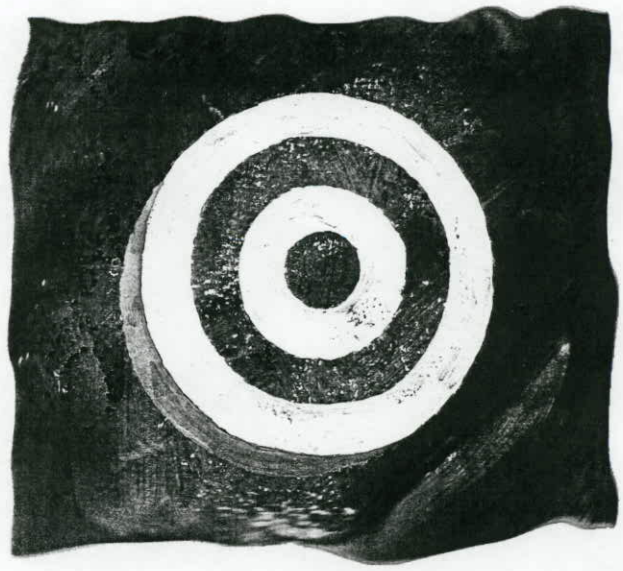
The Mediator's Role: As Little As Possible But As Much As Necessary



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. In some circles, evaluative mediation is relegated to an inferior form of practice. While some have sought to set boundaries between mediation and adjudication, others have tried to define the term "mediation" so as to exclude evaluations.

The debate reminds me of the old beer commercial about whether a certain brand was "less filling" or "tastes great." Of course, the advertiser was attempting to make the point that its beer was both. So too is good mediation. The better dialogue would be to recognize that mediation styles occur across a continuum between purely facilitative and purely evaluative. The best mediators have many arrows in their quiver. They adapt their styles depending on the type of dispute, the needs of the parties, and the stage of the mediation. No one style is right all of the time for every dispute. Parties' needs change over the course of mediation. Good mediation requires the ability to diagnose and adapt to the changing the needs of the parties.

Information Changes Perception

The one constant in mediation is that mediation has the power to change parties' behavior. The axiom that information is power holds especially true in mediation. My mentor, the late Judge William Bryant believed that litigation was a failure. A renowned trial attorney who, lore has it, never lost a case, believed a trial represented failure for it meant that he had been unable to convince the other side of the strength of his case and the likelihood that they would lose.

For parties to need mediation, they must have a significantly different estimate of litigation risk, otherwise they should settle on their own. For each side, the wider the gap, the more incredible or unreasonable the other party is perceived to be. Through the mediation process, and sometimes with the aggressive help of the mediator, parties may alter their estimate of litigation risk. If the gap shrinks enough, most parties will settle because they are risk averse. The power of information is in its ability to change party perceptions and close the litigation risk gap.

Judge Bryant believed that the uninformed or ignorant opponent was his biggest obstacle to settlement. Information deficits can occur for a variety of reasons. Some parties may have been so caught up in the battle of the dispute that they have never taken the time to just listen to the other party. Sometimes very experienced advocates and their clients have never bothered to determine what the other side needs to settle. The maxim for some seems to be fight first and consider settlement only after much time, expense and emotion have been spent. Indeed, some advocates profit by fanning their clients' emotions to forestall any meaningful discussions with the other side.

High levels of emotion interfere with effective communication. In high-conflict disputes, such as some family law matters, the parties may simply be unable to communicate with each other without becoming emotionally flooded. Emotionally-flooded people cannot process information. If they fail to understand what the other party is saying they may be totally unable to respond.

Factual misunderstanding can lead to widely varied estimates of litigation risk. Parties and their advocates focus on the facts, *which is what they understand reality to be.* But, reality will be in the eye of the beholder. Memories are imperfect. Facts can be marshaled to present decidedly different perspectives. People in a dispute tend to discount and maybe not even hear the alternative

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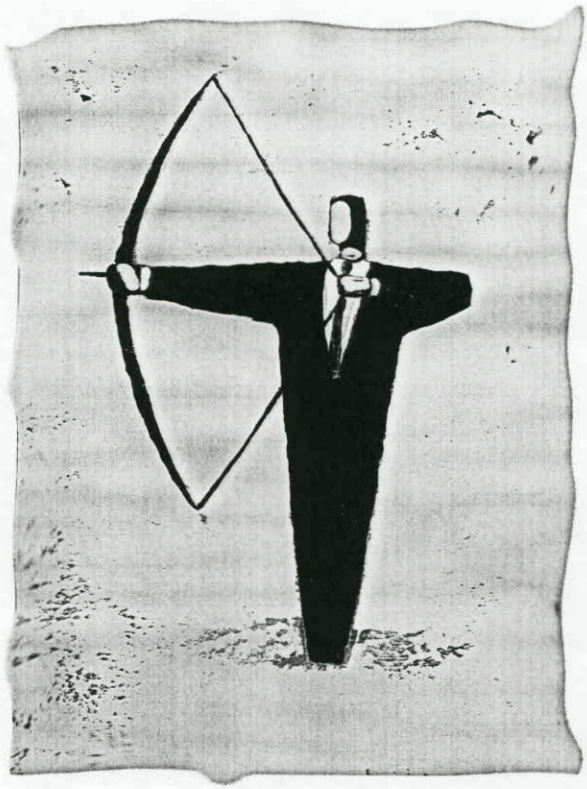

