

ROBERT'S THOUGHTS ON MEDIATOR SELECTION

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Questions abound about Mediator Selection, especially for the practicing lawyer who believes her client's best interests are served by keeping control over the outcome of her client's dispute. These questions are the source of ongoing debate among all of us in the mediation world: users, practitioners and academics, and those regulating the intersection of mediation and law (especially the litigated case).

"Choosing your Mediator begins with an understanding of her approach to the process - her style of mediating."

PRACTITIONER'S QUESTIONS

From the practitioner's side, the questions may look something like this:

- What do you want from your Mediator?
- How do you expect her to handle your mediation?
- Does it matter to you if he is more controlling, telling you and your client that your case is doomed to failure?
- Would you rather she help you work through the analysis, allow you and your client to draw your own conclusions about whether you have a dog or a diamond of a case, and focus instead on helping you and the other side find a negotiated solution?
- How far do you want him to go in assisting the negotiations?
- What do you think about her serving as a negotiation coach?
- How do you react to him crafting settlement alternatives?
- What does your client expect - what will be his reaction if what the experience is different from his expectations?
- How do you respond to your colleague

on the other side when she says she only uses retired judges or better yet justices as mediators?

- What is your experience with different Mediator's approaches to getting you to settlement?
- Does it matter to you how the Mediator does it? Should it matter to you?

There are of course no easy answers to the questions but they are of great importance to counsel and their clients as they choose their mediator. Regardless of how you choose, the important thing is to understand who will provide you with the most effective process, which has a lot to do with your chosen mediator's style.

WHAT'S IT ALL ABOUT: THE DEBATE OVER MEDIATOR STYLES

To understand the debate, we must understand the terminology, so here it is:

Mediator Style Lexicon:

Facilitative: an approach intended to make the discussion easier, make things possible, to smooth the process of and to help bring about settlement; viewed by many as "pure" mediation, where the mediator "facilitates" the settlement by making the conversation possible but stays away from evaluating the parties' positions or directing them toward a particular solution.

Evaluative: viewed as perhaps the polar opposite of the facilitative approach; here, your mediator assesses your positions in an effort to determine the value, significance, or worth of your position.

Directive: the extreme evaluative approach, intended to direct the outcome, rather than helping the parties find their own.

Elicitive: engages the parties, drawing from them their ideas, alternatives, proposals; can be viewed as the "non-directive" evaluative style

The *FACILITATIVE* definition jives well with the notion that mediation is assisted negotiation - the mediator's role is to facilitate the parties' search for resolution. Many theorists, academics, practitioners and regulators believe that this is the mediator's sole role, but she shall not evaluate.

For the mediator "purist", the focus on "determining" spells the death knell for the *EVALUATIVE* mediator. After all, theorists inform us, one of the distinguishing features of mediation is that the mediator is not there to make decisions. Thus, to evaluate, "they" say, topples a fundamental pillar upon which the house of mediation is built - that of party self-determination.

Yet, being evaluative may be as seemingly innocuous as questioning a party regarding the strengths and weakness of her case. And it may be more - something like telling the party that his case is a loser or dictating the basis upon which the case should be settled. The closer your mediator gets to dictating outcome the more jeopardy to the sanctity of the house of mediation.

The evaluative mediator, however, is not an evil doer. Her assessments, predictions or directions are often designed to make easier - in many instances, make possible - the decision-making by party and counsel. When employed in the proper context, the mediator's evaluative input can enhance a party's sense of vindication. It can also give that party an objective base to point to when discussing settlement terms with her constituency. In other words, the goal of the evaluative style is but to smooth the negotiation process so as to help bring about the parties' own agreement.



The mediator who is *ELICITIVE* engages the parties, drawing from them their ideas, alternatives, proposals and the like. The *DIRECTIVE* approach rests on the extreme evaluative side, designed to draw the distinction between evaluations that are not intended to direct an outcome. Rather than stifling the parties, the "non-directive" evaluations are designed to expand the parties' vision of the possibilities freeing them of the myopic impact of the shadow of the law.

THE QUINTESSENTIAL MEDIATOR

The myriad of approaches - styles if you will - used by the folks referred to as mediators are as varied as those applying them. We struggle with calling a given approach "mediation" because it does not meet a particular, "pure" sense of the process. Yet, we who sit in the mediator's chair call what we do "mediation" and so do you, the people who seek our mediator skills.

THE SEARCH FOR THE QUINTESSENTIAL MEDIATOR

- Perhaps the quintessential mediator possesses the internal clock that restrains evaluating or directing, being guided instead by the facilitative mantra.
- Better yet, maybe that mediator has the flexibility to use the requisite style, strategies and skills dictated by the parties' needs as they evolve during the process...
- By understanding Mediator styles, you can guide your clients into the most effective process, beginning with Mediator selection.

SOME CLOSING THOUGHTS¹

Is there a quintessential mediator? If so, maybe she possesses the internal monitor that restrains her from evaluating or directing, being guided instead by the facilitative mantra. Alternatively, he may have the flexibility to use the requisite style, strategies and skills dictated by the parties' needs as they evolve during the process.

The important thing for you is to know what this all means so you can make a reasoned decision about what you want from your mediator. Only then can you guide your clients into the most effective process, including selecting the most suitable Mediator with the styles to fit their needs and yours.

¹ Our discussion of styles is derived from part of the landmark work of Prof. Leonard L. Riskin. See: 1 Harv. Negot. L. Rev. 7; and 79 Notre Dame L. Rev. 1

A LITTLE HUMOR

From: WASHINGTON, D.C. - A white house source stated that Congress is considering awarding Vice-President Dick Cheney the Medal of Freedom, the national highest civilian commendation, for his act of bravery in shooting an attorney.

The source was quoted to say "All Americans have wanted to shoot a lawyer at one time or another and Cheney actually had the balls to do it".

In a related story, the Texas Parks and Wildlife Department, which issues hunting licenses, said that it will start requiring hunters, wishing to bag a lawyer, to have the new "lawyer's stamp" on their hunting license. Currently Texas hunters are required to carry stamps for hunting birds, deer, and bear, at a cost of \$7 annually. The new "lawyers stamp" will cost \$100, but open season will be all year long.

The department further stated that although the "lawyers stamp" comes at hefty price, sales have been brisk and it is believed it will generate annual revenues in excess of \$3 billion dollars the first year. Other states are considering similar hunting license stamps.

Impatient with efforts to close the courts to litigants, the Administration literally fired the first shot in its groundbreaking "No Lawyer Left Standing" initiative. Vice President Cheney, hunting on a private lawyer ranch near Kingsville, Texas, bagged an impressive buck (Harry Whittington, UT Law '50). Under the new program, hunters may take one white shoe in-house lawyer or three outside lawyers

daily. The limit has been suspended for trial lawyers. "We've just got to thin the herd," said the Vice-President. "We've tried tort reform and caps on damages, but people are still suing." Cheney added, "It's easy and fun. In Texas, you can shoot in almost any direction and hit a lawyer."



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