Work the mediator – Or work *with* the mediator?

A comparison of the evaluative and facilitative styles of mediation

By David Rudy

Ok, time to 'fess up. When you show up at a mediation with one of your "go-tos," what is your perspective on the upcoming day? Is the mediator a trusted friend, a confidant, an ally, a co-strategist in thoughtful assessment of your goals and mapping out the straightest path to achieve them? Or is the mediator sometimes an ally, sometimes an adversary, never a friend, trusted only when s/he seems to be working on your side? In other words, are you going to work *with* the mediator, or will you *work* the mediator (or some of both) during the process ahead?

Answer the question again – this time for a mediator you've never worked with before, or only occasionally, with whom you have no current track record. Are your answers the same or different?

The thoughtfulness of your answers can shed light on a much more critical issue – are you getting the most out of your mediations? That in turn depends (in large part) on whether you and your mediator are the correct match.

The thesis of this article is that if you're working the (facilitative) mediator, you have either selected the wrong mediator, or your style clashes with and contradicts the process used by the mediator you have selected.[1]

As is true of most mediation efficacy issues, the examination begins with selection of the mediator.

Selection of the mediator

I am frankly amazed at how many of my clients tell me they will agree to virtually any mediator recommended, suggested or "pushed" by the opponent. The thinking seems to be that as long as the mediator has a pulse (not much of an exaggeration), the most critical factor in the selection is which potential neutral has credibility with the *opponent*. Who will be able to effectively stretch the other side (whether Plaintiff or Defense) to compromise their position the last little bit at crunch time?

But that approach settles for too little. Respectfully, what the advocate should be doing in mediator selection is getting the best available mediator – one who will excel at getting the case to that resolution that maximizes not only the results, but the process that gets there.

What is your goal at mediation? Settling the case – or settling the case in the way most advantageous to your client? If the latter, how much value do you place on subjective value (perceived value) vs. concrete (dollars and cents)? Is it important to you that your client walks away believing that justice was done, or understanding why she made negotiation decisions to compromise her "best day" position? Is it only about the result, or does the process matter?

Just as you wouldn't think of punting selection of an arbitrator to your opponent, you shouldn't concede retention of a mediator who is less skillful or less effective at process simply because the other side wants him.

Once you've decided to actively seek the best available mediator, how do you find him? Surprisingly, again, many advocates rank subject matter expertise as the number one qualification. Subject matter expertise is unquestionably relevant and should stay on the list. But in the view of this writer, it is far less important than other qualifications.[2]

The first and by far most important mediator qualification is settlement skills. In order for a facilitative mediator to excel at her job, she must be able to settle the case if it is able to be settled. In reality, this is not one skill, but an entire skill-set, including the following (only a partial list):

- *Analytic skills* to help the parties correctly evaluate risk and benefit in the complex environment of litigation;
- *Problem-solving skills* to help the parties turn good analysis into successful solutions;
- *Process skills* to understand and be able to apply the process to an almost infinite variety of factors, enabling the mediator to make good decisions scores of times during the day;
- *Communication skills* to maximize the ability of the parties to really hear and be able to evaluate the opponents' positions and interests in an acceptable and non-confrontational way, and to relate to and even bond with various participants representing a wide range of backgrounds, language skills, intelligence, ability to understand and solve problems, etc.;
- *Emotional empathy* to be able to connect with the sense of injustice that often dominates the perspective of the clients, and sometimes the lawyers, on every side of a dispute;
- *Persuasion skills* to be able to convince parties, lawyers and principals to change course and negotiation strategy when desirable as changes occur during the process;
- *Closing skills* to help the parties remove the roadblocks hampering an eventual settlement that is enduring and likely to reach complete execution.[3]

Your mediator could be a formerly successful trial lawyer that lacks one or

more of these mediation-specific skills.[4] She could be the leading expert in the world on one or more of the precise, if somewhat arcane, issues that will probably determine the case at trial, yet be deficient in one or all of the skills required to settle the case. In this writer's view, she would then be a bad choice for mediator of the dispute, although she might make an excellent evaluator.

