' opposing positions, encouraging both parties to "walk across."[8] One technique is "anchoring," in which the parties are encouraged to re-evaluate potential settlement options as constituting relative gains instead of losses. Anchoring can also be supplemented by further reality testing of positions and alternative outcomes. Another technique is to present hypothetical negotiation scenarios; for instance, asking "What if they demanded (or offered) "x," how would you likely respond?" A commonly used technique is "bracketing," which can take different forms, but typically involves one side or the other proposing a demand or offer conditioned on the other side committing to a pre-agreed response. This tends to move numbers and close gaps faster, and there is an implicit agreement that the midpoint of a proposed bracket falls within an acceptable settlement range. Sometimes, especially when emotions or non-monetary interests are impeding progress, taking a break to allow quiet self-reflection can work wonders. Other times, the parties need to do more work, such as completing key discovery, before they can continue to negotiate, in which case the mediator may lay the foundation for a continued mediation.

Facilitative mediators will reluctantly provide the parties with a "mediator's proposal" (a settlement number is proposed, and each party communicates acceptance or rejection to the mediator confidentially. If both parties agree, the case is settled at that number; if either party rejects, there is no settlement). From the facilitative mediator's perspective, a mediator's number can accomplish three things, but only one is good and two are potentially bad, especially if not appropriately timed. Achieving settlement is obviously the good thing; the bad things – one party's position is devalued while the other party's intransigence may be reinforced, and the negotiation may be terminated prematurely. This technique is best used when both sides want a mediator's proposal and have committed to giving it serious consideration (and the mediator feels confident that it has a reasonable chance of success). A hallmark of facilitative mediation, like the Hippocratic Oath, is to "do no harm."

• ***Phase 5 – Concluding: Resolution.*** If the case settles, the parties typically memorialize the terms of the settlement in writing and execute a summary "deal sheet" (unless one of the parties, typically an insurer, has with them a final settlement document ready for completion). Some mediators assist in writing settlement terms, while others do not. Mediators usually continue to work with the parties to refine and flesh out the agreement and seek assurance from counsel and parties that the agreement is understood; new disputes or other obstacles can arise at this stage that must be addressed in order to preserve resolution.

If the case does not settle, the mediator will summarize the status of negotiations,

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communicate optimism and encourage the parties to follow up. Finally, the mediator will commit to providing continuing assistance and assure that all participants have direct contact information.

• ***Phase 6 – Follow up: Finishing (as necessary).*** In addition to the foregoing, many mediators continue to follow up with counsel representing non-settling parties to check on the status of ongoing negotiations, if any. If there are none, many mediators, depending on the case, will continue to follow up and encourage negotiation until counsel indicates it is no use.

As a practical matter, and depending on the mediator or the particular circumstances of a case, mediation phases may be compressed, skipped over, omitted or otherwise modified, especially early in the process. Some mediation sessions are shorter by the very nature of the case or dispute, but trying to rush parties through a negotiation can be counterproductive and is not recommended.

Evaluative approach

The evaluative approach differs from the facilitative approach both in style and substance. Theoretically, a facilitative mediator views their role as helping or guiding the parties through interest-based conflicts, while an evaluative mediator sees their role as directly influencing assessment of rights-based positional conflicts. In reality, when involved in distributive money negotiations, both facilitative and evaluative mediators aim to effect a realistic assessment of both positions and interests. The facilitative mediator tends to pose value-neutral questions to the parties that have the effect of triggering self-examination of positions and interests, while the evaluative mediator proactively expresses positional assessments. Both methods may succeed in having the parties confront and acknowledge uncertainty, vulnerability or weakness in their positions and correspondingly soften their negotiating stances.

The evaluative mediator prepares to deal with the facts, the issues and the law in detail, and challenges the parties to defend their positions. Sometimes a mediator initiates an evaluative approach from the outset because that is their personal style or preference. In that case even an evaluative mediator will likely employ key aspects of the facilitative approach later in the mediation in order to advance negotiations and secure a settlement. Purely positional negotiation usually does not produce agreement by itself. It can readily lead to stalemate, but it also has the potential for setting the stage for productive negotiation.

