Help Clients by Combining “Facilitative” and “Evaluative” Mediation

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John Lande, Isidor Loeb Professor Emeritus
University of Missouri School of Law
&
Jennifer Shack, Director of Research
Resolution Systems Institute
Classic Facilitative Model

In Riskin grid, facilitative mediation is bundled model including all of the following:

- helping parties evaluate, develop, and exchange proposals
- asking about strengths and weaknesses of each side’s case
- asking about consequences of settling and likely court outcomes
- helping parties understand their interests
- helping parties develop options that respond to their interests
Classic Evaluative Mediation

Evaluative mediation is a bundled model including all of the following:

- assessing strength and weaknesses of each side’s case
- predicting impact of settling and court outcomes
- urging parties to settle
- proposing settlements
Reality is More Complicated

- Elements of bundled models vary in their effects.
- Mediators often use interventions from both models in response to situations at different times in a case.
- Merely asking a question implies some opinions.
- “Reality-testing” questions imply that mediator thinks that a party has an unrealistic view.
- Mediators often express opinions using facial expressions, tone of voice, and body language.
More Complications

- Mediators imply opinions when they ask a series of questions about a topic.
- Mediators “selectively facilitate” discussions when they ask more “reality-testing” questions about one party’s perspective.
- Parties may feel pressured in marathon mediations.
Controversy about “Evaluation”

- Assumption that mediator “evaluation” necessarily causes inappropriate pressure and undermines self-determination.

- Litigation often is stressful, and some parties may welcome moderate pressure to settle the case, especially if principled and applied to both sides.

- Lawyers often welcome some pressure when they believe it’s in their clients’ interests.
False Assumptions

Mediators shouldn’t make false assumptions:

- “Merely” asking questions can’t undermine parties’ decision-making / self-determination
- Giving assessments, coaching, making proposals etc. necessarily undermine parties’ decision-making / self-determination

Instead, mediators should tailor interventions to circumstances in each case and pay attention to actual effects on parties’ decision-making
Let’s Start From Scratch

Watch this video carefully
Now that facilitative and evaluative mediation concepts have been vaporized from your brain, consider unbundled interventions responding to parties’ needs in the moment:

- Asking questions and listening
- Helping parties assess their case
- Referring clients to talk with lawyers, experts, associates etc.
- Providing information and resources
- Assessing issues and options
- Coaching and giving advice
- Making suggestions or proposals
- Predicting outcomes
- Applying pressure
Helping Parties Make Good Decisions

- Key should be helping parties make careful decisions to help them achieve their goals and overcome settlement barriers.
- Mediators’ interventions depend on factors such as:
  - What help parties ask for
  - Parties’ decision-making competence
  - Whether some or all parties are represented by lawyers
  - Relative power of parties
Mediators’ Choices

- Mediators’ interventions should focus on parties’ goals and barriers to agreement
- Appropriateness of mediators’ interventions depends on factors such as timing, amount, quality, and confidence of their statements
- Mediators can choose interventions based on their mediation philosophies
  - So “facilitative” mediators can choose which interventions to use or not
Litigation Interest and Risk Assessment

Mediators can focus on litigation interest and risk assessment factors to help parties develop bottom lines and mediation strategies:

- Expected court outcome (aka BATNA value)
- Future tangible costs
- Future intangible costs and interests
LIRA book has appendixes with questions such as:

- What are your goals and concerns in this case?
- How might you achieve your goals?
- What do you think are other side’s goals and concerns?
- Why have parties not be able to settle so far?
- How would going to trial affect your goals?
- You may be pretty sure you can convince a judge or jury about some issues and less certain about others. Which parts of your case are you confident of winning, and which do you think that there is some risk of losing?
Mediators’ Input

Mediators who think it might be helpful to express their views might ask questions such as:

- Would you like to hear my opinion about any issues?
- If you go to trial, it may harm your interests more than you expect because XYZ. What do you think?
- Would you like to hear my assessment of the strengths and weaknesses of your case?
- Would you like some suggestions about how you might respond to the other side's last offer?
Chapter and Appendixes for Mediators

The LIRA book includes:

- Chapter on mediators’ use of LIRA techniques
- Appendix with model questions for mediators to help parties do LIRA assessments
- Appendix with guidance to help parties and lawyers prepare for mediation
Information about LIRA Book

For description of book, lots of resources, and link to order, go to tinyurl.com/ybc5ou68.

For 25% discount, use code 25LIRRA.
For More Information

- Blog post: [Merging Mediation Models – and Other Lessons](#)
- Blog post: [Lawyers Are From Mars, Clients Are From Venus – And Mediators Can Help Communicate in Space](#)
- My website: [law.missouri.edu/lande](#)
- My blog: [http://indisputably.org/author/john-lande/](#)
- My other blog: [http://mediationblog.kluwerarbitration.com/author/jlande/](#)
- My email: [landej@missouri.edu](#)