

# ADR

A SPECIAL REPORT

## Giving mediation clients what they want

Analytical mediation, synthesizing many different strategies, can adapt to circumstances.

BY JOHN BICKERMAN

Far too much time and energy have been devoted to debating the virtues and drawbacks of evaluative, facilitative and other “styles” of mediation practice. The evaluative approach involves the mediator passing judgment on the merits of the dispute, while the mediator using the facilitative approach seeks to improve communication between the parties. The best mediators use different styles and adapt and adjust them as the circumstances of the moment demand. They recognize that no one style is right all of the time for every dispute. Good mediation requires the ability to diagnose and adapt to the changing needs of the parties and apply the right techniques during the course of the mediation.

Significantly, clients are demanding a different type of mediation than that for which most mediators are being trained. Research by the Task Force on Improving Mediation Quality of the American Bar Association Section of Dispute Resolution asked consumers of mediation about what they considered high-quality mediation to be. The findings are compelling. Consumers expect mediators to be much more engaged in the entire mediation process and to address the parties’ expectations about the type of process they desire. American Bar Association Section of Dispute Resolution, Task Force on Improving Mediation Quality: Final Report April 2006-February 2008, [www.abanet.org/dch/commit-](http://www.abanet.org/dch/commit-tee.cfm?com=DR020600)

[tee.cfm?com=DR020600](http://www.abanet.org/dch/commit-tee.cfm?com=DR020600).

Analytical mediation synthesizes many different mediator strategies. Its foundational principle is that a mediator’s job begins the moment a party initiates contact and continues until there is a binding resolution or the parties reach impasse and agree to cease negotiating. Preparation, constant thought and attention are its hallmark. Rather than a cookie-cutter approach, the analytical mediator uses the style best suited to the dispute at each moment of the process. Analytical mediation affords the mediator the greatest opportunity for creativity and maximizes the likelihood that participants will achieve a durable and creative resolution that addresses the maximum number of their needs.

### BEFORE MEDIATION BEGINS

Good mediation practice requires preparation—both for the parties and the mediator. Organizational conference calls will identify information gaps that must be filled before parties can negotiate effectively. When gaps are identified, the mediator carefully tailors an exchange of information to provide, as efficiently as possible, only information needed to negotiate effectively.

The analytical mediator should always try to meet with parties and their advocates in advance of any joint mediation sessions. Through these meetings, a mediator learns much more than one could from the written pages of the mediation statement. The parties may reveal facts relating to external con-

straints that influence behavior—for example, that a corporate party is planning to file for bankruptcy. Its incentives to settle may not be based purely on the merits of the dispute.

Another important reason for meeting with parties beforehand is to defuse emotion. Analytical mediation requires sensitivity to circumstances. An initial meeting with parties is the time for listening and learning, not passing judgment on the merits of the dispute. Listening nonjudgmentally to a story can have a cathartic effect on a party and allow the party to move forward and establish trust with the mediator.

Lastly, the analytical mediator may take an active role coaching the parties on how best to make their arguments to the other side. She may suggest emphasizing certain arguments or proposing who should speak.

### THE OPENING SESSIONS

Based on her preliminary work and with the assistance and consent of the parties, the analytical mediator sets an agenda and manages how the opening sessions will unfold. Joint sessions should be used strategically. If counsel communicate well, starting out with a joint session may be especially efficient. However, opening statements should be abandoned if emotion is so high that little will be learned. Or the parties may already be intimately familiar with the facts and legal arguments. In other cases, even with high emotion, parties may not be able to negotiate effectively until they have had a chance to confront the other side and express themselves.

When opening statements may hurt the process, the analytical mediator may decide that better progress will be made by leading the discussion and posing questions for both sides to answer. Or she may set out what she believes are the key issues. If the parties agree, the issues will have been narrowed and time saved.

The style of mediation that the analytical mediator uses should fit the circumstances of the moment and adapt as the circumstances change. During the initial stages of having the parties together, the analytical mediator will adopt a facilitative role. If the parties are sharing information effectively during the joint session, the best role for the mediator is to shut up, get out of the way and allow the communication to continue uninterrupted.