story that the other side to their dispute tells. When they ignore such information, they are at risk of misperceiving the strength of their position and the likelihood of the outcome they desire. But facts alone are not the only reason for information deficits.

In litigation, legal precedent can be determinative. Success or failure may turn on the application of legal authority. However, authority is most often not precisely on point and the outcome of a legal issue may be very much in doubt. Because it is human nature for parties to want to believe their advocates and for their advocates to elevate their legal analysis, they will devalue the analysis of the other side. Mediation provides the potential to cure information deficits and improve the likelihood of settlement.

Preparation

A mediator should do as little as possible but as much as necessary. Knowing what to do as a mediator requires an understanding of the conflict and a diagnosis of why there has been a failure to reach an agreement. Only then, can the mediator know how best to help.

Good mediation practice requires preparation both for the parties and the mediator. Organizational conference calls will identify information gaps. If the parties do not have enough information to negotiate effectively, the mediator can ensure that information is exchanged in an economical, efficient and timely manner. The initial paragraphs of my mediation agreement read like a discovery order, except that the agreed-upon exchange of information is carefully tailored to provide, as efficiently as possible, only information needed to negotiate effectively.

An increasingly common practice is to meet with parties and their advocates in advance of any joint mediation sessions. Through these meetings, a mediator learns much more than from the written pages of the mediation statement. The parties may reveal settlement facts relating to external constraints that influence behavior or gain a better understanding about the role emotion has played in interfering with the judgment of the parties. The information from the pre-joint session meetings helps the mediator assess how to stage the mediation and adapt his or her behavior to the needs of the parties.

A second reason for meeting with parties beforehand may also be to defuse emotion. Parties need to be heard before they can listen. It would be best if the opposing party always had the ability to hear and validate the feelings of the other side. Because they often cannot, the mediator can be an acceptable substitute. Listening non-judgmentally to a story can have a cathartic impact on a party and allow the party to move forward and establish trust with the mediator.

Interestingly, consumers and their advocates who use mediation who have participated in focus groups sponsored by the American Bar Association Dispute Resolution Section have shared their expectation that a mediator's work begins at the moment of retention. Increasingly, there is an expectation by these professional negotiators that the mediator will take the time to meet with them prior to a joint session and will be fully informed about the facts and the relevant legal authority when they do. According to this non-random sample of mediation users, mediators who see the parties for the first time at the joint session are not viewed as favorably as those who have made preliminary contact.

A Flexible Approach to Mediation

With the assistance of the parties, the mediator should set an

agenda and manage how the initial opening sessions will unfold. Joint sessions should be used strategically. Having one side hold forth for an extended opening statement and then hear the other side make an equally long statement may hurt the process, especially if controversial or antagonistic statements are exchanged. Instead, fostering a discussion of the issues by the parties themselves can lead to more progress. It is in these initial stages of having the parties together that the mediator plays a mostly facilitative role. If the parties are sharing information in 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. (For inexperienced mediators, one of the most difficult skills to learn is when to do nothing.)

The most helpful role for the mediator when parties can communicate information well to each other is to ensure that important information is conveyed clearly and understood by the other side. Occasionally, a mediator should ask a question to draw attention to an important point. By asking a question, the flow of conversation will be interrupted forcing everyone to pay attention to what may be an especially important item of information.

Asking questions is a technique for promoting effective communication and exchange of important information. Where emotion is preventing information from being exchanged, the mediator may become more proactive in repeating and restating key points. If the preparatory work has been done well, the mediator should know the "hot button" issues ahead of time. When they arise he or she should 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. As the disinterested party, a mediator must choose between allowing parties to continue to exchange information in an emotionally charged setting and separating them.

In addition to acting as the traffic cop and controlling the exchanges in a joint session, the mediator can also restate points or make the arguments for each side. By interposing oneself into the process to state positions or ask questions, the mediator can diffuse high emotion. The party's whose position is being reflected by the mediator or whose questions are being asked by the mediator will feel heard. The other party may also be much less defensive responding to questions from the neutral mediator. Because the mediator is disinterested, the party to whom the mediator is directing his or her comments may find it easier to provide responsive information. Of course, a mediator must be balanced in this technique. Even if a mediator is utterly impartial, the appearance of partiality by asking tough questions should not give a party the sense that the mediator is taking sides in the dispute. Great care must be taken in explaining the technique and diffusing negative reactions to inquiries by the mediator.

