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Evaluative v. Facilitative Mediation Style: RIP to an Outdated Paradigm

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Joan Stearns Johnsen | November 11, 2025

Introduction

The evaluative or facilitative debate has been going on for decades. These conversations frequently reference mediator standards and ethics and often assume a tension between practitioner conduct rules and user expectations. Some speakers even go so far as to suggest court-annexed programs prohibit evaluation requiring mediators to be facilitative. In contrast most legal practitioners and other users of mediation seek evaluation. Even more confusing, mediators trying to please everyone frequently describe themselves as "facilitative in the morning and evaluative in the afternoon."

This framing of evaluative v facilitative is not just outdated—it is inaccurate. Part of the problem is that no one really has a consistent understanding of what constitutes evaluation. The longstanding debate between "evaluative" and "facilitative" mediation is misleading. Many litigators and even mediators misunderstand what "evaluation" actually entails. Most mediators engage in some form of evaluation, whether they label it as such or not. Evaluation is not a narrow behavior, it is a continuum of techniques that range from non-verbal cues, subtle questioning, more explicit expressions of doubt and analysis of risks, up to and including statements of likely outcomes.

Rather than continue debating whether evaluation is permissible or appropriate, we should be asking how and when evaluation should be used and in what context. When used appropriately with skill, proportionality, and respect for party autonomy, evaluative methods are not only compatible with ethical mediation, they are often indispensable.

Historical Context

Mediation in the U.S. emerged prominently beginning in the 1980's following Frank Sander's proposal of the multidoor courthouse initiative as a means of reducing overburdened court dockets.[1] Early mediation models were derived from community mediation and were focused on facilitative techniques emphasizing communication, trust, and relationship preservation.[2] This model was well suited to disputes between unrepresented parties or those seeking relationship repair. When mediation began to be used to settle lawsuits including large and complex litigation and arbitration matters the primary objectives shifted to efficiency and settlement. Parties in these mediations were less interested in enhanced communication and relationship repair. Mediators adapted, but training and perceptions of best practices often lagged, leaving unresolved the tension between facilitative and evaluative practice.

Facilitative Mediation

Facilitative mediation is a dispute resolution process where the mediator supports the parties in reaching their own voluntary agreement without providing substantive input on the issues. The mediator controls the process but does not in any way influence the flow or content of the discussion. A purely facilitative mediator utilizes techniques such as reframing and summarizing, to further mutual understanding. While caucus is permitted, the default process is joint session, and parties are often unrepresented.

In practice, facilitative mediation is well-suited to contexts where relationships matter or where parties are unrepresented, such as in community disputes, custody and visitation matters, or restorative justice settings. Facilitative skills can be very valuable in the evolving area of Dispute Prevention where communication, trust, and relationships are paramount. While facilitation avoids the risk of undue influence, it may also fail to provide the kind of structure, insight, or guidance that parties and counsel expect in a litigation or arbitration setting. This is not to say facilitation is ineffective only that it is not always the best process for achieving the parties' objectives. Context and dynamic are key.

Evaluation in Practice

Evaluation has gotten a bad reputation in the academic community. Possibly because it is regarded as directive or even confrontational and coercive. But that singular definition of evaluation is wrong. Evaluation in mediation is best understood not as a singular behavior, but as a continuum of techniques. These techniques range from non-verbal cues to subtle questioning, to more explicit analysis of legal claims or likely outcomes, and, yes, a directive approach is evaluative.

Evaluation goes beyond process to content including Best Alternative to a Negotiated Agreement, BATNA, Worst Alternative to a Negotiated Agreement, WATNA, and Most Likely Alternative to a Negotiated Agreement, MLATNA. Mediators, especially in litigated matters, are acutely aware of each party's BATNA WATNA, and MLATNA. These evaluative techniques use one or all of these essential negotiation frames. Most mediators resolving litigation matters acknowledge the legal landscape when assisting parties in evaluating proposals. This is called Bargaining in the Shadow of the Law.[3] Most litigators and parties in these types of disputes seek this sort of analysis as one of the most valuable benefits of mediation.

