The Hard Question: When to Bring Evaluation into the Mediation

Introduction:

At some point in your mediation career, you will be asked this question. "What is your mediation style?" The question asks where one sits on the spectrum between facilitative or evaluative styles of mediation. It's a hard question to answer because mediation is a dynamic process that requires different approaches throughout the session(s). Your style has to change and adjust to the needs of the parties, progress made (or not) and most importantly - what you are hearing.

Frequently, evaluative techniques have to be deployed to bring sides closer. Mediators use them throughout the day. Does being evaluative early in the day make one an "evaluative-style mediator?" Or does it simply mean that one side or another asked you for your opinion or assessment on an aspect of the litigation, and you gave it?

In this article, we consider some approaches when evaluation takes center stage. It's a tricky area. Evaluative discussion can be a sobering experience for attorneys and clients. Discussing the weaknesses of one's case, for example, often after having believed one was entirely in the right, is hard. Moreover, evaluative questions from the mediator can create tremendous defensiveness and reactivity. Attorneys do not back down easily. Often, neither do their clients. The parties are relying on you to help them get to a resolution, but the process is not an easy one. When the time comes, either because parties and counsel asked you, or because you feel it is necessary, how do you bring evaluation into the mediation room?

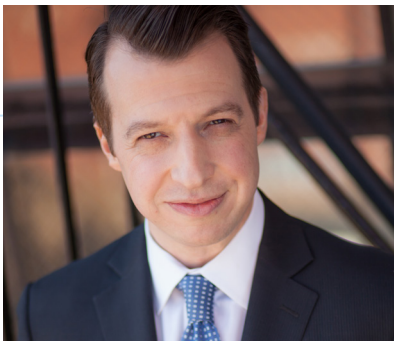
What is Evaluation?

There are many, many ways to help parties evaluate their case, but let's break it down into the most critical piece. **Evaluation is when the mediator and/or the parties assess individual components or the overall outcome of a case.** Evaluation may be in the form of questions asked by the mediator, or when the mediator offers an opinion or an assessment on some aspect of the litigation. Mediators do this, or some of this, all the time, but when and how do we consider these critical issues?

Lay the Foundation for Evaluation with Strong Facilitation:

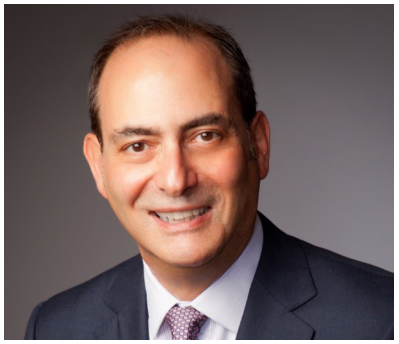
We have never begun a mediation with an aggressive evaluation of a party's case. There are many reasons for leaving evaluative techniques and questions until later.

Read more on page 16



Adam J. Halper, Esq.

Adam J. Halper *is a mediator, arbitrator and attorney. He specializes in mediating family, matrimonial, employment, commercial and trust and estates disputes. In addition to his private practice, he is on the roster of neutrals for the American Arbitration Association and for several state and federal courts.*



Bart J. Eagle, Esq.

Bart J. Eagle *is an attorney in private practice focusing on commercial litigation, a mediator, and an arbitrator. He is on the roster of mediators for the AAA, the NYS Supreme Court Commercial Division, the SDNY, and the NYC Bar Association's Co-op and Condo Mediation Project; and is on the roster of arbitrators for the AAA. Mr. Eagle is co-chair of the NYSBA Dispute Resolution Section Mediation Committee, chair of the NYC Bar Association's State Courts of Superior Jurisdiction Committee, a member of the NYSBA Commercial and Federal Litigation Section, and a member of the NYC Bar Association's Council on Judicial Administration.*

The Hard Question... continued from page 5

First, there is great value in **developing trust and rapport** with each side. Caucus sessions are an opportunity to do so, and to have candid conversations with parties and attorneys. That rapport is often established by listening, actively, and trying to understand not only a side's positions – their "wants," but also the "whys." Helping counsel and parties to evaluate where they stand in a litigation (or potential litigation) is much easier when you have heard from them, in confidence, how and why they are in mediation. Second, facilitative techniques, such as using open-ended questions in caucus and developing options for movement, provide clients and attorneys with what they bargained for by coming to mediation, **self-determination**. Conversely, the more evaluation there is from the mediator, the more easily self-determination can slip away. Finally, a key component of caucusing is some element of **traditional bargaining**. The need to bargain is practically biological. Traditional bargaining is a form of communication and to skip to the end, through evaluation, is to neglect a piece of the conflict.