One more point bears noting. In addition to all of the above, you should select a mediator who is both trustworthy and collaborative. Before considering these last two qualifications, we must look at the threshold issue of impartiality.

Impartiality

Presumably, one of your requirements for a mediator will be impartiality.[5] There are two utterly different ways in which mediators can be impartial. One is the legal "default," the direct product of our legal training and study of legal and judicial ethics. According to this reigning paradigm, impartiality is by nature aloof. The judicial officer must avoid even the appearance of favoritism, all ex parte communication, etc. But upon even shallow reflection, this model of impartiality is ill-suited to mediation. The judge must remain apart from and above the parties and advocates. Although she need not be hostile, the sitting judicial officer can hardly be chummy or even friendly or collaborative with one of the parties, *especially* in an ex parte setting.[6]

The second model[7] is the opposite of the first. Instead of remaining aloof, the mediator engages with all sides (in turn). The mediator is collaborative with each party, helping to identify negotiation goals, discuss tactics, consult on individual steps, etc. This model only works because the mediator is committed to complete even-handedness in being collaborative with all parties and all rooms throughout the day. Although it can be uncomfortable for some lawyers (especially those with less mediation experience), this model is far superior in allowing parties to thoughtfully analyze, improve and obtain their best negotiation goals with the help of the mediator.

This model is not only inconsistent with the necessarily aloof role of a judicial officer. It is also inconsistent with a mediator role that goes hand in hand with the judicial officer role – the evaluative approach.[8] And most importantly, it is inconsistent with styles of advocacy designed for combat in judicial proceedings.

The evaluative approach

In the evaluative approach, the mediator behaves much more like a sitting judge. The evaluative mediator's focus is not to collaborate with each of the parties, but to receive information which enables the mediator to make a judgment (analogous to a tentative ruling) as to who most likely has the winning side of an issue or the case.

We have examined the role of the mediator in the two models. But what of the role of the advocates? It is here where the most dramatic difference occurs – a difference which affects the advocates' relationship with the mediator, the nature of the mediator's impartiality, and whether it is possible to work *with* or only to *work* the mediator.

An evaluative mediation is one in which the advocates essentially compete to convince the mediator that they are on the winning side of a particular issue or the case. The mediator is then empowered to explain to the other side why it must back down or settle in a manner much more advantageous to the "winning" side.

How the advocates use the mediator is dramatically different in an evaluative mediation than in the facilitative model. The mediator is not available as a collaborator, because she is too much like a judicial officer, and must remain aloof. The mediator cannot help with negotiation strategy, because the advocate's focus is getting the mediator to believe that his side will likely win. No weakness should be confessed. No "let your hair down" conversation should occur. With an evaluative mediation process, the mediator's role has to be highly restricted. The target of the process is evaluation by a third party of the strengths and weaknesses of each case. Each party must adjust his own expectations according to the opinion and advice of the mediator.[9]

Although mediation is not a process designed to find fact and culminate in a judicial determination, evaluative mediation heads in that very direction – but without witnesses, cross-examination, argument or virtually any of the other tools we normally think of as "due process" in the careful and deliberative judicial determination of a conflict. Because the process focuses on the evaluation of the mediator, and despite the fact that the mediator's evaluation is not exactly a judicial determination, the advocates play much more conventional legal roles than in a facilitative mediation. The object is essentially the same as a Court trial or arbitration – to get the judge on your side. The mediator-judge then becomes a force to assist one party in bringing the other to reason. Even though the mediator's evaluation may go against the "prevailing party" on some points, the thrust of the process is to identify the primarily unreasonable party and try to make her understand why her confidence in the case is misplaced.

