

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.

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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

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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

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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:

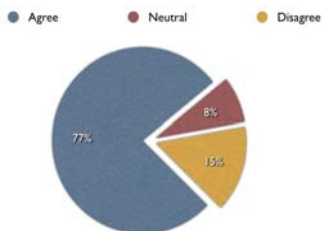
Table C
"I assess and share my opinion regarding the legal strength of arguments made by parties and/or counsel."

Comparison of Responses by Regions of Practice

	Never (0)	Sometimes (1)	About 1/2 the Time (2)	Usually (3)	Always (4)	Weighted Average
All responding mediators	10.7% (13)	33.9% (41)	18.2% (22)	30.6% (37)	6.6% (8)	1.88
Mediators practicing in US	4.4% (4)	31.9% (29)	17.6% (16)	38.5% (35)	7.7% (7)	2.13
Mediators practicing in California	0% (0)	22.9% (9)	14.6% (6)	51.2% (21)	12.2% (5)	2.54
US mediators practicing in states outside California	6.6% (4)	37.7% (23)	16.4% (10)	34.4% (21)	4.9% (3)	2.10
Mediators practicing outside US	32.4% (11)	38.2% (13)	17.6% (6)	8.8% (3)	2.9% (1)	1.12



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
	1	(this year)		


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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