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How an Evaluative Mediator Helps Parties Settle Cases

By

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Much has been written about styles of mediation. Perhaps the two most common styles are "facilitative" and "evaluative." In the most general sense, a facilitative mediator serves as a host and attempts to stimulate negotiations between the parties without offering a view of the dispute. An evaluative mediator, on the other hand, is willing to offer views and feedback on the parties' positions.

I approach this issue from the perspective of having represented parties in commercial litigation for many years. Good lawyers can and do assist their clients in settling cases without mediation. My view is thus that a purely facilitative mediator does not bring much to the table in a commercial matter, as the lawyers would probably discuss settlement anyway. Based on conversations I have had with other commercial litigation attorneys across the country, this view seems to be widely shared. Lawyers often derisively refer to mediators who are only "note carriers," meaning that all they do is carry notes of settlement offers between the parties during the mediation.

Although I prefer an evaluative approach, that does not mean a heavy handed approach. A good mediator has to be a good listener. A good mediator needs to have a thorough grasp of the facts and always needs to be open to hearing additional information, and making sure that the parties are fully informed. If a mediator expresses a strong view of a case to either side very early in the mediation, the mediator will not be viewed as neutral, and the party on the short end may elect not to participate further.

Often, the best approach to "reality testing" is to ask questions. Asking questions has the concomitant benefit of gathering information. If a party's damages case seems weak, a mediator might ask, initially: "I am not sure I fully understand your position on damages. Can you explain it to me in more detail?" The answer may prove that the damages case is stronger than initially thought,

and that information (with the permission of the plaintiff) can be shared with the defendant.

If the answer suggests, however, that the damages case is a little weak, a further question might be asked, "What do you expect the other side will argue against your damages case?" Later in the process, a more specific question might be asked, "Just to make sure I am not missing something, my understanding is that your damages are based on lost sales, and that your best case view of that is around \$500,000?"

In the caucus in the other room, a similar dialogue takes place. That dialogue might begin with a question like this: "I understand that you do not think the other side has proven their damages. Do you think they have been damaged in any amount?" After that information is gathered, a further question might be, "Even though you think the damages are weak, do you think a jury might conclude they have some damages?" At the end of the day, hopefully the parties will be in a range where the case can settle.

An effective evaluative mediator will get the parties to fully examine their case and the other party's case. In this process, the mediator will try to move the parties toward a settlement. Mediators who "push" in this manner – and who push both sides – tend to be the most effective.

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