

2007

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Recommended Citation

Kenneth M. Roberts, *Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement*, 39 Loy. U. Chi. L. J. 187 (2007).
Available at: <http://lawcommons.luc.edu/lucj/vol39/iss1/5>

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Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement

*Kenneth M. Roberts**

I. INTRODUCTION

In 1994 and 1996, Leonard Riskin published two articles analyzing the “facilitative” and “evaluative” methods of mediation. The articles generated a great deal of debate over the two styles of mediation. Some contend that evaluative methods violate the principles of mediation and undermine its goal of assisting the parties to come to their own conclusions. Others contend that there is no such thing as purely facilitative mediation and that all mediation requires evaluative methods. This article respectfully submits that many practitioners have not focused on this distinction during actual complex commercial mediation, simply because evaluative methods are inseparable from facilitative methods. In the real world of complex commercial mediation, evaluative methods together with facilitative methods have proven essential and indispensable for achieving success.

Success in mediation is not characterized by a settlement between the parties. Instead, a successful mediation is one that provides decision makers with information they can use to reevaluate their positions, make informed business decisions, and engage in a systematic modification of their initial positions, or an “organized retreat.” Further, a successful mediation provides decision makers with new information, a better understanding of the case, or a clearer grasp of their chances of prevailing or losing at the next level. Even when mediation does not result in settlement, lawyers and clients who engage in evaluative mediation often find the mediation process beneficial. Unlike facilitative mediation, evaluative mediation results in the mediator providing information to the parties, which is key to a successful mediation. Thus, evaluative and facilitative methods are interdependent in successful complex commercial mediation, and “the

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eclectic style appears to be what takes place in the metaphorical trenches of mediation practice.”¹

Part II of this article focuses on defining the terms “evaluative” and “facilitative” as they have been used by opposing sides in debating the best method of mediation. Part III addresses the criticisms made by advocates of purely facilitative mediation. Finally, Part IV explains why purely facilitative mediation does not exist in complex commercial mediation and why evaluative methods, used in a facilitative process, are essential to any successful mediation.

II. THE DEBATE: EVALUATIVE VS. FACILITATIVE ²

With an understanding of what mediation is and why it is used as an umbrella term for various methods of dispute resolution, it is easy to understand why the debate over styles of mediation has been prolonged and confusing. Until 1994, there was no common terminology to identify, classify, and discuss the various mediation-like activities.³ While many individuals used mediation as the dominant method of alternative dispute resolution (“ADR”)⁴, mediation was poorly understood and dissatisfying to its users.⁵ In response to the confusion and unarticulated concerns about mediation, Leonard Riskin published a seminal article credited with producing the vocabulary used to talk about mediation: evaluative and facilitative.⁶ Mediators began

1. Jeffery W. Stempel, *The Inevitability of the Eclectic: Liberating ADR From Ideology*, 2000 J. DISP. RESOL. 247, 250 (2000) [hereinafter *Liberating ADR*]. Stempel describes the eclectic style as:

[O]ne in which a mediator—while maintaining neutrality and impartiality at all times—attempts to both assist the disputants in finding acceptable solutions on their own and also remains free to provide necessary guidance as to the outcomes that might obtain in the legal regime that will govern their dispute should no agreement result from the mediation.

Id. at 248.

2. For a short description of the major proponents and most prolific writers of facilitative, evaluative, and eclectic mediation, see E. Patrick McDermott & Ruth Obar, *What's Going On in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit*, 9 HARV. NEGOT. L. REV. 75, 80–90 (2004).

3. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 8 (1996) [hereinafter *Orientations, Strategies, and Techniques*].

4. Alternative Dispute Resolution (“ADR”) is a way to resolve disputes outside of the government judicial system. Methods of ADR include mediation and arbitration.

5. Richard Birke, *Evaluation and Facilitation: Moving Past Either / Or*, 2000 J. DISP. RESOL. 309, 313–14 (2000).

6. Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COSTS LITIG. 111 (1994) [hereinafter *Mediator Orientations*]; see Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U.

characterizing themselves as “facilitative” or “evaluative,” with academics positioning themselves on either side of the debate.⁷ As individuals began to discuss this common terminology, disputes arose over whether evaluative mediation should be considered mediation at all. Understanding how the terms “evaluative” and “facilitative” have been used helps to explain how the sides of this dispute have become so polarized.

A. Riskin⁸ and the False Dichotomy⁹

In exploring the evaluative-facilitative debate, it is helpful to revisit the debate’s origin. Leonard Riskin attempted to clarify his approach to mediation in his 1996 article, *Understanding Mediation Orientations, Strategies, and Techniques for the Perplexed*.¹⁰ His goal in part was to describe the practice of mediation and provide a framework for further discussion.¹¹ To achieve this, he proposed a four-box grid containing two axes. The east-west axis defined how issues could be approached: broadly or narrowly. The narrowest approach focused primarily on legal issues, but as the spectrum became broader, business, personal, relational, and community interests were also included.¹² The north-south axis defined two stylistic approaches: evaluative and facilitative.¹³ The resulting four boxes in the grid were evaluative-narrow, evaluative-broad, facilitative-narrow, and facilitative-broad.¹⁴

L. REV. 985 (1997) (describing Riskin’s article).

7. Birke, *supra* note 5, at 309.

8. For an understanding of Riskin’s work in the field of mediation, see *Mediator Orientations*, *supra* note 6, at 111; *Orientations, Strategies, and Techniques*, *supra* note 3, at 7 (setting out a system for classifying mediator orientations, strategies, and techniques using a grid); Leonard L. Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientations*, 9 DISP. RESOL. MAG. 22, 22 (discussing the background and problems associated with the mediation grid and proposing solutions for replacement); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New Grid System*, 79 NOTRE DAME L. REV. 1 (2003) [hereinafter *Decisionmaking in Mediation*] (proposing a new grid system).

9. For further explanation of the “false dichotomy,” see Birke, *supra* note 5, at 309 (arguing that all mediations are both facilitative and evaluative); Stulberg, *supra* note 6, at 985 (arguing that any orientation that is evaluative on the Riskin grid is inconsistent with the values and goals of the mediation process); *Liberating ADR*, *supra* note 1, at 247 (arguing that classifying a mediation as evaluative or facilitative creates a false dichotomy); Jeffery W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. RESOL. 371 (2000) [hereinafter *Identifying Real Dichotomies*] (commenting on the evaluative-facilitative divide).