Humor can also be an effective technique in reducing tension in the joint session. Getting parties to take themselves a little less seriously can help in the exchange of information. Without evaluating the merits, humor can also gently send a message that a party's goals may not be attainable in the course of the mediation and that resolution will only come with compromise. Parties will take their cues from the mediator. If he or she is relaxed, then it may have a calming impact on the party. If the mediator is not treating the dispute as a life and death struggle then the parties may get a better perspective of their conflict.

Like humor, food can also have a humanizing influence on mediation participants. It is much harder to demonize the other side if a party must confront the reality that they have families, kids, and stresses and pleasures that are unrelated to the dispute. Small talk, lunch together, and other social ice-breaking techniques are not superfluous. A mediator who helps parties find personal connections may also help them reach a settlement.

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 their perceived estimate of litigation risk. If the litigation risk gap narrows sufficiently because one or both of the parties change, then the case should settle. But many cases require a mediator to do more and a mediator owes it to the parties to be prepared to act accordingly.

For example, consider a two-party zero-sum dispute (e.g., a dispute over money) where there is virtually no opportunity to create value. The mediator has tried a range of techniques but nothing has resulted in settlement. The parties have now been separated and the mediator is conducting shuttle diplomacy.

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At first, the mediator may just try to coax the parties to continue the bartering process. He or she may try to create settlement ranges—"would you agree to demand $x, if the other party agrees to offer $y?" Inevitably, a party will ask "why"—"why should I decrease my demand [increase my offer]? What's the justification?" Indeed, experienced negotiators want to make rational decisions based on information.

Of course, the mediator will start by repeating and restating the arguments of the other side. But often this technique is unavailing. When this happens, the mediator should engage in more directive questions by playing devil's advocate and suggesting alternative interpretations of fact and law that may cast doubt on the strength of a party's position. Parties can be reminded of the procedural difficulties they may face if the case goes to court. For defendants, the risk that they cannot prevail on the law and must face a jury whose decisions are notoriously difficult to predict should give them pause. The skilled mediator can raise an eyebrow, express skepticism in his/her voice and generally communicate gentle disagreement with parties over the strength of their case.

These techniques used in caucus carry a measure of evaluation, whether explicit or implicit. They all help to adjust a parties' estimate of litigation risk and may move them closer to settlement. Is there some risk that the mediator will be less than even-handed in exposing weaknesses? Sure. In fact, a mediator may prefer the legal or factual strength of one party over another and push the other party more aggressively. I have been in many situations where the attorney advocate has told me afterwards that he has agreed entirely with my aggressive assessment about the weaknesses of his client's position and needed me as the mediator to convince his client. Clients may also need to report to their superiors that the mediator raised serious weaknesses with their case that justifies a substantial movement toward settlement.

In many cases there is not a "right" answer for settlement. A range values for settlement may be entirely fair and appropriate given the imprecision of evaluating factual and legal uncertainties. Any of the values in that range would be superior to the alternative of no settlement because the cost of defense, reputational harm that will ensue, or the damage to a long-term relationship could all be greater than the result of a negotiated compromise.

In complex cases or those involving insurance companies, the parties may expect and need the mediator to set out a settlement matrix. Construction defect matters are an example of where a strongly evaluative model of mediation is not only required but expected. Carriers that insure defendant contractors and subcontractors to a construction dispute need to know a definitive bottom line before they will obtain authority. A constant refrain in these mediations by the carrier client is: "If I get the amount you've requested, will it settle the case for my policy holder and my carrier?" No amount of facilitative mediation will answer that question.

In other matters involving just money, a mediator may be called upon to make a double blind proposal whereby a settlement value is offered confidentially to both parties. If one party objects, there is no deal and no information about whether the other party accepted the proposal is revealed. If both parties agree, there is a settlement. When making a double blind proposal, I tell parties that I am offering my best guess at an amount that could settle the case. My role as mediator is to provide information so they can make an informed decision about whether to settle the case or pursue litigation. While highly evaluative, if I've done my job and closed the information gap, the double blind approach often settles the case because the gap between the parties has narrowed sufficiently.

Mediation is neither purely facilitative nor purely evaluative. Many might agree that a judge-like prediction of outcomes resembles adjudication more than mediation and carries with it certain attendant risks. It is time to move beyond that overly simplistic dichotomy. Good mediation requires the ability to use evaluative techniques that will help parties assess their risks of not settling and provide them with needed information so they can make informed decisions about their choices to settle or not. My approach requires the mediator to have the skill and ability to perform many different styles of mediation. To be maximally effective and give true meaning to party autonomy, a mediator must diagnose the reasons for negotiations to fail and gauge the amount of intervention accordingly. Perception, intuition, flexibility and adaptability are the touchstones of this approach. With care, the mediator will do just enough.

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