Evaluation is when the mediator and/or the parties assess individual components or the overall outcome of a case.

Know When to Begin Evaluating:

All of the above are why the traditional mediation model is facilitative, not evaluative. Most mediation training, at the very least, begins there, stressing how the process is intended to be party driven; that achieving a resolution is, and should be, the result of the self-determination of the parties. And for many mediators, and perhaps for many parties, the process should never veer from this approach. So, when to evaluate?

The Story Has Been Told: You have had an opportunity to talk with each side and their counsel. They have clarified various pieces of the litigation, or what led up to the present conflict. They have vented. You are confident that listening to the sides discuss only why they are right is not going to get you any farther. Also, the offers and numbers are not moving. You will know the moment when it comes. This is the moment to change the energy a little bit, state as much, and begin by stating affirmatively, "I'd like to look at this through their eyes. Let's do it together."

Conversely, the more evaluation there is from the mediator, the more easily self-determination can slip away.

They Ask You: Conversely, experienced counsel (and experienced clients) may simply ask you to evaluate the case with them. The best counsel (our personal favorites) ask you to walk through the steps of litigation, the risks involved, and your thoughts on possible next offers. The hope for every mediation is that it resolves the matter completely. In order of having any hope of getting there, parties recognize that it is invaluable to have a fresh pair of eyes review the strengths and weaknesses of a case. When a party or counsel turns to you and says, "what do you think," begin slowly but surely on where you think they are right and where you think they may be overconfident.

It Would Be Impossible Not to Evaluate: Confidence in one's case is important. Overconfidence can create blind spots. On occasion, a side will demonstrate a catastrophic miscalculation that can be seen from space. A common example, one we have seen, is where one party does not understand the law completely and dramatically miscalculates the strength of the case. In this moment, it is incumbent upon the mediator to assist by shining a light on this misunderstanding. The critical decision for the mediator is how to do this constructively and productively.

How to Evaluate:

Regardless of whether they proceed to mediation voluntarily, or are directed to attend by a court, parties and attorneys are coming for resolution. If you don't provide some evaluation of their positions, especially where they want and expect it, you may lose the chance. And rest assured, many want and expect it. Begin with questions.

Be Specific. Be specific and ask the parties to get specific as well. We begin by asking the parties and their attorneys to reality test their own case. For example, if the case relies heavily on documentary evidence, ask about what it really shows and what it does not. Often, parties have exchanged documents (or at least initial disclosures) and sometimes a blizzard of documents prior to the mediation. Unsurprisingly, they often have different opinions about what the documents mean for their side. At the appropriate time, give an opinion as to what the documents may look like to others, including a trier of fact. For example, "can't this document also be interpreted to mean "X"? For an attorney, being engaged in litigation can mean putting advocacy "blinders" on your eyes. Being a mediator requires you to help an attorney take them off for just a few moments. Likely, it will be enough. Get specific with your reality-testing questions and the doors to different ways of thinking about the risk may open.

Similarly, throughout the day, attorneys often ask for assistance in crafting settlement offers and counteroffers. Regardless of the settlement range, when the parties ask for help, they may be implicitly asking for some evaluative thoughts. If you feel comfortable doing this as a mediator, provide your thoughts on where other, similar cases have settled and work backwards to craft the next proposal. If you're not comfortable with this approach, even better, ask the attorneys to discuss where they think the cases in this particular area usually settle.