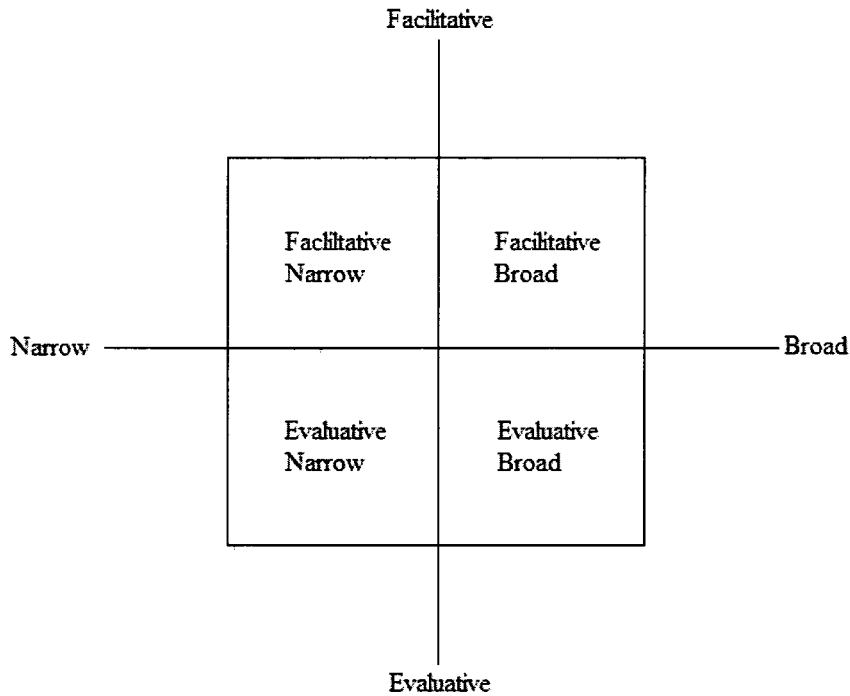
10. *Orientations, Strategies, and Techniques*, *supra* note 3, at 2.

11. *Id.* at 13.

12. *Id.* at 19–23.

13. *Id.* at 23–24.

14. *Id.* at 25.



The result of creating this grid was twofold. First, it introduced the terms “evaluative” and “facilitative” in reference to mediation.¹⁵ Second, it raised the question of whether evaluative mediation should be considered mediation. As Riskin stated, it was not his intention to endorse any one style of mediation over the other, but rather to shed light on the current practice of mediation.¹⁶ While recognizing the strengths and weaknesses of each approach, Riskin considered all four approaches legitimate styles of mediation.¹⁷ Under this view, the grid is a medium for understanding and choosing a suitable mediation process.¹⁸ Riskin intended to clarify the categories or approaches of mediators based on where their different styles and techniques placed

15. J. Brad Reich, *Attorney v. Client: Creating a Mechanism to Address Competing Process Interests in Lawyer-Driven Mediation*, 26 S. ILL. U. L.J. 183, 186 (2002).

16. *Orientations, Strategies, and Techniques*, *supra* note 3, at 12–13.

17. *Id.* at 24–26 (introducing the four mediation orientations).

18. Birke, *supra* note 5, at 314.

them within the two axes.¹⁹ Instead, Riskin's terminology created a dichotomy between the facilitative and evaluative styles.²⁰

Riskin foresaw many uses for the grid beyond providing terminology to discuss mediation. From an end user perspective, Riskin thought it would help clients determine what type of mediator would best fit their needs.²¹ Additionally, it would allow mediators to classify themselves into a particular category.²² Although this was Riskin's intention and many mediators did classify themselves, clients did not make much use of the information. Facilitative proponents attribute this confusion to the inclusion of "evaluative mediation" as "mediation." However, the information was probably not put to use for different reasons. Parties generally do not know at the outset what type of mediator they are looking for even where clear definitions are available. Realistically, parties do not go to mediation often enough to know what type of mediator is best suited for their situation.

Moreover, choosing a type of mediator is really not the job of the parties entering mediation. In truth, most mediators will adapt their strategy throughout the mediation in order to suit the parties' needs.²³ A good mediator will better understand the parties' needs and the skill set required to perform the mediation. Furthermore, mediators give clients a reasonable expectation about the process when explaining it, resulting in higher satisfaction. Although mediators may prefer to practice using a certain approach, using an evaluative-facilitative distinction is not appropriate.

Relying too heavily on a mediator's approach will foreclose opportunities. A mediator's style largely responds to the parties' dispute, the parties' interaction, and the course of the mediation itself; it is a dynamic and flexible process. Since styles of mediation, especially in the evaluative-facilitative arena, often overlap, run together, and change over the course of the process, it is more important that the

19. *Orientations, Strategies, and Techniques*, *supra* note 3, at 40–41.

20. Birke, *supra* note 5, at 314; Stulberg, *supra* note 6, at 988.

21. See Scott H. Hughes, *Facilitative Mediation or Evaluative Mediation: May Your Choice Be a Wise One*, 59 ALA. LAW. 246, 246 (1998) (explaining the importance of attorneys fully understanding the two styles of mediation "in order to adequately counsel their clients when deciding on the use of mediation"); William Hartgering, Presentation, *Selecting A Mediator For The Complex Or Highly Sensitive Case: You Can Generally Only Do It Once, So You Need To Be Thorough* (Sept. 2002).

22. However, Riskin did recognize that a mediator may switch mediation styles from time to time. His purpose was to allow a mediator to define his predominant style.

23. See Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41 (2000) (discussing the reasons why mediators change strategies during the course of a mediation).

parties are comfortable with the process and the mediator. To define a mediator's "style" would do a disservice to the parties by confining the mediator to one approach when a different approach may be more useful for all involved.²⁴

Even Riskin did not intend for the terms to create such a dichotomy.²⁵ In a later article, Riskin acknowledged the debate over the terminology and suggested changing the terms. Instead of "evaluative," Riskin determined that "directive" better explained the distinction he intended; he also determined that "elicitive" was a more useful term than "facilitative."²⁶ This change of terms demonstrates that the divide between facilitative and evaluative is not so great after all. How the mediator provides information and guides the process matters more in understanding the mediator's role. Additionally, Riskin recognized that mediators need not stay in the same square of the grid throughout negotiations. Instead, a new grid system with various possible dimensions was proposed to chart the progression and the style of mediation.²⁷

Evaluative and facilitative approaches need not be viewed as opposite ends of a spectrum. It is not as simple as hot versus cold or black versus white;²⁸ often the same actions can be characterized as facilitative or evaluative depending on the context.²⁹ To view facilitative and evaluative mediation on a continuum is to say that in order to use more of one, you need to use less of the other. This is an incorrect assumption. When an evaluative element is introduced, be it shifting to a new subject, providing information, or otherwise, mediation still remains a facilitative process. Facilitative and evaluative mediation can be used simultaneously. A "false dichotomy" grew when the two were categorized separately.³⁰ Proponents of pure facilitative mediation admit that there are evaluative components even in the most facilitative of mediations and that sometimes distinguishing where facilitation ends and evaluation begins is impossible.

24. See Cris M. Currie, *Mediating Off the Grid*, 59 DISP. RESOL. J. 9 (2004) (discussing the role of a mediator in greater detail).

25. *Decisionmaking in Mediation*, *supra* note 8, at 23.

26. *Id.* at 20.

27. *Id.* at 37–45.

28. See *Identifying Real Dichotomies*, *supra* note 9, at 379 (discussing the importance of classification in daily existence).

29. *Liberating ADR*, *supra* note 1, at 264.

30. *Id.* at 247; *Identifying Real Dichotomies*, *supra* note 9, at 371.

