

1996

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Recommended Citation

Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Meditation Is An Oxymoron*, 14 *Alternatives* 31 (1996).

Available at: <https://larc.cardozo.yu.edu/faculty-articles/280>

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"Evaluative" Mediation Is An Oxymoron

By Kimberlee K. Kovach
and Lela P. Love

The general counsel of a large shipping company once traveled from New York to Florida to attend a mandatory mediation conference. He went there wanting to settle the case, which involved a multi-million dollar dispute with a union. In a joint session, the court-appointed mediator, who was a federal magistrate, urged the company to be flexible, warning that the business did not have a chance of winning on appeal.

That "evaluation" shut down the negotiations. Union representatives froze in their position. The general counsel left in disgust, since his analysis of the case was so at odds with the mediator's opinion. Several years and hundreds of thousands of dollars in legal fees later, the company won a complete victory in court, which was affirmed on appeal. Both sides could have saved time and money by negotiating the outcome.

Incidents like this one illustrate one of many pitfalls of what has become known as "evaluative" mediation. As one commentator recently described it, an evaluative mediator assesses the strengths and weaknesses of legal claims, develops and proposes a settlement, pushes the parties to accept a settlement, and predicts court outcomes and/or the impact of not settling. See "Mediator Orientations, Strategies and Techniques," by Leonard L. Riskin, *Alternatives*, September 1994 at p. 111. Widespread as these activities have become, they are inconsistent with the role of a mediator.

An essential characteristic of mediation is facilitated negotiation. Unlike a judge or arbitrator who ultimately sides with one party in pronouncing the "winners" and "losers," a mediator must remain neutral throughout the process. Only by remaining neutral can a mediator use the tools of facilitated nego-

tiation: encourage parties to examine and articulate underlying interests; recognize common interests and complementary goals; and engage in creative problem-solving to find resolutions acceptable and optimal for all parties.

Mediators should encourage *parties* to evaluate suggested options and alternatives and the viability of potential agreements. Mediators also should encourage *parties* to get outside advice, opinions and evaluations from appropriate experts. But mediators should not do these things themselves.

"Evaluative" mediation is an oxymoron. It jeopardizes neutrality because a mediator's assessment invariably favors one side over the other. Additionally, evaluative activities discourage understanding between and problem-solving by the parties. Instead, mediator evaluation tends to perpetuate or create an adversarial climate. Parties try to persuade the neutral of their positions, using confrontational and argumentative approaches. In some cases, the party whose position the mediator disfavors will simply leave the process.

Norms and Standards

Furthermore, if we permit mediators to give evaluations and assessments, we should give them norms and standards to guide those evaluations. Society entrusts judges, arbitrators and other decision makers to render decisions, awards and opinions based on their training and expertise. Such decision makers operate within a framework of ethical norms and legal standards which direct their evaluations. This is not the case with mediators.

The *Model Standards of Conduct for Mediators*, recently promulgated by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution, are at odds with "evaluative mediation." These standards say that the principle of self-determination

is central to the mediation process and prohibit a mediator from providing professional advice. These standards also provide that mediators who engage in other processes must inform the parties. Fairness requires accurate labels of the neutral intervenor's role, labels that do not mislead the parties.

Despite these considerations, many practicing mediators have an evaluative orientation. Yet most mediation trainers, teachers and professors don't teach evaluation as a permissible component of mediation. The courts and the legal community are largely responsible for this paradox.

Role of Courts

As the gatekeepers of legal disputes, courts have established mediation programs chiefly to get cases settled and clear dockets. Settlement rates are often the primary measure of success in such programs. Frequently, mediation becomes a variation of the familiar judicial settlement conferences. During such meetings, judges often engage in "arm twisting," focusing on the weaknesses of each party's case and predicting unfavorable litigation outcomes. Such approaches settle cases, but they are not consonant with mediation's primary goals of enhancing understanding between parties and encouraging parties to create outcomes that

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respond to underlying interests. The personalized and unique outcome of mediation is often very different from a "likely court outcome."

Many court-annexed mediation programs require that the mediator be a lawyer, skewing the mediator pool towards those with training in evaluative processes. Limited budgets for mediator education result in inadequate

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training, so lawyers acting as court-appointed mediators never shed their evaluative habits.

Lawyers as advocates also influence the mediation process. Rarely experienced with mediation (or educated about it), they are more comfortable with neutrals who have substantive expertise and evaluative skills. Understandably, they direct their clients towards neutrals who fit into familiar patterns of dispute resolution.

During mediation, counsel often stick to the traditional role of speaking for the client. In court-annexed programs, for example, lawyers typically present the case, and do all the negotiating. Most of the discussion focuses on damages for legal causes of action. Again, these practices are inconsistent with primary objectives of mediation: promoting self-determination of parties and helping the parties examine their real interests and develop mutually acceptable solutions.

What's At Stake?

If "mediation" becomes an umbrella term that includes neutrals in evaluative roles, it will threaten a number of important values:

Uniformity. To develop rules, standards, ethical norms and certification requirements, legislators and administrators need well-defined and uniform processes. Similarly, meaningful

program evaluations require uniformity. Evaluation and facilitation require different skills and expertise and generate different outcomes. Evaluative and facilitative activities should have accurate—and separate—labels and should not be mixed in one program.

As advocates, lawyers are comfortable with evaluation, and direct their clients towards neutrals who fit into familiar patterns of dispute resolution.


Whether they choose to mediate privately or must participate in court-annexed programs, disputants and attorneys need to know what to expect. "Mediation" should mean the same thing from state to state, and from one court to another within a state. Of course, programs will vary, but the public should understand the essential nature of each dispute resolution process. Unhappy surprises destroy public confidence.

If mediators evaluate cases and provide opinions, mediation starts to look like case evaluation, neutral expert opinion and non-binding arbitration. Only with meaningful labels and bright-line distinctions between pro-

cesses, can disputants and attorneys evaluate particular approaches, and "match" them to appropriate disputes.

Clear Goals. Financial gurus often say, "the Street (meaning Wall Street) likes a pure play." What they mean is that enterprises with a single-minded and clear-cut focus are most likely to succeed. Likewise, "mediation" should be a "pure play." It should connote facilitation. That limits the neutral to helping the parties communicate effectively with each other, identify and address all the negotiating issues, and develop proposals acceptable to all parties.

Mediation's Unique Role. Mediation assumes that people have the resources and creative capacity to resolve their own disputes better—and differently—than an arbitrator or a judge would. Contrast this view of mediation with our legal system. It relies on an outside authority like a judge to decide cases for the parties, applying legal norms and rules to the "facts" as the parties have presented them. "Evaluative mediation" shifts mediation back into the comfortable framework of the adversarial norm.

Lawyers will not stretch to understand and use new paradigms unless they have to. Mediation should stand as a distinct and clear-cut alternative to the evaluative and frequently highly-adversarial processes that lawyers know best. 

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