Moreover, if you are engaging in an evaluative discussion in caucus, it can be helpful to take the case analysis a step further. Discuss the likelihood of success on the merits and discuss what it will take to get there. Even where one side has assessed the probability of success as being very high, attorneys and clients may discount

the time, money and energy it may take to get there. At various times, we have offered opinions regarding witnesses (and their continued availability), the chances of actually collecting on a judgment, and the very real possibility that counterclaims will be seen as more than just a retaliatory gesture. We find that evaluation is critical as to everyone's understanding of the ultimate outcome of a case. Questions we have asked recently in caucus include — "What is the best-case scenario for a win and what is the likelihood of actually achieving the best-case scenario?" "If you get a judgment for half (or less), will it still be worth it to pursue the litigation?" "If you get a quarter of your best-case scenario, three years from now, and then have to try and collect, would you still want to litigate?" And an overriding question, "What will it cost to succeed?" What we ask counsel in evaluative discussion is to make sure they are not litigating themselves to the point of potentially winning the battle but losing the war. Our personal favorite, because no one ever seems to consider this, is "would you please tell me what will happen if you lose?" It is remarkable how distant a possibility that is for attorneys and for clients.

Be Broad: One way of bringing evaluation into the room, and to do so earlier, is to take a broader approach on the evaluative questions you ask as a mediator. We recommend using "softer" questions, such as those which raise the external pressures that impact every civil case. "Tell me about what this case means for you or your business." "The litigation cost will be X, right?" "What would you give this matter, percentage wise, for prevailing or losing?"

By way of example, never has it been more appropriate to ask and provide some comment on the issue of time. "How much time will it take to get to a dispositive motion, trial and appeal?" "What are the costs per step?" "What are the costs to your business of having an on-going litigation; to produce documents; to appear for depositions; to prepare for and appear at trial?" Counsel may answer these questions broadly. Parties - their clients - on the other hand, can be devastatingly specific. Moreover, parties in an ongoing litigation may already be intimately familiar with the economic costs of a litigation and the disruptive power it has on the rest of business, or even one's life. However, if a party is new to litigation, generally, or if the mediation takes place at an early stage of a litigation, they should be made aware of it. The threat of a judgment that has to be paid, maybe for years, or to a plaintiff, one that may never be collected, is an ever-present issue. Further, no matter how business-oriented is any client or entity, there is another issue which needs to be evaluated. "How much longer do you want to wait while the court sits in judgment, not only as to the ultimate issue of right and wrong, but as to all of the other issues that may have to be decided to get there – such as a dispositive motion?"

Discussing, gently, the impact of a continuing conflict on parties, business, customers and other interests may be seen as a waste of time by counsel. So, a critical element of asking soft questions is to include a question about how much the answer to the question will cost. For example, how much does it cost for two or three people at a business to be dealing with the conflict for the next two years… roughly? For counsel, there is the fight and often, only the fight. And counsel may only be viewing the discussion of cost as limited to attorney's fees and litigation expenses. For the client, the cost to their business is a real consideration, and one that they may not have thought about or discussed previously with their attorney. As mentioned previously, the reasons for settling in mediation may surprise you and may not be completely connected to the dollar amount at issue.

Offer Statements: We like questions, because it places the responsibility for the answers in the hands of counsel and parties – which is where it should be. Still, you have been hired for your expertise and your insights, in the form of statements, will likely be a piece of an evaluative discussion. We encourage you to tread lightly. Statements and opinions, if not given carefully, can have the effect of eroding the appearance of neutrality. By way of example, we offer some evaluative questions and statements, side by side:

Question	Statement
What are the strengths and weaknesses of our case here?	I think that this record (or lack thereof) is very significant.
If we try this case (motion) 100 times, what is the likely outcome for the majority of those times?	Given how many facts are in dispute, this is going to trial.
What don't they understand?	I don't think your arguments are as persuasive as you think.
What if the jury does not accept your position?	I want to help you resolve this so that you don't have to roll the dice with people you have never met.

These are different and the same, right? The question and related statement are intended to convey the same thought. However, how it is delivered – as a question or as a statement – may have a profound effect on how it is received. As a mediator, you can ask these questions or make these statements in an infinite number of ways. Be careful.

The relationship you have developed with the parties will inform how comfortable you are with either approach. Remember, the proposition in either column is always the same, "Are you certain about this position?" Looked at through the prism of

the absolute, the answer simply has to be, "no." If the answer is "no," then the field of discussion is less black and white than the arguments suggest. Maybe it is more gray. Arguments are discussed in the spectrum of bold colors. A mediated settlement takes place in a more nuanced shade of light.