B. Purely Facilitative Mediation Does Not Exist in Complex Commercial Cases

At its inception, mediation was considered an alternative to arbitration and a different and dynamic way to resolve disputes. To achieve this goal, early proponents of mediation opposed the use of any evaluative elements in the mediation process.³¹ Hence, facilitative mediation is often referred to as “pure” mediation and is the basis for all mediation. The rationale behind the facilitative process is that parties can work together to constructively resolve their dispute in a “neutral, safe, and supportive” environment.³² The barrier to dispute resolution is believed to be a failure to communicate effectively.³³ Thus, a facilitative mediator assumes that “parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator Accordingly, the parties can develop better solutions than any the mediator might create.”³⁴

Facilitative mediation focuses primarily on the interests of the parties.³⁵ The image of an empathetic and counselor-like mediator attempting to help the parties repair their shattered relationship is characteristic of purely facilitative mediation; the approach is a therapeutic one. A facilitative mediator seeks to increase understanding between parties, explores their interests instead of promoting a position, creates a collaborative environment, and helps parties create a solution that is unique to their situation.³⁶ In a typical facilitative mediation, the mediator asks questions in order to understand the situation and subtly directs the parties to explore options and potential outcomes.³⁷ Under the facilitative approach, the parties expect the mediator to interfere as little as possible with the parties’ discussion. Instead, they expect the mediator merely to facilitate and guide the discussion so that negotiations do not break down.

31. Lela P. Love & James B. Boskey, *Should Mediators Evaluate? A Debate*, 1 CARDOZO ONLINE J. CONFLICT RESOL. 1, 1 (1997) (“[M]ediation . . . offers an entirely different approach to dispute settlement than all of the processes that focus on evaluation.”).

32. Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 268 (2000).

33. Birke, *supra* note 5, at 314–15.

34. *Orientations, Strategies, and Techniques*, *supra* note 3, at 24.

35. Carole J. Brown, *Facilitative Mediation: The Classic Approach Retains its Appeal*, 4 PEPP. DISP. RESOL. L.J. 279, 281 (2004).

36. Carol Weigler & Jerard Weigler, *Facilitative Mediation: The Alternative Dispute Resolution Alternative*, 63 OR. ST. B. BULL. 27, 28 (2003).

37. *Id.* at 27.

Facilitative mediators are process oriented.³⁸ The mediator is responsible for guiding the process; he does not provide his own opinion or predict outcomes.³⁹ The parties are responsible for arriving at a resolution themselves. For the process to work, the mediator need not have expertise in the subject matter of the dispute. His purpose is only to ask questions rather than suggest solutions, judge, or otherwise provide advice. Consequently, it is rare for a facilitative mediator to have subject matter expertise. In most cases, those who choose pure facilitative mediation prefer that the mediator not have subject matter experience in the disputed area at all. A lack of experience eliminates the danger that the mediator will interject evaluative information. Instead, a facilitative mediator only needs to know how to effectively facilitate the negotiations between parties, or have “process expertise.”⁴⁰ When additional information is necessary, the facilitative approach requires the mediator to recommend that parties look to outside authorities for professional or legal advice.

Facilitative mediation is often characterized as interest-based. The mediator should allow parties to express their sides of the issue and offer them an opportunity to be heard. Aside from ensuring that each of the parties has an opportunity to speak, the mediator is essentially a “know-nothing” intervener in purely facilitative mediation.⁴¹ His sole focus is to facilitate the conversation. Accordingly, a facilitative mediator will not concern himself greatly with the facts and instead will focus on the parties’ desires. This forward-looking focus, along with the responsibility of the parties to arrive at a resolution, increases the potential for non-legal, creative solutions.

The facilitative approach can be directive or non-directive. Under a directive approach, the mediator educates parties about the strengths and weaknesses in their positions by having the parties evaluate and reevaluate the case. A directive-facilitative mediator would fall under the facilitative-narrow approach on the Riskin grid and would engage in the following tasks: asking questions, helping parties develop proposals, and assisting parties in evaluating proposals.⁴²

Whereas a directive facilitator asks questions, a non-directive facilitator focuses on understanding the issues instead of encouraging

38. Birke, *supra* note 5, at 314.

39. Robin Hoberman, *Mediation: A Nonadversarial Alternative to a Win-Lose System*, 90 ILL. B.J. 588, 589 (2002); Birke, *supra* note 5, at 314.

40. Levin, *supra* note 32, at 268.

41. Stulberg, *supra* note 6, at 997.

42. *Orientations, Strategies, and Techniques*, *supra* note 3, at 28–29.

examination of case positions. The non-directive type focuses on the broader issues and is placed in the facilitative-broad approach on the Riskin grid. Four major tasks of the facilitative-broad mediator are: helping parties understand underlying interests, assisting parties in developing and exchanging broad interest-based suggestions for settlement, helping parties exchange proposals, and helping parties evaluate those proposals.⁴³

C. *Evaluative Mediation*

Evaluative mediation, which is modeled on the settlement conference, has become popular largely due to court orders and referrals. Consequently, evaluative mediation focuses on the legal rights of the parties and evaluates the merits of each party's claim.⁴⁴ However, despite the legal focus on evaluative mediation, the process does not embrace traditional adversarial methods, such as requiring third party interveners to determine resolutions. An evaluative mediator focuses on the underlying substance and cause of a dispute.⁴⁵ The mediator does not ignore the interests of the parties; rather, he has a more practical focus than in a purely facilitative mediation. Due to this broader legal focus, the parties generally expect an evaluative mediator to have a legal background.

Furthermore, unlike a facilitative mediator, it is essential for an evaluative mediator to have at least some substantive experience with the subject matter in dispute. Such knowledge is necessary in order to ask appropriate questions, guide the parties in a reasonable direction, and help the parties realistically reevaluate their claims. A mediator considered qualified to give such opinions must have "training, experience, and objectivity."⁴⁶ Subject matter expertise is particularly beneficial when the subject area of the dispute is highly complicated or unique.

The role of an evaluative mediator requires more than skillfully guiding the parties' conversations. As the name suggests, the evaluative mediator makes recommendations, points out case flaws and strengths, predicts court outcomes, and evaluates case components. The rationale underlying evaluative mediation is that parties benefit from the knowledge of an objective third party who can provide guidance about

43. *Id.* at 32-34.

44. Levin, *supra* note 32, at 269.

45. Birke, *supra* note 5, at 315.

46. Reich, *supra* note 15, at 187.

substantive issues and merits.⁴⁷ An evaluative mediator takes the position that parties want and need guidance regarding the appropriate grounds for settlement.⁴⁸ Adherents to this approach believe that the barrier to resolution is rooted in the parties' unrealistic opinions about the value of their claims. The mediator thus has a duty to be an "agent of reality" to help the parties reevaluate their positions more realistically and come to a resolution.⁴⁹ In this role, the mediator provides new information, helps parties realize the costs and risks of litigation, and points out weaknesses and strengths of each side either in private caucuses or with both parties present.

Like the facilitative approach, the evaluative approach can also be either directive or non-directive. Under the directive-evaluative approach, the mediator encourages settlement, predicts outcomes of litigation, and proposes position-based compromises. The directive mediator not only provides evaluations but also exerts pressure on the parties to agree with them.⁵⁰ The four tasks Riskin associated with a directive mediator are: (1) assessing the strengths and weaknesses of each side's case; (2) predicting outcomes; (3) proposing position-based resolutions; and (4) urging parties to accept a particular proposal.⁵¹

Unlike the directive type, the non-directive mediator may only evaluate some of the issues and may only use information to guide resolutions, not to guide discussions. The four tasks that Riskin associated with this orientation are: (1) educating oneself about the parties' interests; (2) predicting the impact of failing to reach a settlement; (3) developing and suggesting broad-interest based proposals; and (4) urging parties to accept a proposal.⁵² Although evaluative mediation is considered to be rooted more in legal rights than individual interests, it can also incorporate the parties' interests. Unlike facilitative mediation, however, even a non-directive evaluative mediation requires more mediator intervention and involvement than a directive facilitative mediation.

