Facilitative or Evaluative?

The Myth of the Distinction[1]

By Mark Jackson-Stops

In the course recently of revising my mediator profile, I have needed to reflect on an important question: What distinguishes my mediating style from the rest, and how can I guide potential users in their decision to hire me or someone else? Am I, for example, a facilitative or an evaluative mediator? The question is not unusual. Some people really want to know.

Furthermore, the clerks at my workplace, In Place of Strife, are always anxious to understand the different attributes of the thirty or so mediators for whom they make bookings. Their job is to steer users towards the right mediator for the case. They have an important consultancy role based on their knowledge of the In Place of Strife mediators and the information they receive about a particular case, its subject matter and in particular the types of people involved. One request might be:

"This is a very sensitive and delicate matter. We're looking for a mediator with a light touch. Our client is not the type of person who would react well to pressure.".

Or perhaps: "We think we have a very strong case, but the other side just don't seem to get it. We think we need a top litigation lawyer/QC as a mediator to make sure they understand the weakness of their position."

These typical injunctions to the In Place of Strife office would seem to pose an impossible conundrum for the clerks. Is it to be a facilitative or an evaluative mediator? Is there a common understanding of these terms? Are they mutually exclusive? Who is most likely to be able to steer these parties to a resolution of the dispute?

Much is made in textbooks and commentaries of the distinction between a facilitative and an evaluative model of mediation. At the time of my accreditation in 1994, the Centre for Effective Dispute Resolution training course handbook suggested that "facilitative mediation in its purest form involves the mediator's discreet, almost anonymous presence, enabling the parties to achieve settlement by oiling the wheels of communication". This interpretation of the facilitative model suggests a mediator who studiously avoids any possibility of indicating a view about the merits of one party's case as against another. (As an aside, there can be little doubt that this pure facilitative style is clearly the one to teach in foundation training. It is essential that professionals, so used to giving opinions in their existing profession, have an intense period of training and practice where they learn to achieve results without advising or directing, or anything close.)

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Evaluative mediation by contrast, in its purest form, involves the 'mediator' providing an opinion on merits, or on appropriate settlement terms or on some other aspect of the case on the basis of which the parties can choose to settle or not. The process (and its dangers) is well described in an article by David Richbell (*The International Journal of Arbitration, Mediation and Dispute Management)*, However, I would suggest, to both the clerks and mediation users, that distinctions between evaluative and facilitative mediation can be misleading and perhaps risky.

Facilitative mediation is rarely as simple as it may seem. The very presence of a neutral changes the dynamic of a negotiation, probably tempering the behaviour and attitude of the people, and providing a clear focus on problem-solving.

Equally evaluative mediation may well have its uses, but, for me, such an approach, in its purest form, is no longer mediation at all but a type of non-binding adjudication where the only control remaining in the hands of the parties is the right to walk away and start or resume a formalised judicial or arbitral process over which they no longer have any control.

In truth, a competent, confident and experienced mediator is unlikely to be wholly evaluative (where it would be debatable whether he is a mediator at all) any more than he is likely to be wholly facilitative (where a round table settlement conference without a mediator might be perceived as equally effective). The mediator is rarely hired to provide a view, but is surely always hired to assist the parties in refining their own and/or the other side's risk analysis upon which their own judgements about "what is in our own best interest" relies. As Kenneth Cloke writes: "Parties most often want mediators to be honest, empathetic, and 'omnipartial', meaning on both parties' sides at the same time" [1] (*Mediating Dangerously, The Frontiers of Conflict Resolution,* 2001) They are looking for guidance and direction.

In separate rooms, the mediator will work hard to ensure a fair assessment of strengths and weaknesses. She will participate, often like a friend and ally, and she will challenge, where the analysis seems less than convincing. Sometimes the raised eyebrow is enough to signal the possibility that the argument has a credibility problem. On other occasions, intensive devil's advocacy is necessary to demonstrate where confident reliance on an argument might be misplaced. The line between devil's advocacy and evaluation can be perilously thin. How often have I said such words as: "I know I sound as if I were on the other side, but I do want to ensure you fully understand how strongly they appear to believe in their case."

I recently mediated a local authority's claim against an engineering firm. In private session with the local authority and their counsel, the devil in me forcefully advocated the defendants' case, which seemed to me not to have been well understood. I expected (and pleaded for) robust rebuttal and the ammunition for a comparable session in the other room in response. But no convincing arguments came. My evaluation of the weakness of the claim (dressed in terms of "the other side says…") went unchallenged. So the case settled for a modest sum but still the local authority officer wrote afterwards with grateful thanks. Facilitative or evaluative? Certainly on this occasion I was something other than the "discreet, almost anonymous presence".

Occasionally in describing my role to the parties I have cast myself in the role of a broker. A claim, however strong or weak, has a settlement value. What the parties have is a chance to acquire is certainty in the inherently uncertain world of litigation. A claimant will accept a discount, and a defendant will normally pay a premium to obtain this certainty and to avoid the possibility of the worst outcome – losing and paying the other side's costs. As a broker, I constantly seek out (and evaluate with each side in turn) the advantages that settlement would bring. Therefore I believe my style of evaluation is a co-operative process without any hint of an imposed solution or a pushing towards a goal ordained by me. It is complex, as it involves not just an objective analysis of the law and the facts, but also highly subjective issues personal to the parties themselves.

Mediation should be a complete and fluid mix of facilitation and evaluation. Providing the right environment, oiling the wheels of discussion, bringing the right people together at the right time, is the facilitation. Assessing strengths and weaknesses is the evaluation, from which the mediator should not be a dispassionate bystander. When a solicitor in private session says to me: "You don't appear to be wholly convinced by our argument/stance/position", she is recognising that I am evaluating the case she is advocating and implicit is the risk that she might not be able to convince the other side nor even, perhaps, a judge.

So what about the conundrum for the clerks faced with one party wanting a facilitative mediator and the other an evaluative one? Can they satisfy both parties? I am certain they can. A good mediator will have the ability to suit his style and techniques to the needs and sensitivities of the parties. Above all, the ability to be partial to both in the endeavour of finding a resolution which both can accept is better for them than the alternative.

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