

MEDIATION

HOW EVALUATIVE IS TOO EVALUATIVE?

*By: E. Scott Douglas**

The ensuing discussion is fictional. Two securities litigators are discussing mediation following an NASDR mediation roundtable. During the conference, the terms "facilitative" and "evaluative" had been used to describe different styles of mediation. One of the attorneys, Miles, had successfully used mediation for years and formed some strong opinions on what he liked and disliked about certain mediators and their styles. His counterpart, Kendall, had been mediating more cases lately, but was still assessing the landscape. During the roundtable, a panel mediator's comments provoked discussion regarding evaluative versus facilitative methods. To Miles and Kendall, it seemed the issue was not whether one was better than the other, but instead what form of evaluation was being provided. Just how far should the mediator go in providing his evaluation? Should his evaluation include the ultimate issues? When should the mediator step aside and allow the parties to control the terms of the settlement? *How evaluative is too evaluative?*

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Miles: All this talk about evaluative versus facilitative styles. I think most good mediators are really a blend of both styles.

Kendall: One mediator I know described herself as facilitative in the morning and evaluative in the afternoon. Or was it vice versa? I obviously want to know they understand the case and have evaluated the issues and facts correctly, but in the end, I still want them to facilitate a settlement that my client and I control. I don't like it when the mediator tells me what number I should pay or accept in settlement.

Miles: I'm going to say it depends on the case. Sometimes in an all or

nothing claim where the damages are not disputed, I want the mediator to take a strong position. If I'm wrong, tell me. More importantly, be prepared to tell me why. I may disagree, but I want to know a third party's opinion. If I'm right, I want to know the mediator is telling the other side they are wrong.

Kendall: I think it's more subtle than that. Some cases are obviously more clear-cut than others. I can think of many cases I've handled where the outcome was harder to predict than a Florida election. And haven't we all been surprised at one time or another by evidence at an arbitration hearing? Or by the result? Geez, where are they getting some of these arbitrators, anyway?

Miles: I've got news for you, that part probably isn't going to change for the better.

Kendall: You're probably right. Look, what it comes down to in the end is control over the negotiations. I'd like to think I'm a pretty good negotiator. We don't get that many chances to show off in front of our clients, so when I get the opportunity to demonstrate my negotiation skills, I don't want some mediator preempting me.

Miles: But isn't it the result that's important? I mean, if the mediator evaluates the case to your side's benefit, isn't that the best result for you and your client? And good results beget more business.

Kendall: So what you're saying is it depends on whose ox is gored – if I have a lousy case, or if the mediator simply overvalues my case, I may really like his number. If not, I'm screwed and my client is upset.

Miles: Well, the reality of the matter is that both sides have to agree. If one side perceives that the mediator is favoring the other side, for whatever reason, the likelihood of the case settling is minimal. After all, he's just the facilitator – he has no real power.

Kendall: In fact, I had a bad mediation experience just recently. We hadn't been there more than an hour, when the mediator announced that he had determined what the case was worth, and By George W., that was what we should pay.

Miles: He did that in front of both parties? Was he a retired judge?

Kendall: He acted like one.

Miles: I would have fired him on the spot. No, what I am talking about is *one on one* evaluation. Announcing a number in front of both sides is crazy.

Kendall: I'd have to admit we were both caught off guard a bit. The mediation went on for another hour or so, but it was so poisoned and the plaintiff's expectation level was so skewed, we adjourned miles apart, Miles. Strangely enough, we ended up

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settling a few weeks later, at a totally different number than the mediator told us we should pay. Turns out, the claimant's attorney disagreed with him as well. Unfortunately, it took him a couple more weeks to bring his client back to reality.

Miles: I heard the mediator took credit for the settlement.

Kendall: If he did, that speaks volumes for his settlement statistics.

Miles: But look at the flip side. You don't want a mediator who is purely facilitative and offers no evaluation. The "milquetoast mediator," we call him. That guy might as well be a messenger between the two rooms.

Kendall: Sometimes that is what's called for, isn't it? I can think of cases which settled at mediation where I think the only thing the mediator did was get the parties together. That, and to be fair, provide a safe and structured process to get the deal done.

Sure, the purely facilitative mediator can be frustrating in the wrong situation. But I think I'd rather have that than the overbearing know-it-all guy who thinks he can intimidate me and my clients into settling. Where does he get off telling us what the claim is "worth" after spending an hour on a case we have lived with for months or even years? He clearly can't know all the facts, since we haven't presented him with 50% of what we know. He doesn't see most of the key witnesses who will testify at arbitration. He probably doesn't even know who the arbitrators are. And what could be more important than that? How can he possibly evaluate the "worth" of the case?

Miles: Along those lines, one time I had a client who insisted on settling for way more than the case was worth, simply because the court set the trial during his vacation. The mediator had no clue.

Kendall: That's a good example of why mediators should not try to play judge. Why risk alienating one or both sides by acting omnipotent when the parties surely know more than the mediator does about how they value the case? And the parties' evaluation is often affected by hidden motivations.

The other concern I have when a mediator tries to control the settlement terms is the issue of allegiance. How do you know the mediator isn't biased for one side or the other, perhaps even subconsciously? You know darn well he gets a lot of business from the same repeat customers. He doesn't want to do anything to upset them. That bias can really present an issue if he is the one picking the number rather than us.

Miles: But don't you agree it may be appropriate for the mediator to pick a number when the parties have reached an impasse or have clearly hit a standstill?

Kendall: Big difference, my friend, between making a mediator's proposal and the mediator announcing to the parties what he thinks in his infinite wisdom the case is "worth." In a mediator's proposal, I expect the mediator to suggest a figure at which both sides might meet. Whether he thinks that number equates to the settlement value of the case is unimportant, because he may disagree with the value the parties have given it and at which they are willing to settle. Your vacationing client is a perfect example.

Miles: So what you want is the mediator to allow the parties to get as close as they can on their own, but if they impasse, to get more aggressive, even to the point of picking a number.

Kendall: That's just my personal preference. Remember, the mediator gets to be in both rooms. I am using him to feel out the other side just as they are using him to assess our position. Once he has hammered both sides on the facts, law or whatever he can do to get

the parties moving, I want him to turn facilitative. I want a mediator who uses his skills to keep the negotiations going. As long as he can do that, the case *will* settle – and on the *parties'* terms, not his. If we can't get it done in that fashion, I expect him to reach into his bag of tricks. The good ones don't give up, even if we don't settle at the first session.

Don't get me wrong, Miles, I want evaluation. I think analysis is useful for the parties and I appreciate hearing the honest assessment of someone I trust. That's why I hire a mediator I respect and whom I think the other side will respect. But I personally prefer a mediator who limits his evaluation to the issues and facts. At the end of the day, I want to pick my own number and so does my client. That's the bottom line.

Miles: Well, you know what your objective is and are more comfortable with your own evaluation of the case value than many people. Not everyone has that level of confidence or experience. Maybe a certain percentage of the population wants someone to make the decision for them.

Kendall: Hey, if they want the mediator's opinion on the dollar value of a case, they can always ask in a private session. The mediator may or may not give it to them. But that's a different issue altogether than the mediator taking the next step and either poisoning the negotiations by announcing the "value" of the case in front of everyone or trying to cram his number down my client's throat. That I can do without.

Miles: Good thing there are lots of mediators to choose from. You can pick the one whose style suits the needs of your particular case or particular client.

Kendall: You got that right, brother.