An important distinction between evaluative mediation and facilitative mediation is that proponents of the evaluative approach do not reject the facilitative process. Instead, most evaluative mediators

47. Levin, *supra* note 32, at 269.

48. *Orientations, Strategies, and Techniques*, *supra* note 3, at 24.

49. Birke, *supra* note 5, at 315.

50. Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111, 114 (2002).

51. *Orientations, Strategies, and Techniques*, *supra* note 3, at 27–28.

52. *Id.* at 30–31.

consider evaluation a tool that can assist the parties in resolving disputes. By using evaluative tools, the mediator can offer parties a “reality check” through honest assessments that can often bring parties closer to a resolution. This is especially important in complex cases, where a facilitative style has often been called inappropriate.⁵³ The evaluative approach has been criticized for its limited approach to solution-making; however, proponents believe that while evaluation narrows the options or alternatives and the facilitative approach widens them, evaluation is a necessary tool to bring the most important issues into focus in order to resolve them.⁵⁴

III. WHY THE SPLIT? CRITICISMS OF EVALUATIVE MEDIATION

Although proponents of the facilitative approach are critical of the evaluative approach, the reverse is not true.⁵⁵ Evaluative mediation advocates consider evaluation a necessary part of mediation, but they see it as a tool to be used in conjunction with facilitative mediation. Furthermore, in the context of complex commercial disputes, the distinction between evaluative and facilitative mediation is not useful. Any valuable facilitative element of mediation necessarily includes some evaluative component. However, before explaining why pure facilitative mediation does not exist, this article will address the concerns and criticisms of those who disfavor the use of evaluative mediation.

The significant increase in the use of mediation has mainly been attributed to the use of evaluative mediation.⁵⁶ Part of the reason for the expansion is an increased demand for “expert case evaluation . . . substantive settlement recommendations . . . strong pressure[] to accept those recommendations . . . and [tight management of] the discussion process.”⁵⁷ Two different theories can explain this shift toward evaluative mediation. One is that evaluative mediation is taking the place of arbitration.⁵⁸ A growing need to protect the parties’ rights

53. *Orientations, Strategies, and Techniques*, *supra* note 3, at 30–31 (noting that proponents of evaluative mediation argue that the purpose of evaluation is not to increase the size of the pie, as the facilitative approach does, but instead is to divide the pie).

54. John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COSTS LITIG. 70 (1996).

55. Levin, *supra* note 32, at 270.

56. Bush, *supra* note 50, at 113.

57. *Id.*

58. Evaluative mediation differs from arbitration in that an arbitrator’s decision is binding. An evaluative mediator’s evaluations and suggestions are in no way binding. While an arbitrator evaluates the positions and renders a decision to conclude the arbitration, an evaluative mediator offers his evaluations solely as information that may be useful to the parties as they come to their

causes arbitration to resemble an adjudicative process; as a result, evaluative mediation became the preferred substitute.⁵⁹ A second theory is that the shift to evaluative mediation was informed by greater client understanding of what they want to achieve by participating in mediation.⁶⁰ According to this theory, consumers have grown to appreciate the value of having a mediator who is substantively involved in the process. Most clients want “substantive information, outcome predictions, and advice” and someone to help them “close the deal.”⁶¹ Furthermore, parties using mediation are typically faced with the alternative of litigation. Thus, they view mediation as an opportunity to try the case with a reduced risk of an undesirable third-party decision because both parties must agree upon any resolution.⁶²

While both of these theories help explain a shift toward evaluative mediation, each theory supports a different approach to the process. If evaluative mediation is an evolution of facilitative mediation, traditional facilitative mediation rules should apply. However, if evaluative mediation is a substitute for arbitration, it may be appropriate to proceed under new rules.⁶³ Considering that the debate has focused on evaluation as a product of mediation and that there is a demand for such services, there is no reason not to treat evaluative mediation as an essential element of the mediation process, especially when it is done within a facilitative process.

The quick growth and use of evaluative mediation did not occur without resistance. Facilitative advocates believe that an emphasis on legal issues detracts from the collaborative, creative mediation process and can hinder the ability of the parties to come to their own resolution. Opponents of evaluative mediation also claim that the mediation process changes dramatically when a mediator assumes an evaluative role, reducing mediator impartiality and party self-determination. They are concerned that evaluative mediation creates an adversarial setting that prevents parties from sharing valuable information. As a result,

own conclusions.

59. See Bush, *supra* note 50, at 122 (noting that as arbitration became obsolete and dysfunctional, parties turned to preserve finality and settlement but discard formality, cost, and delay).

60. *Id.* at 116.

61. *Id.*

62. *Id.* at 117.

63. Bush, *supra* note 50, at 125 (“[T]he realization that evaluative mediation is an arbitration substitute makes clear that it is simply inappropriate to regulate evaluative and facilitative (or other non-evaluative) mediation practitioners by the same standards, whether as to qualifications, training, competency, or ethics.”).

opponents generally assert that evaluative mediation is not mediation at all.

Because evaluative mediation is an outgrowth of mediation itself and is essential to a successful mediation, it is important to address the concerns held by those who oppose the use of evaluative mediation. When viewed pragmatically, from the perspective of those who regularly engage in complex mediations, these opinions lack a sound basis.

A. *Practical Criticisms of Evaluative Mediation*⁶⁴

The concerns about using evaluative mediation center on perceived logistical or even ethical problems, such as the unauthorized practice of law. However, these problems are either easily corrected or have been exaggerated. Additionally, many critics of evaluative mediation have not rejected, and admit they cannot reject, at least some evaluative elements. Process-related activities of mediation inherently require the mediator to use his judgment and make evaluative calls. Even facilitative purists such as Love and Kovach ultimately concede that evaluative elements are a necessary and essential component of mediation.⁶⁵ In any event, the criticisms of evaluative mediation, when viewed pragmatically and from the perspective of those who regularly engage in complex commercial mediation, rarely materialize.

1. Evaluative Mediation Does Not Require the Practice of Law⁶⁶

Opponents of evaluative mediation commonly argue that, given its heavier focus on legal rights, evaluative mediation requires the use of lawyers, lest individuals engage in the unauthorized practice of law.⁶⁷

64. See Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COSTS LITIG. 31 (1996) [hereinafter *Evaluative Mediation*] (criticizing evaluative mediation as a method that invariably favors one side over another, discourages understanding between the parties, and promotes an adversarial climate); Zena Zumeta, *A Facilitative Mediator Responds*, 2000 J. DISP. RESOL. 335, 336-37 (2000) (criticizing evaluative mediation as too narrow, unreliable, and misplacing reliance on lawyers to resolve non-legal issues).

65. Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 79 (1998) [hereinafter *Mapping Mediation*].

66. For a detailed discussion of this issue see Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from A Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235 (2002) (discussing the tension between lawyer and non-lawyer mediators) and Matt Wise, *Separation Between the Cross-Practice of Law and Mediation: Emergence of Proposed Model Rule 2.4*, 22 HAMLINE J. PUB. L. & POL'Y 383 (2001) (discussing the boundary between the practice of law and mediation).