Likewise, most facilitative mediators use some elements of the evaluative approach as negotiations progress because parties whose positions go unchallenged and who do not feel the pressure of uncertainty or possible loss are less likely to negotiate realistically. Even then however, the approaches are different. The evaluative mediator may project himself into the negotiation, while a facilitative mediator endeavors not to do so. Therefore, while an evaluative mediator may express their opinions about the merits of a party's positions or case valuation, the facilitative mediator will more likely convey such information as coming from the adverse party, not from the mediator, as part of the process of pre-rating demands and offers when exchanged.

As a practical matter, it is very difficult, if not impossible, to be a purely evaluative mediator or a purely facilitative mediator in the context of negotiations about money in the litigation setting. Counsel often wants to spend a good deal of time discussing the merits of their positions on the facts and the law, and the corresponding lack of merit of their adversary's positions. Counsel and parties often expect that the mediator will engage in evaluation of the parties' positions and they actually seek such input from the mediator, including the hope they can enlist the mediator in their effort to devalue an opponent's position. This is especially so if the mediator is a former judge or a former litigator with expertise in the area of law under consideration in the case. Not infrequently, the mediator has to be facilitative in one room and evaluative in another at varying times through the process. If positional evaluation goes on too long, it can engender the hardening of positions and impede meaningful and productive negotiation.

In this regard, the mediator's approach often evolves during the negotiation process from first facilitative to later evaluative. The evaluative approach involves a real balancing act for the mediator. Just because an evaluative mediator is right about a party's position (or thinks they are right) does not mean that counsel or the party receiving the evaluative input wants to hear it, or agrees with it or is willing to accept it, even if they solicited the assessment. In training courses, mediators who tend toward the evaluative approach are cautioned to choose their words carefully and deliver their input cautiously lest they alienate a party and lose their trust. This is why the timing of the evaluative approach is important; urging and pushing counsel and parties to make a deal often becomes necessary, and this is better done, and more effective, after rapport and trust have been established.

Directive approach

A directive approach as a style of mediation is not taught in mediation training nor recognized in mediation-related literature as desirable. Sometimes, however, a mediator sees himself as a dealmaker who can bend the process and the outcome to their assessment of the dispute. This occurs more as a function of mediator personality than anything else when a mediator unilaterally directs counsel or a party about what they should or should not do in a negotiation. In terms of a mediator injecting themselves directly into the substance of the negotiation, as opposed to managing the

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process, it stands at the opposite end of the spectrum from facilitation, and is discouraged for good reason. Telling counsel or a party what they should do or how they should do it has the potential to undermine almost everything that facilitative mediation has been proven to accomplish in successfully resolving disputes.

Nevertheless, mediators are sometimes invited to be directive by counsel or the parties themselves. This usually occurs in one of two ways. Sometimes an attorney simply feels at a loss, and they ask the mediator what they should do, such as asking what demand or offer they should make. In their mind, they are simply asking for help from someone who has gained their trust and who knows not only about how to negotiate in general, but also has had an opportunity to interact with the opponent during the negotiation at hand. However, what they are actually doing is asking the mediator to abandon the mediation process and step out of their customary and proper neutral role in it.

The other way mediators are drawn into a possible directive posture is when counsel has made it clear to the mediator what they want to accomplish, such as making a particular demand or offer aimed at inducing a certain response from the opponent, but the mediator knows that the action (demand or offer) will not only fail to accomplish the stated goal (inducing greater movement), but will have the opposite effect.

A mediator who tends toward a directive style may elect to take over and direct the action, but a facilitative mediator, and even an evaluative mediator, will not. Instead, the mediator will ask counsel or the party to consider all the possible options they have, and then review and discuss each of the options and their potential consequences. At the end of this interactive discussion, counsel and the parties are better able to decide for themselves an appropriate course of action. This facilitative approach has the advantage of maintaining neutrality, preserving trust, and valuing and empowering the participants.

Conclusion

The *facilitative* approach to mediation is at the heart of the mediation process, and involves a highly interactive process that follows a progression. The *evaluative* approach differs from the facilitative approach; facilitation tries to indirectly guide the participants, while evaluation tries to directly influence them. As a practical matter, it is difficult for mediators to be purely facilitative or purely evaluative in negotiations about money in the litigation setting, and both are used.

A *directive* approach is neither standard nor particularly desirable. Nevertheless, mediators are sometimes invited to be directive by participants themselves and deal with such dynamics according to their preferred style.

In the final analysis, the facilitative approach has long been proven to be highly effective in resolving disputes, and aims to maintain neutrality, preserve trust, and value and empower the participants.



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Endnotes

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