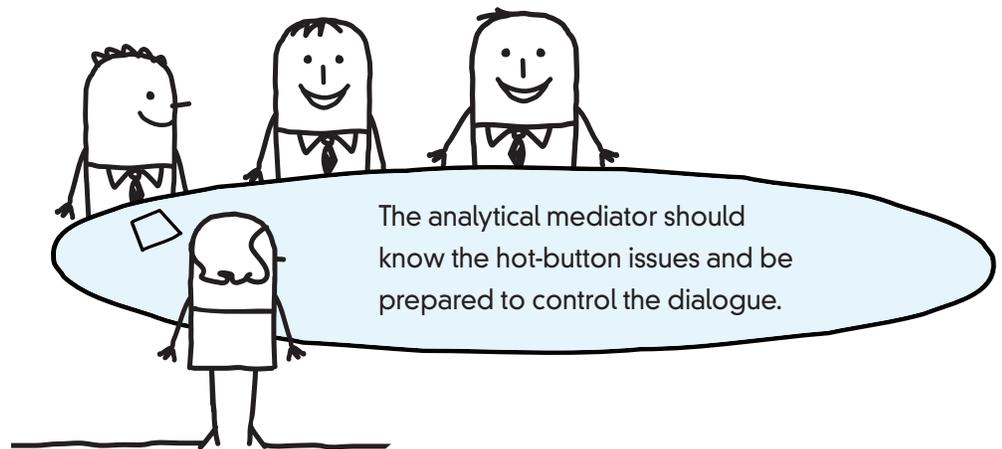
High levels of emotion interfere with effective communication. A party may become so emotionally overwrought that he may be unable to communicate or negotiate with other parties. When emotion is preventing information from being exchanged, the analytical mediator adjusts her style to become more active in repeating and restating key points. If the preparatory work has been done well, the analytical mediator should know the hot-button issues ahead of time and be prepared to control forcefully the exchanges between the parties. There is a fine line between allowing venting of emotions and having emotions overcome rational processing of information or causing the other side to rise up in anger. Weighing the pros and cons of allowing parties to continue to exchange information in an emotionally charged setting or moving into caucus requires good judgment.

On the spectrum between facilitative and evaluative behavior, most mediators would categorize the techniques described above as entirely facilitative. Nowhere has there been a hint of the mediator offering a judgment on the merits of a party's position or the likely outcome if there is no settlement. In some cases, these techniques may be sufficient to allow parties to convey enough information to each other that they are able to adjust their expectations and settle.

But many cases require a mediator to do more, and a mediator owes it to the parties to be prepared to act accordingly. Analytical mediation recognizes when a particular style of mediation will fail and changes styles to address the needs of the parties. For example, consider a two-party zero-sum dispute (e.g., a dispute over money) in

which there is virtually no opportunity to create value. The mediator has tried a range of techniques, but nothing has resulted in settlement. The parties now have been separated and the mediator is conducting shuttle diplomacy.

At first, the mediator may just try to coax the parties to continue the bartering process. Significantly, the analytical mediator will accompany her requests to change positions with a justification and, if necessary, more aggressive challenging of positions and arguments. She may play "devil's advocate" by suggesting alternative plausible interpretations of fact and law that may cast doubt on the strength of a party's position.



She may remind a party of the procedural difficulties it may face if the case goes to court or the risk of facing a jury whose decisions are notoriously difficult to predict.

Evaluative techniques may succeed in adjusting a party's estimate of litigation risk and may move the parties closer to settlement. Many attorney-advocates may agree with the mediator's assessment of the weaknesses of their client's position and need the mediator to help convince their client. Clients may also need to report to their superiors that the mediator raised serious weaknesses with their case that justify a substantial movement toward settlement.

In some difficult matters in which other techniques have failed, the mediator may need to be highly evaluative and directive to help parties make an informed decision about whether to settle the case or pursue litigation. She may need to offer a proposed settlement for both sides to consider that reflects her best guess at an amount that could settle the case. In many cases, a range of values for settlement may be entirely fair and appropriate, given the imprecision of evaluating

factual and legal uncertainties. Although this approach is highly evaluative, if the mediator has done her job and closed the information gap, the mediator's proposal often settles a case that the parties would be unable to settle on their own.

Analytical mediation is neither purely facilitative nor purely evaluative. Many might agree that a judglike prediction of outcomes resembles adjudication more than mediation and carries with it certain risks. But good mediation requires the ability to use evaluative techniques that will help parties assess their risks of not settling and provide them with the information they need to make informed decisions about their choice to settle or not. To be

most effective and give true meaning to party autonomy, a mediator must diagnose the reasons negotiations fail and gauge the amount of intervention accordingly. Perception, intuition, flexibility and adaptability are the touchstones of this approach.

It is long past time to move beyond inter-necine fights over the "right" mediation style or dictating practice rules for a field in the name of quality. Instead, what is needed is recognition that good mediation encompasses many different styles, maybe all in the same mediation. Done well, mediation can achieve its promise of being a robust, creative and imaginative way to resolve disputes.

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