67. See HENRY S. KRAMER, ALTERNATIVE DISPUTE RESOLUTION IN THE WORK PLACE 4-12.4 (2d ed. 2007) (examining the point at which mediation becomes the unauthorized practice of

However, critics claim that only allowing lawyers to be mediators would weaken the pool of available mediators.⁶⁸ This argument seems to originate from non-lawyer mediators who participate in the expansion of the mediation field and resent lawyers who want to practice mediation.⁶⁹ Although the tension between these groups is real, the problem of practicing law during mediation is not. The unauthorized practice of law is regulated in a variety of ways.⁷⁰ While it is unlikely that a lawyer-mediator would intentionally disregard such regulation, the concern is that the difference between legal advice and legal information will be blurred. Proponents of this argument believe that if parties need legal advice or information, they should be referred to outside counsel.

This concern is exaggerated for three reasons. First, mediators do not need to be lawyers to evaluate the parties' positions. It is true that mediation has a legal component, and it might be beneficial in some circumstances to choose a mediator with legal experience. However, in most cases, even in an evaluative analysis, mediators do not make legal determinations. Any analysis of the law made by a mediator occurs outside a legal setting. Such analysis is useful solely as a reference point for comparing and assessing the parties' options and not to compel a final determination of the issue. An evaluative mediator does not explicitly judge or try a case, or even advocate for a particular side. Instead, the mediator makes use of his own experience to help the parties focus on prioritizing the issues, determining how much time to spend on each issue, evaluating potential weaknesses, and using his own experience, legal or otherwise, to guide the parties toward a reasonable solution. Thus, not all mediators need to be lawyers. Any tension between lawyer-mediators and non-lawyer mediators is created by individuals, not by the evaluative mediation process.⁷¹ It is not the mediator's status as a lawyer, but rather the ability to provide information, that drives the mediation process.

law); Nolan-Haley, *supra* note 66, at 235 (describing lawyers' use of the unauthorized practice of law doctrine to suppress competition from non-lawyer mediators); Wise, *supra* note 66, at 384 (arguing that the most problematic concern facing alternative dispute resolution is the cross-practice of law and mediation).

68. Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 941-42 (1997).

69. Nolan-Haley, *supra* note 66, at 255-56.

70. *Id.* at 259-60 (describing the unauthorized practice of law doctrine and its relationship to mediation).

71. *Id.* at 246-47 (discussing the power struggle between lawyers and non-lawyers for control over mediation which has led to tension between the groups, each side proposing different qualifications a mediator should possess).

Second, because an evaluative mediator does not represent either party, his advice does not constitute the practice of law. In mediation, each side usually retains its own lawyer; in fact, it is typically the lawyer who recommends mediation. What a mediator adds to the discussion is different. The information provided by a mediator is based on a broader perspective that is free from the agency bias that lawyers may have. Unlike the party's representative attorney, the mediator has no stake in the outcome of the mediation. While acting as a party's agent, an attorney always considers the best interest of his client.⁷² Moreover, no attorney-client relationship can form during the mediation process, and a good mediator will make that clear at the beginning of a session. There can be no practice of law in the absence of an attorney-client relationship.⁷³

Third, unlike attorneys, arbitrators, or judges, mediators have the enviable option of staying silent when they lack knowledge or expertise in a given area. A good mediator will admit that he lacks information or will refrain from making any statements if that is the case. Furthermore, the information is not decisive when assessing the parties' legal rights.

Regardless of whether the mediator is a lawyer, he may be asked to mediate or provide information about an unfamiliar subject. This issue is not unique to the evaluative-facilitative debate. If a mediator is asked a legal question that he is unqualified to answer, his approach to mediation does not change his options: he can refrain from answering, research the issue and get back to the parties, or direct the parties to an outside source. A good mediator provides information to expedite the mediation process when possible. Parties often prefer mediation because of the opportunity for quick resolution as compared to often times prolonged litigation. However, a good mediator, regardless of style, knows when he cannot answer a question or concern; only in those cases should a lawyer be sought.

72. See Jeff Kichaven, *Adding Value: Making the Strongest Case for Evaluation*, 19 ALTERNATIVES TO HIGH COST LITIG. 1, 169 (2001) (noting that a mediator adds value to the mediation scenario by providing information from a neutral, unbiased source, and that having a mediator can often confirm a representation a lawyer has made to a client, good or bad, that allows him to make a more informed decision).

73. Nolan-Haley, *supra* note 66, at 273–74.

2. Evaluative Mediation Requires Neutrality⁷⁴

Another common argument against using evaluative components in mediation is the concern that it threatens the neutrality of the setting and of the mediator. This concern is based on a perception that a mediator may give advice in a manner that is one-sided, potentially creating or adding to an adverse climate.⁷⁵ This may alienate a party who believes that the mediator is making a negative judgment about his or her position.⁷⁶ Critics contend that unfavorable evaluations result in “anger, disaffection, and alienation” during the mediation process instead of a neutral setting of mutual trust.⁷⁷ Critics also argue that this jeopardizes the mediator’s neutrality and may hinder her ability to facilitate the mediation later. Compounding this concern is the fear that an evaluation unfavorable to a particular party could end the negotiation process entirely.⁷⁸

Finally, critics argue that without a proper check on their activities, mediators are not sufficiently well-positioned to exercise broad discretion in making evaluations.⁷⁹ Hence, critics fear that mediators will rule like Caesar, depriving parties of their ability to direct the process.

Fears about a mediator’s neutrality, notwithstanding advising and assessing, are part of the very role of a mediator. When giving advice about how to approach the issue, evaluating what issues are important, determining how much time should be spent on each issue and in what order the issues should be discussed, the mediator is constantly making determinations that do not jeopardize his neutrality.⁸⁰ Providing advice in an accepted and conventional manner is the mediator’s job. Such assessments can serve as a reality check for the parties.⁸¹ In fact, there

74. See Levin, *supra* note 32, at 270 (arguing that if a party begins to sense an evaluative mediator is being partial, the party will withhold information and this will have an adverse effect on the mediation); Love, *supra* note 68, at 940 (arguing evaluative mediation promotes positioning and polarization which is antithetical to the goals of mediation).

75. *Evaluative Mediation*, *supra* note 64, at 31.

76. Levin, *supra* note 32, at 277 (“Rendering an evaluative opinion may display a lack of evenhandedness. It can be viewed as a display of favoritism both in appearance and act. When a mediator formulates an opinion and then shares that information with the disputing parties, this necessarily favors one party over another, unless the mediator’s evaluation lies precisely in the middle of the parties’ positions of impasse.”).

77. *Mapping Mediation*, *supra* note 65, at 101.

78. Love, *supra* note 68, at 945.

79. Love & Boskey, *supra* note 31, at 1 (noting that Professor Love “believe[s] mediators are not well positioned to evaluate . . . simply . . . [because] [t]hey are in private sessions, there is no public scrutiny, and certainly evaluations will impact the parties”).

80. *Liberating ADR*, *supra* note 1, at 248.

81. Bickerman, *supra* note 54, at 70.

is a valid argument that parties may perceive an evaluative mediator as more neutral. By dealing with the issues in an open and direct way, parties have greater confidence that the mediator is working fairly for both sides. The mediator is necessary to provide information and make evaluative judgments. The mediator's task is to encourage parties to reevaluate their positions. This often requires giving the parties additional information regarding litigation outcomes, making judgments about what issues are important, or telling a party about a weakness in his case. If the parties had access to such information or could make evaluative judgments on their own, they would not be involved in mediation in the first place.