Assessing Outcomes and the Cost to Achieve: Sometimes, counsel and the parties will need a more guided approach. During an evaluative discussion, we often discuss the likely outcomes of a case and the cost to get there, in very detailed terms. Some mediators work with decision trees, which diagram the percentages, and costs of different stages of the litigation to arrive at a "weighted cost," or the expected cost per outcome. This can be a very effective exercise to do with counsel, especially in complex cases where there is a range of possible outcomes.

A simpler and perhaps, more commonly used approach, is to have each party estimate the best and lesser potential outcomes of a case at different stages and the cost of getting there. For example, what is the cost of a plaintiff winning 100% of its claim on summary judgment? Or, of 50% of its claim? What would that net after legal fees? If they lose on summary judgement, how much more would it cost to prevail at trial? And of course, what if they lose the whole case?

You can make these analyses as complicated or as simple as you wish. As an exercise, they provide a valuable opportunity to walk through the litigation process and assign real numbers and values to pieces of the case. In writing this piece, we concluded that we, as mediators, do this type of exercise constantly in mediation. We think that the greatest value of doing so is that it forces everyone to start thinking in terms of numbers and hard realities. Whether you draw it on a piece of paper, use software, or simply talk it through, this cost/risk litigation analysis is a critical part of the evaluation process.

Make a Mediator's Proposal: Finally, seen from a certain perspective, the mediator's proposal is an evaluation of how the case can be settled. Full disclosure: some mediators do not agree that a mediator's proposal is ever appropriate; that it is inapposite to the basic tenet of mediation – party self-determination.

For those of you who are not opposed to it, or who have not used it, or who do not engage in mediator's proposals, it goes like this: The mediator, privately, suggests a settlement proposal to resolve the dispute to each side[1]; it may just be a number, it may be, or include, the resolution of other issues. The parties are told that it is not negotiable. Each side, privately, tells the mediator whether or not they will accept it or reject it. If both sides accept the mediator's proposed resolution, the parties are told that they have an agreement, and it's time for drinks. If one party, or neither

party does, there is no agreement. If one side does accept and the other does not accept, the mediator simply tells both sides, “no deal.” The side that accepted the proposal is not prejudiced, because neither side knows the decision of the other.

We suggest not proceeding with a mediator’s proposal unless, after explaining how it would work, all of the parties agree to it. **We are very careful to communicate that our proposals are not evaluations of the merits**. In fact, we write those very words into the letter that goes with the proposal. We suggest that the mediator’s proposal is best used as the very last step in the day. By that point, hopefully, you have worked with both sides to come to a place where the gap between them is relatively small. At that point, what you have likely done as a mediator is to help both sides evaluate their own case and make moves towards each other. In some cases, the elements of a settlement, after significant time is spent in mediation, is apparent to everyone. However, one or both parties may not be able to make the offer or counteroffer that bridges the gap – pride, or ego, or anger, gets in the way. The mediator’s proposal can overcome this reluctance – the parties can say “yes,” while saving face. The mediator’s proposal is not the ultimate evaluation of the case. Rather, it is simply an avenue to cut through the dance of negotiations at the end of the day.

Conclusion:

If mediation begins with a facilitated discussion focused on party interests, think of evaluation as the end of the beginning. Evaluation can be difficult because it can be interpreted, by mediator, counsel, and parties alike, as a challenge to the present thinking of one’s case. We offer these approaches so that you may begin the evaluative part of a mediation, armed with the knowledge that you have laid the proper groundwork for the inquiry, and so that you can proceed deliberately. The suggestions we have outlined above are some of the tools that help make evaluation effective. At times, in caucus, it is very challenging to engage in this discussion. Still, evaluation, in many ways, is a natural part of a facilitative discussion. We think it adds to the building of rapport; to productive negotiation and, most importantly, to assist the parties to achieve a mutually satisfactory resolution of their dispute.

Endnotes

1 For purposes of this example, we are assuming a mediation involving two parties. However, the approach would be the same with a mediation involving multiple parties.