So the advocates start the day intending to convince the mediator that it is the other party who is unreasonable, whose positions are unsupported, who needs to be brought to a reasoned appreciation so that his positions can be softened and the case can be settled in a moderate and reasonable way. In other words, the advocate's role is to persuade the neutral, not to negotiate with the opponent. The following tend to flow from the evaluative structure of the process:

- Briefs are rarely exchanged;
- Joint sessions are rare;[10]
- Little or no effort is spent trying to persuade the opponent – the main focus is persuasion of the mediator;
- The parties have little concern – and often very little information – about what is happening in the other room;

• The negotiation occurs between advocate and mediator, not you and the opponent through the mediator;
• Negotiators become advocates;
• Once the mediator has made his evaluation (if not before) you will inevitably lose control of the process;
• Pressure, even coercive pressure, typically plays a substantial role in the outcome;
• The parties (especially the party brought to reason) often leave the mediation frustrated and with no sense that justice was done;
• The lawyers do not see themselves as allies or collaborators of the mediator;
• Because the focus of the lawyers is to persuade the mediator, they function as advocates rather than colleagues of the mediator;
• The lawyers *work* the mediator, but do not (primarily) work *with* him.[11]

Finally, one substantial risk is always present in evaluative mediation – it may be you, and not your opponent, who ends up on the short end of any given evaluation. *You* may be identified as the one on the unreasonable and losing side. Settlement may occur contrary to your client's goals, not your opponent's.

Facilitative mediation

We have now come full circle to consideration of the mediator as trustworthy and collaborative. Since the advocate in the evaluative mediation tends to argue against and not concede weaknesses, trustworthiness is not really a major consideration in that process. There is no "letting your hair down" (unless you are letting the mediator know that it is your client who needs to be brought to reason). Typically, you are not willing to concede weakness, because such a concession would weaken your ability to win the mediator over.

Further, since the advocate is trying to persuade the mediator, to "win" the case to the neutral, collaboration is essentially off the table as well – at least until the mediator has made her evaluation. In other words, the roles of advocate and judicial officer approximate the roles here of lawyer and mediator. Judicial hearings are not essentially collaborative in nature, because the judge sits above and outside of the conflict, and is empowered to make dispositive decisions regarding the outcome.

With facilitative mediation, however, trustworthiness and collaboration are paramount. In order to work with the mediator to get neutral advice about the strengths and weaknesses of your case, acknowledging weakness is essential. In order to strategize about the best way to negotiate, the neutral must be brought in to the discussion of both goals and methods, so that s/he can assist in refining and adjusting goals and fashioning the most effective negotiation strategy. And the mediator must be understood to be doing much the same thing in every room, so that s/he remains truly impartial. Here are some of the advantages of a facilitative process in which you work with the mediator:
• Your client will experience your efforts to see justice done in a much more effective way, and will typically have much more satisfaction in the process;
• You will have the advantage of adding a skilled and experienced negotiator and problem-solver to your team (and all other teams) for the day, with the attendant benefits;[12]
• Advocates become negotiators;
• You will retain control of the negotiation throughout;
• You will negotiate, with the mediator's assistance, with the opponent, not with the mediator;
• Positions will change because the parties better understand the risk and benefit of further dispute, not because they were pressured into changing a position they still believe in;
• Parties typically leave the mediation with a sense of accomplishment, because they were persuaded to change positions and did so voluntarily, rather than through third-party pressure;
• The lawyers function less as advocates and more as problem-solvers, which brings more satisfaction to the lawyers;
• The lawyers enjoy the collaborative benefit of working *with* the mediator, rather than *working* the mediator.

Mismatching style and process

Difficult and even disastrous days can happen when mismatching the mediator and process with advocates' styles. An advocate who relates to a facilitative mediator as though she were an evaluator will miss many of the benefits of facilitative mediation. Although you can *work* a facilitative mediator, you will find that both the process and result is far less satisfying than when you work *with* one. Both the satisfaction and substantive result of your client will likely be diminished by not maximizing the process.

Also, an advocate who brings a facilitative approach to an evaluative mediator could well have a disastrous day, experiencing both bad process and a bad result. Although the best advocates often concede smaller points or lesser arguments to establish credibility with the decision-maker, conceding major weakness to an evaluator is a high-risk strategy. The very backbone of evaluative mediation requires working the mediator and not collaborating with him. The appearance of collaboration may be helpful to the experienced advocate, but the latter never takes her eye off the prize – convincing the mediator of the rightness and reasonableness of her side.