3. Neutrality Is Possible in Evaluative Mediation

Neutrality does not require that the mediator refrain from speaking or treat both parties equally. A mediator can demonstrate his judgment through a number of gestures or facial expressions. Mediation is neutral because the mediator is a third party without any interest in the outcome or preconceived notions of the parties' positions. Hence, her judgments are completely free from bias toward either side. The value of a mediator lies in her ability to apply her expertise and help the parties reevaluate their claims. Mediation outcomes are neither legally binding (if they are even disclosed) nor determinative of compensation. Thus, a mediator has no incentive to favor either side. The parties understand this; hence, it is easier for parties to hear and believe information coming from a mediator rather than their attorney or the other party. In this way, mediators are very well positioned to evaluate. Moreover, because mediation is a party-driven process, the parties have the opportunity to walk away if they believe a mediator is biased. The ability of the parties to drive the process (a key goal in mediation) and the free market provide checks on the mediator regardless of his mediation style. If a mediator is consistently ineffective, word will travel, and the mediator will lose business.

A major concern in evaluative mediation is that the process will turn from collaborative to adversarial. Thus, parties may only reveal favorable information because they know they are being evaluated. Another unintended consequence of evaluative mediation is the possibility that the parties will lock themselves into their positions or fail to seek alternative solutions beyond legal parameters.⁸² Critics fear that evaluative elements shift the focus of the mediation from the

82. *Mapping Mediation*, *supra* note 65, at 100.

parties, who seek resolution, to the mediator.⁸³ When evaluation is involved, the parties may act differently; they may try to make themselves look as good as possible and their opponent as bad as possible. Parties may be less likely to compromise or reveal all the relevant information, believing that doing so would cause them to lose ground on the evaluation.⁸⁴ When parties are polarized because of their fear of an unfavorable evaluation, collaboration cannot be achieved.

While this argument seems valid at the outset, it is important to remember that the parties are polarized at the start of the mediation. If they were on good terms, able to negotiate a deal themselves, or knew the likelihood of successful litigation, they would not be in mediation in the first place. Parties mediate because they need help in coming to a settlement and expect it from a mediator. Parties do not want a referee to tell them to play nicely. The advantage of a neutral, third party mediator is the value he adds by providing information, organizing the discussion, and assisting the parties in the reevaluation of their positions. Suggesting possible outcomes and consequences, settlement possibilities, and appropriate bargaining ranges are all designed to help align the parties and bring them closer to settlement.

Furthermore, an evaluative approach to mediation does not reject the facilitative process. It is the addition of information and assistance in reevaluating each side that allows a mediation to move forward. Parties remain involved, creative solutions are still explored, and, most importantly, parties are willing to provide information in order to assess their own positions. It is the responsibility of the parties to bring this information to light. Even the most effective mediator may not be able to help a party whose primary interest is to get his day in court. However, the premise of mediation is that it is voluntary. Thus, if a party enters mediation unwilling to explain the full situation, at least to the mediator, the mediation will not be successful regardless of the mediator's style. Parties come to mediation to get a second opinion and test run their cases. Even if a mediator points out weaknesses in a party's argument, the parties appreciate the information because it helps them reassess the probability of success. Likewise, it helps them

83. Brien Wassner, *A Uniform National System of Mediation in the United States: Requiring National Training Standards and Guidelines for Mediators and State Mediation Programs*, 4 CARDOZO ONLINE J. CONFLICT RESOL. 1, 1 (1997), available at <http://www.cojcr.org/vol4no1/notes01.html> (contending that some believe the mediator is seen as the decisionmaker to whom the parties must prove their case).

84. See Love, *supra* note 68, at 945 (stating that where a party disagrees with a mediator's unfavorable opinion, the party is likely to withdraw from mediation).

evaluate the risks and costs of failing to settle during the mediation process.

Opponents of evaluation contend that parties engage in adversarial conduct when they know the mediator's task is to render a judgment.⁸⁵ If an adversarial mindset prevails, then the advantages of using mediation are lost.⁸⁶ The concern is that the adversarial climate will inhibit creativity and collaboration and simply result in the same resolutions that can be obtained through litigation. Thus, the solutions may not be as tailored to the needs of the parties as they could potentially be. If mediation is allowed to regress into an adversarial, content-driven practice, it would be unlikely to "reorient the parties toward each other" and provide a new "perception of their relationship."⁸⁷ "Judging," according to critics, "block[s] imagination."⁸⁸ However, the purpose of the mediator is to raise the level of discussion and generate new options. Additionally, critics argue that parties will be reluctant to reevaluate the situation themselves if the mediator provides an evaluation, thus obstructing the parties' ability to direct the process.⁸⁹ Such evaluation may minimize party participation or skew the resolution toward predicted court outcomes.⁹⁰

Contrary to these concerns, evaluation can alleviate an adversarial climate by helping the parties distinguish between real and illusory issues.⁹¹ The real concerns regarding evaluative mediators result from the attempt by a few mediators to "lawyerize" mediation.⁹² However, this is not an accurate characterization of evaluative methods. When evaluation is used as a tool, opportunities are created. It is ultimately the parties who decide whether to reach resolution or forgo settlement. In any good mediation, a neutral evaluation is not the main focus of the process; it is a tool that helps move discussion along, allowing parties to reconsider their positions and make informed decisions. This allows

85. Love & Boskey, *supra* note 31, at 1 ("When parties know that part of [the mediator's] task is to render a judgment that is going to be important to [the parties], they are going to engage in adversarial conduct.")

86. Love, *supra* note 68, at 945 (arguing that where one party feels advantaged or disadvantaged by a relative mediator opinion and, as a result, negotiations stop altogether, the mediator's goal of furthering negotiation is thwarted).

87. Currie, *supra* note 24, at 11.

88. *Mapping Mediation*, *supra* note 65, at 103.

89. *Evaluative Mediation*, *supra* note 64, at 31; *Mapping Mediation*, *supra* note 65, at 99.

90. *Mapping Mediation*, *supra* note 65, at 98.

91. Love & Boskey, *supra* note 31, at 1 (noting that while evaluation can stop the negotiation process and create an adversarial climate, evaluation can also alleviate this adversarial climate by showing parties real and illusory issues).

92. *Mapping Mediation*, *supra* note 65, at 92.

them to engage in an organized retreat, as they can systematically reform their positions to come closer to settlement. There is still a heavy emphasis on the parties' decision making based on knowledge acquired during the mediation. Even critics of evaluation admit that when evaluation is non-coercive and does not conflict with party participation, it does not interfere with the self-determination of the parties.⁹³

4. Informed Consent

Critics also contend that a mediator taking on an evaluative role should obtain the consent of the parties. However, parties often have no idea what to expect upon entering a mediation session. It is the mediator's job to inform the parties how mediation works and to describe her role. Consent is essential in this situation, where parties can leave mediation at any time without being bound by anything that the mediator says. In effect, consent merely requires the mediator to tell the parties what to expect at the outset of the mediation.

B. There Is No Theoretical Difference Between Evaluative and Facilitative Mediation

Some opponents disapprove of the evaluative approach on the grounds that evaluative mediation is not mediation at all.⁹⁴ While they do not discount its benefits, they feel that evaluative mediation should be considered a separate process. Proponents of this view believe that the evaluative elements in mediation must be distinguished in order for mediation to be understood and to be effective. They assert that when evaluation occurs, mediation has stopped and a separate process has begun.⁹⁵ Otherwise, there is a risk that parties entering mediation will be unsure of what to expect and consequently will not utilize mediation to its optimum capability.

