Evaluation: A Potential Tool in Your Mediation Strategy

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Evaluation in mediation

• Legal merits are often not the real obstacle
• If so, evaluation will be ineffective/risky
• But disagreements about case value do drive many impasses
• Evaluations can also have psychological benefits: “day in court,” “cover,” “face saver,” etc.

Planning for evaluation

• Don’t do an evaluation simply because it “can’t hurt” – it can!
• How an evaluation is done is often key to its success
Suggestions for evaluative feedback

• Evaluation is like surgery: “Less is more…”
  • Focus on the issue blocking progress…
  • Give only to the person(s) who need it
  • Emphasize uncertainty, risk
• Start with
  • a single issue, not the value of the entire case
  • speak vaguely, and become more specific later
  • orally, and go to writing if necessary

What kind of opinion?

• Your personal view of a fair result (Don’t!)
• Your expert judgment on the issue (No!)
• What will break the bargaining impasse (yes)
• A prediction of the likely result at trial (Use if necessary)
• Offer a weather forecast: Is it likely to rain in a future courtroom? You don’t want anyone to get wet, but…would it be worth buying an umbrella?
• You are speaking of probabilities, not certainties

What is the effect of evaluation?

• It may
  • help the lawyer persuade the client
  • Show one side a limit to what they can get
• Does not end your work: it is only a tactic to move the process forward
• It provides one “push” – choose the moment!
• Expect parties to disagree. Admit that there is always uncertainty - you may be wrong. Do not “fall in love” with your own opinion!
Practices of commercial mediators:

<table>
<thead>
<tr>
<th>Table C</th>
<th>Assess and share my opinion regarding the legal strength of arguments made by parties and/or counsel.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comparison of Responses by Regions of Practice</td>
<td></td>
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<tr>
<td>All respondents (mediations)</td>
<td>15.7%</td>
</tr>
<tr>
<td>Mediators practicing in NY</td>
<td>14%</td>
</tr>
<tr>
<td>Mediators practicing in CA</td>
<td>12.9%</td>
</tr>
<tr>
<td>US mediators practicing in other states (all)</td>
<td>14.1%</td>
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</tbody>
</table>

International Mediation Institute Survey: Mediators should not be purely facilitative but adopt a proactive idea-generating role, including proposing solutions and settlement options.

Facts: Mumbai v. MedPro

- Six years ago, MedPro gave Mumbai an exclusive contract to distribute oximeters in India
- The contract allowed each party to terminate:
  - For cause, or
  - On 90 days’ notice, without cause, or
  - On the 1 September anniversary date each year
- Mumbai spent two years building the market for oximeters, spending about US$500K
Sales grew rapidly, then fell:

- Years ago: 5 4 3 2
- (this year) 1
- Sales (US$): 0 100K 500K 800K 400K 50K

- In May last year, MedPro terminated the contract on 1 July citing “poor sales”
- Two days later Mumbai’s salesman resigned and a week later MedPro gave him a non-exclusive distributorship
- Mumbai alleged the salesman conspired with MedPro to steal business. Mumbai got an Indian Court order that forbids him to sell MedPro oximeters
- Mumbai sued MedPro. The parties agreed to mediate.

A first strategy: Develop more information

- Arrange an exchange of information
- Moderate a joint discussion
- Focus on non-merits issues or data

Ask questions

- Ask interest-based questions
- Ask information questions
  - What evidence is relevant to this issue?
- Ask for their analysis
  - What are the strengths/weaknesses of your case?
- Narrow your questions
  - How should we answer their argument that …?
- Be the “Devil’s advocate”
  - Why would it be wrong to argue that…?
Lead an analysis

- Ask the parties to go through an analysis of the case with you
- Do not evaluate or disagree with them
- Ask about all legal issues, litigation cost, business impact of case
- Get their estimate of the chance of success and the money impact on each issue
- Compare the outcome to their current offer

Scenario 1

- It is 13:00. The parties have made small moves (1.6M, 50K, 1.5M, 75K). Both are frustrated. Both claim they will win in court.
- Take MedPro through an analysis:
  - Risk/impact if there is “cause”, if they can cancel on 90 days’ notice or on 1 September, if the court grants Mumbai restitution for its costs
  - Cost of litigation and management distraction
  - Impact on MedPro’s plan to sell oximeters in India

Scenario 2

- It is 4 pm.
- Mumbai is now at $750K (down from $900K), in response MedPro moved to $140K (up from $125K). Mumbai refuses to move without more from MedPro
- Ask Mumbai if you can give an evaluation
- Give an evaluation of Mumbai’s chances in court
- Use words only - not numbers or percentages
Scenario 3

• It is 7 pm. Both sides are tired and frustrated. Mumbai is at $325K and MedPro is at $180K
• Give Mumbai an evaluation:
  • Use percentages and numbers
  • Give a $ range for the possible outcome in court
  • Then discuss with Mumbai what to do next

After the evaluation…

• What to do next?
• What if they move, but not enough?
  • Ask questions: where do they differ? What about costs?
  • Explore: What else might be important?
• Restart bargaining: Confidential listener, sub-meetings, brackets, etc.
  • What if?
  • Mediator proposal or last-and-final offer

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