The evaluative mediator causes the party to reflect more closely on its litigation risk by identifying possible blind spots in a party's analysis. The techniques with which the mediator raises doubt in a party may be as subtle as a non-verbal cue such as a raised eyebrow, a silence, or a shift in tone to signal concern or invite reconsideration. Or the mediator could be more evaluative by asking questions that can also range subtly in directness from, for example "Why do you think the other side is raising that issue?", to "Do you have any concerns about that issue?", or "What will the jury do with this issue?" The mediator may share a concern from a personal perspective, for example, "I see risk in this argument," or "I believe you have some exposure here that you may want to weigh." At the far end of the spectrum, the mediator might apply percentages to the case or even provide an opinion - clearly stated as opinion- as to what the parties should expect to see as the most likely result. "I think you have a 70% chance of losing this case completely." "I do not think the jury will find that witness' testimony as credible." A common misperception is that all forms of evaluation are coercive or compromise party self-determination. In fact, many evaluative techniques can enhance decision-making by helping the parties to engage in more effortful analysis, or by revealing risk especially among sophisticated parties represented by able counsel.

Defining evaluation as a continuum changes the conversation from whether to evaluate to what sort of evaluation and when allows for tailored intervention appropriate for each dynamic and each stage of a mediation. Different parties, disputes, and moments in a mediation call for different tools. Recognizing this flexibility is critical to advancing the practice beyond rigid style categories.

Standards of Conduct

A widespread misconception persists that many court rules prohibit evaluative mediation. In fact, most rules prohibit coercion and emphasize party autonomy and mediator neutrality, but mediator standards of conduct tend not to ban evaluative techniques outright. For example, many mediators certified by the Florida Court System believe that they are prohibited from evaluation. However, the Florida Rules for Certified and Court-Appointed Mediators, 10.370 (c) Advice, Opinions, or Information, provides that while a mediator "shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue. ... A mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute." (emphasis added). The prohibition against predicting the future with certainty, does not prohibit discussions of possible outcomes.

The comments to 10.370 clarify this: "A mediator may also raise issues and discuss strengths and weaknesses of positions underlying the dispute. Finally, a mediator may help the parties ***evaluate*** resolution options and draft settlement proposals. " (emphasis added)[4]

Read as a whole, a mediator may point out how a court may resolve the dispute. A mediator may discuss litigation risks and help the parties evaluate the settlement offers and demands.

Other jurisdictions similarly permit appropriate forms of evaluation. California's rules allow opinion-sharing that respects self-determination, New York permits evaluative input in court-connected mediation with represented parties, and Texas law emphasizes resolution assistance without forbidding evaluative tools. Model Standards of Conduct for Mediators likewise permit evaluative strategies when used ethically and transparently.[5]

Conclusion

In light of evolving mediation practices and expectations, the evaluative v facilitative debate is outdated and unhelpful. The standards of conduct, when read carefully, do not prohibit evaluation. Instead, they emphasize the core values of mediation: party self-determination, informed decision-making, and procedural fairness. Within that ethical framework, evaluative tools when used skillfully with regard to the parties' preferences are entirely appropriate especially in a litigation environment with sophisticated, represented parties. Evaluation is often preferred by the parties themselves where the purpose of the mediation is to reach a settlement efficiently. Rather than asking whether a commercial mediator in a litigation setting is "evaluative or facilitative," the better question is what do the parties want. And given the parties' objective when, and how should a mediator provide value through appropriate evaluative techniques. It is time to retire the false dichotomy and acknowledge the sophistication and fluidity of skilled mediators.

[1] Frank E. A. Sander, *Varieties of Dispute Processing*, 70 Fed. R. D. 111 (1976).

[2] *See generally* Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 Nev. L.J. 399 (2005); Lisa Blomgren Bingham, Susan S. Raines, Timothy Hedeen & Lisa Marie Napoli, *Mediation in Employment and Creeping Legalism: Implications for Dispute Systems Design*, 2010 J. Disp. Resol. 129 (2010).

[3] Robert Mnookin, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979).

[4] Fla. R. Cert. & Ct.-Apptd. Mediators 10.370(c); see also Fla. R. Cert. & Ct.-Apptd. Mediators 10.370 cmt.

[5] See Cal. Rules of Court, R. 3.857(d) (permitting mediators to "raise questions or offer opinions" so long as party self-determination is not undermined); N.Y. Unified Court Sys., Part 146 Guidelines for Court-Connected Mediators (allowing evaluative techniques in appropriate cases, especially where parties are represented); Tex. Civ. Prac. & Rem. Code Ann. § 154.053(a) (West) (requiring mediators to encourage settlement, without barring evaluation); Model Standards of Conduct for Mediators stds. I

& II (Am. Bar Ass'n, Am. Arbitration Ass'n & Ass'n for Conflict Resol. 2005) (supporting use of evaluative interventions when consistent with impartiality and party autonomy).

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