Those reluctant to call evaluative mediation "mediation" assert that it overlaps too much with other ADR processes. They consider the hallmarks of mediation to be emphasis on the parties' ability to come to their own resolution and the neutrality of the mediator. Opponents

93. *Id.* at 100.

94. See Love & Boskey, *supra* note 31, at 1 (criticizing evaluative mediation for not being a type of mediation at all); Love & Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 295-96 (2000) [hereinafter *ADR*] (arguing that when mediators begin to evaluate, they are not engaging in mediation); *Mapping Mediation*, *supra* note 65, at 71 (noting that mediation is being pulled toward the litigation norm and that litigation's adversarial nature will erode mediation's neutral nature).

95. Wassner, *supra* note 83, at 3.

argue that these underlying goals are challenged by the neutral mediator's interference, the process is no longer mediation, and calling it such merely causes confusion.⁹⁶

However, Kovach and Love's position of calling evaluative mediation by another name is "unworkable in practice."⁹⁷ They include so many evaluative components in defining facilitative mediation that it is unlikely they would be pleased with the results. Eliminating evaluation from mediation or calling it something different will not result in greater clarity or more successful mediations. If the public can distinguish between processes such as mediation-arbitration and mediation-recommendation, it can surely discern a difference between evaluative mediation and facilitative mediation.

Opponents of evaluation further claim that the tasks and roles of evaluative and facilitative mediators are at odds. They argue that since each mediation style requires the use of distinct skills and techniques, the use of one style inherently detracts from the goals of the other. Allowing for such a wide variety in the practice of mediation does both evaluation and facilitation a disservice. Success is more likely to occur when only one objective needs to be met and it is not competing against other objectives.

Perhaps the linguistic confusion that opponents speak of continues to be a problem because the difference between evaluative and facilitative mediation is not apparent. The skills required are not dissimilar, nor are the overall objectives. As discussed in the following section, facilitation and evaluation are not as diametrically opposed as the two sides of the debate make it seem. Even critics of evaluative mediation have trouble defining where a line between facilitation and evaluation lies.⁹⁸ This is consistent with our proposal that both evaluation and facilitation are interdependent and both are necessary for a successful mediation.

IV. A SUCCESSFUL MEDIATION IN COMPLEX COMMERCIAL CASES IS EVALUATIVE

In many complex commercial cases, purely facilitative mediation does not exist. Most mediation involves a combination of both

96. Love, *supra* note 68, at 947 (arguing that when mediators remain partial, the lines between mediation, neutral evaluation, and arbitration become blurred).

97. *Liberating ADR*, *supra* note 1, at 383.

98. *ADR*, *supra* note 94, at 303 (acknowledging that it is difficult to draw a distinction between appropriate and desirable mediator reality testing, which involves an element of mediator evaluation).

facilitative and evaluative methods. The most significant determination of success is the ability of the mediator to leave the parties better informed about their positions.

A. Purely Facilitative Mediation Does Not Exist in Complex Commercial Cases

As this article has suggested, there is no such thing as purely facilitative mediation. Evaluative elements are inherently imbedded in the mediation process. Purely facilitative proponents try to define evaluation out of mediation, but this is not practically possible.

First, the elements of a mediation process implicitly include evaluative components that even critics of evaluative mediation acknowledge. The seating of the parties, order of the issues, what issues are addressed, and the time spent with each party can all encompass evaluative elements. Without them, mediation would be ineffective. If a mediator were completely passive, the parties may as well negotiate a settlement on their own. As Boskey explains, there are many interim evaluative elements throughout mediation.⁹⁹ These can range from the eye contact a mediator makes with a party, to body language, to concerns addressed, time spent, and so on. Any of these actions could be perceived as favorable to one side. Yet facilitative proponents allow these evaluative elements, calling them “essential parts” of the mediation process.¹⁰⁰ If these evaluative elements are acceptable, why are other evaluative elements unacceptable, and how do we determine the boundaries?

Moreover, the distinction between a “process element” and a substantive issue is difficult to discern in mediation. Even process variables have a substantive effect and may influence the parties. If parties do not listen to the mediator at all, there would be no purpose in having a mediator. The order in which a mediator discusses the issues, the time spent on each, and even non-verbal reactions to each side’s position can affect the final outcome determined by the parties. These are not purely facilitative or purely evaluative actions.¹⁰¹ In mediation, both facilitative and evaluative mediation take place together. Even critics of evaluative mediation have difficulty drawing this distinction, calling it “the most troubling question in the evaluative-facilitative debate.”¹⁰² They reason, however, that a fuzzy line is still a line; yet

99. Love & Boskey, *supra* note 31, at 1.

100. *Mapping Mediation*, *supra* note 65, at 79.

101. *Liberating ADR*, *supra* note 1, at 263–64.

102. *ADR*, *supra* note 94, at 303.

they fail to justify the existence of the line in the first place. It is not clear why there is a distinction between reality testing, which critics admit does involve a component of evaluation, and evaluation. There is no obvious value to allowing some evaluative elements and not others.

Meanwhile, evaluative mediation increases the chances of a successful mediation and settlement. The benefits of using evaluation in mediation remain even when moving from the process factors of mediation and into the substantive issues. As we proposed in the introduction, evaluation does not require the mediator to play the role of judge and make an ultimate right or wrong, thumbs up or thumbs down decree. Rather, evaluation is a means of helping the parties obtain additional information, reevaluate their positions, and suggest ways both sides can plan an organized retreat as they move closer to settlement.

Even the staunchest facilitative mediator may use tools that are evaluative or may be perceived as evaluative.¹⁰³ The evaluative critics admit that some actions that they believe are essential to facilitative mediation also involve “a degree of evaluation.”¹⁰⁴ Reframing the conversation, structuring the bargaining agenda, challenging proposals that seem unrealistic to the mediator, urging the parties to obtain outside information, and even proposing suggestions for resolution are all elements that facilitative advocates admit need to be included in mediation. It would seem that drawing a line between facilitative and evaluative mediation causes increased confusion over mediation, not clarity. And indeed, confusion has resulted from the attempt to separate evaluative elements from facilitative mediation.

In complex commercial disputes, it is unrealistic to expect a mediator to remain purely facilitative throughout the mediation process. Stulberg makes a convincing argument in this respect.¹⁰⁵ He notes that the idea of a mediator who truly embraces a solely facilitative approach is implausible because a third party will always influence the interaction. The way in which a mediator contributes to the mediation forum is by guiding the interaction and influencing the parties to work with one another. A mediator does not just repeat what the parties say or play timekeeper, giving each party equal time to talk; instead, a mediator is an integrated and interactive part of the process. Denying the mediator

103. *But see* Levin, *supra* note 32, at 267 (noting that mediators operate under different philosophies and styles and that a main difference is the extent to which these mediators engage in evaluative mediation).

104. *Mapping Mediation*, *supra* note 65, at 80.

105. Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985, 1003 (1997).

this role would negate the purpose of a neutral third party. The presence of a neutral influence does not undermine the self-determination of the parties and the ability for creative solutions. In fact, this is the way mediation commonly works. In a practical way, mediation can be, and has been, practiced successfully by using evaluation as a tool within a facilitative process.