Not every good mediator is facilitative.[13] Nor is evaluation utterly absent from facilitative mediation. But understanding your mediator and his process, and matching those to your own preferred style, is critical to maximizing both process and result. If you are or can become comfortable with a facilitative process, find a mediator you can trust and work *with* him or her.

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Endnotes:

[1] This article draws together observations and analysis from previously published articles, as well as incorporating new thoughts and perspectives.

[2] This article will argue for choosing, using and working with the facilitative mediator as opposed to the evaluative. Later we will consider evaluative mediation and its call for a different style of advocacy.

[3] This is not an idealized list for a fantasy mediator. Virtually every top-tier mediator possesses all of these skills. Most of them will be evident (when you are looking) most of the time throughout the mediation process. Of course, mediators are human. We do not perform at our highest 100% of the time. Perhaps another skill should be added – the ability to self-appraise in the middle of the process. This skill allows top mediators to course-correct when they are showing one or more deficiencies, make bad decisions, or simply make decisions that do not work out well. All of these skills must operate in a fluid, dynamic and often volatile environment.

[4] Not all excellent trial lawyers or judges make good mediators, although many do.

[5] But if impartiality is an important requirement, why would an advocate abdicate the choice of mediator to his opponent? It seems like creating a potential for disaster. First, there are actually degrees of impartiality. Since mediators do not decide the merits, most advocates believe that even a biased mediator will show herself during the mediation and allow the advocate exit without permanent damage. Second, it is probably an overstatement to say that one side "abdicates" or completely "defers" to the other on choice of mediator. This writer suspects that the advocate giving some deference also does some due diligence and checks the proposed mediator(s) for bias and at least some competence. Thus, it is possible to defer in great measure to the opponent's choice of mediator and still retain some control of the selection. Defer or not, impartiality is an essential mediator quality.

[6] Of course, the judicial officer would never, without violating major and basic ethical rules, be found in an ex parte setting at all. The inability to work individually with sides is reason enough that this model of impartiality is ill-suited to mediation, which works in a substantially (or exclusively) ex parte.

[7] Let us call it "engaged impartiality."

[8] All mediators are evaluative at some point(s) and in some ways. The distinction here is not between evaluative behavior and its opposite facilitative behavior, used by the mediator at some times during the day. The distinction relates to the overall process and the mediator's self-defined role within it. Is the mediator there to decide who has the better of one issue or another and then communicate to the other party that they are on the losing side of that issue? Or is the mediator there to allow the parties to negotiate with each other, maintaining control of the process and the dispute, but assisted by the mediator in making the negotiation more effective?

[9] Most mediations (and mediators) are neither purely facilitative nor purely evaluative, but somewhere in the middle and tending toward one of the poles. Mediations are essentially evaluative when the day is built around the mediator's evaluation. The evaluation is the focal point, and the major means by which parties will move or soften positions so that the matter may be settled. This is not to say that the evaluative mediator cannot be of assistance in other respects, such as communication or analysis of risks and benefits. But the evaluation-focused mediation deprives the mediator of the ability to deliver some of the major benefits that facilitative mediators typically provide to the parties.

[10] Actually, joint sessions are rare in all cases these days. But in the evaluative model, joint sessions are mainly effective when the well-prepared mediator uses them to put the advocates on the spot and see how well they can defend their positions in the presence of the opponent. This technique is not favored by most evaluative mediators.

[11] Again, to highlight and understand the process issues, this summary examination is somewhat one-sided and dogmatic. In reality, the process is more complicated.

[12] This is not to say that you are incapable of determining goals and methods of negotiation. Rather, both process and result are elevated when there is more than one experienced contributor.

[13] It should be quite apparent that this writer prefers facilitation to evaluation as the most effective and satisfying process structure for mediation.