Additionally, evaluation provides a way to get the parties' attention. As many successful mediators note, one can help them to reach a solution.¹⁰⁶ Parties know their own positions very well coming into a mediation. What they do not know is the information only a mediator can provide. By providing additional information, the mediator gives the parties a reason to reassess their own positions. This does not mean that a mediator determines the outcome of the dispute. Absolutist determinations have little place in mediation. However, telling a party his strengths and weaknesses is central to mediation.

Using evaluation in mediation does not require the mediator to make absolute decisions in a judicial manner. There is no final ruling. It is rare for a mediator to completely discredit or endorse the position of one side.¹⁰⁷ Instead, the evaluative element adds the four following objectives to mediation: (1) providing information; (2) providing advice; (3) predicting outcomes; and (4) providing possible solutions. The mediator can accomplish all of these goals by using evaluative elements in a facilitative process.

B. A Successful Mediation Leaves the Parties Better Informed About Their Positions

The main goal of mediation for parties is not settlement—it is access to information. Mediation can often constitute a means for parties to “test run” their cases and obtain a second opinion regarding the strengths of their claims, as well as additional facts that may help them determine litigation costs. Hence, the primary result of a successful mediation is not necessarily settlement. A successful mediation gives disputing parties an enhanced understanding of their dispute and of each other's perspectives, enables others to develop solutions, and brings closure to the dispute on mutually agreeable terms.¹⁰⁸ The main benefit

106. Love & Boskey, *supra* note 31, at 1 (responding to a question about the type of information regarding possible court outcomes a mediator might provide).

107. *See id.* (noting that “I very rarely will come out and say, ‘Your case is worthless,’ or ‘Your case is valuable,’ or something to that effect,” when explaining evaluative mediation).

108. *See* CARRIE J. MENKEL-MEADOW ET. AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 325 (Erwin Chemerinsky et al. eds., 2005) (qualifying a mediation as successful if it gives disputing parties an enhanced understanding of their dispute and each other's

of a successful mediation for parties is the information obtained and an understanding of where parties stand in relation to one another, should litigation ensue.

Informed parties are a measure of successful mediation because the main reason they enter mediation is to gain access to information. If parties could settle based on the information they possess or had access to all of the necessary information on their own, mediation and mediators would be unnecessary. The easy cases settle. The more involved, complex cases, where there is quite a bit of uncertainty, usually end up in mediation. Consumer demand has largely driven the growth of mediation over the past fifteen years, and the area of largest growth has been in evaluative mediation.¹⁰⁹ One reason for this expansion has been an increased demand for “expert case evaluation . . . substantive settlement recommendations . . . strong pressure to accept those recommendations . . . and [tight management of] the discussion process.”¹¹⁰

Another reason a mediation that utilizes evaluative elements is successful is that those interactions help parties better understand their legal rights. Mediation is set up as an alternative to litigation. However, if mediation fails, the parties will end up in litigation. Since trial and litigation costs are the alternative and a factor in what costs a party will incur if mediation fails, the parties need accurate information in order to make informed choices. When parties are able to determine or verify costs of litigation, they gain a realistic perspective of the situation, a reason to reevaluate their positions, a way to make organized decisions, and a rationale for creating an organized retreat from their starting positions that ultimately will bring the parties closer to settlement. Determining litigation costs and outcomes is an evaluative process.¹¹¹ It requires looking at each possible outcome and the risks and costs associated with each outcome. Such information cannot be obtained without some evaluation. A mediator’s ability to point out strong and weak points of cases, question a party’s ideas or an

perspectives, enables parties to develop options responsive to issues raised, or brings closure to the dispute on mutually agreeable terms).

109. Bush, *supra* note 50, at 113. In this author’s view, all mediation is evaluative as there is no such thing as a purely facilitative mediation. However, the growth of evaluative mediation uses the more conventional understanding of evaluative mediation. This argument actually provides greater support for the proposition that evaluative mediation is what consumers expect from mediation and what they believe creates a successful mediation.

110. *Id.*

111. Birke, *supra* note 5, at 316–17.

expert's analysis, and ask directive questions drives the parties to reassess their cases.

V. CONCLUSION

Mediation with evaluative elements is necessary because it helps the parties reach an agreement on their own. Although there is a concern that having extremely evaluative mediators violates other principles of mediation, there is no need to police mediation if the focus is on the parties' ability to come to their own resolutions. Market forces will eliminate mediators that are too extreme in terms of evaluative or facilitative methods because they are not effective. While parties may not know a mediator's approach before entering into mediation, they always retain the right to leave. If a mediator is not performing his job, the parties do not have to stay with that mediator and likely will tell others to avoid him. Hence, concerns about the lack of a check on the mediation process are unfounded.¹¹²

Successful mediation requires giving the parties the opportunity to look at the issues in a new light. Without a tool like evaluation, parties will continue to rehash the same issue. When used as a tool in a facilitative process to provide information or to determine potential costs and risks of litigation, evaluation creates a standard by which the parties can judge the merits of their options.¹¹³ Facilitative elements are useful once a bargaining range is established. In practice, mediators who use the evaluative approach in a facilitative process are highly successful.¹¹⁴

To make informed decisions, parties need to know where they stand and how to approach compromise. While the issues may not be completely clear, rational decision-makers assess the costs and risks of taking an action before proceeding. A contractor would not start to build a bridge without considering the costs of materials, the size of the bridge, and the alternatives. Similarly, parties, as decision makers, want information about what they are getting into before they can rationally decide to proceed with litigation or make use of the mediation process. Until the parties have that reference point, they have no incentive to

112. See Bush, *supra* note 50, at 111 (noting the recent expansion in acceptance of mediation as a process for handling disputes is indicative of its successes); Kichaven, *supra* note 72, at 151 (discussing the merits of successful mediation and the value a mediator adds to the process).

113. Birke, *supra* note 5, at 317.

114. See *Liberating ADR*, *supra* note 1, at 264 ("In practice, however, it appears that the most highly sought mediators are those who provide exactly this sort of evaluative feedback to the parties and use some measure of evaluation as part of their facilitation of a reasonable party dialogue leading to settlement.").

mediate. Evaluative mediation provides that reference point. To maximize the benefit of mediation and the self-determination of the parties, evaluative elements need to be utilized. Ultimately, the parties will decide whether they want to settle. Even if they choose not to settle, they should make the decision with the most information available and understand the consequences.¹¹⁵

115. For a more detailed analysis of how evaluative mediation has been effective and what elements a successful mediation includes, especially in a complex area such as construction disputes, see generally DANA WORDES & SARAH BISER, *THE ART OF CONSTRUCTION MEDIATION*, PRACTISING LAW INSTITUTE, REAL ESTATE LAW & PRACTICE COURSE HANDBOOK SERIES (2003) (outlining when, what, who, where, and how to mediate); Paul M. Lurie, *Factors Influencing a Successful Mediation*, 22 CONSTRUCTION LAW 18 (2002) (contending that remaining uniform during the mediation process leads to poorly planned mediation sessions and unprepared participants); John P. Maden, *Recipe for Success in Construction Mediation*, 56 DISP. RESOL. J. 16 (2001) (describing that while mediation offers an opportunity to hear the strengths and weaknesses of a case from an unbiased, informed mediator, it is expensive and involves the risk of disclosure to the opposing party).