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Legal Practice Tips

FACILITATIVE MEDIATION:

The alternative dispute resolution alternative

By Carol Weigler and Jerard Weigler

Lawyers everywhere field inquiries from clients or potential clients seeking advice and recommendations about their disputes. More often than not, the facts are intertwined with a large emotional component. The customary response (well-learned in law school) largely requires filtering out the emotional aspects — then analyzing the facts as they fit into a statutory and common law template to decide whether there is a 'case,' how 'strong' it is, the potential remedies or defenses and the projected costs of proceeding.

It may be the unusual attorney who includes in his or her preliminary fact gathering questions such as 'What is the most important part of this for you?' or 'What do you want to have happen?' and really probes for an unvarnished response. The answers can sometimes be a surprise. The largest possible monetary award may not be a primary goal of parents whose child has been accidentally killed. A face-to-face meeting with the tortfeasor's company president to discuss what happened and talk about product or premises safety improvements to avoid similar accidents could be at least as important to them (if not more) in achieving personal closure. A favorable court decision in an employee age discrimination claim, following lengthy discovery, including disruptive co-worker depositions, may not be the primary goal of a human resources manager who wants an early win/win closure with minimal departmental stress.

The dispute resolution method called facilitative mediation might well serve these clients better than extended litigation.

Mediation is a dispute resolution method increasingly utilized by lawyers. However, the word has come to describe a variety of processes. Lawyers most frequently think of it as occurring in pending cases close to either a trial or to a dispositive motion hearing and involving a degree of judgmental evaluation by the mediator. This is often referred to as 'evaluative' mediation. The purpose of this article is to distinguish that process from 'facilitative' mediation, which involves direct party-to-party discussions aimed at helping people to participate in accomplishing their own solutions.

What is it?

Facilitative mediation is based on different intent, assumptions and actions than evaluative mediation. Evaluative mediators see their role as assessing, valuing and recommending resolutions for parties in order to get 'movement' toward a negotiated settlement and release. More often than not, the mediator's opinion as to predicted court outcomes and recommended result are an integral part of the evaluative model, which has become a widely accepted adjunct to the litigation process. Because this kind of mediation usually occurs well along in the progress of a lawsuit, it continues the adversarial stance usual throughout the life of the case. Disputants try to make their positions look as strong as possible, and their opponents' as weak as possible. Lecturers now give CLE seminars in how to 'win' at mediation and posturing is frequently the name of that game. Meanwhile, communication between parties generally takes place through their lawyers or between lawyer and mediator. Face-to-face meetings between clients are rare, frequently dispensed with altogether. The process resembles a serial or brokered negotiation between attorneys. Client satisfaction with the process is often dismal on both sides, no matter what the ultimate negotiated 'number.' This is particularly so if there has been a prior relationship of some kind between the parties.

In contrast, facilitative mediators attempt to help disputants to clarify their mutual understanding of the controversy, to shift the interaction from adversarial to collaborative and to work together on an acceptable solution. The focus of this kind of mediation is to facilitate direct communication between the parties, resting on the assumption that parties can work out their own solutions with the help of a neutral mediator who guides the process between them. The work of a facilitative mediator requires different competencies, training and standards of ethics regarding the role of the 'neutral.' This method has very deep historic roots as an alternative to the adjudicatory system of resolving private conflicts between individuals or between individuals and groups. In modern times it has been used to obtain mutually satisfactory outcomes in labor-management, intra-corporate, community, environmental, contractor/owner, domestic relations and land use disputes.

Among the aims of a facilitative mediator are: promoting understanding between parties; focusing them on exploring their interests rather than maintaining a position; shifting the interaction to a collaborative rather than a competitive one and helping parties to creatively seek a resolution tailored specifically for their situation. That solution can be whatever the parties decide it should be, and the creativity and relevance of solutions are often the most satisfying aspect of the resolution for participants.

These concepts may shock litigators trained to think only in 'war' mode, but not all disputes that people bring to lawyers can be stripped down into 'who pays whom how much?' Many can be resolved equitably and satisfactorily by direct dialogue and cooperative thinking between the parties. Every conflict in which professional guidance is sought should not be promptly viewed through the lens of potential billable hours or a prospective contingency fee. In many situations, the possibility of suggesting facilitated mediation as a way to put the conflict to rest should also be considered because it might better fit the circumstances.

Lawsuits and evaluative mediators focus on the history of a conflict or dispute, try to assign fault and to 'price' damages at the highest (or lowest) amount possible. There are certainly many cases for which this is the most desirable procedure. Facilitative mediation, on the other hand, includes only the amount of history the parties think pertinent, and is focused toward the future — how can this be resolved, and how can the parties move forward. Thus, resolutions may contain creative agreements about a variety of future actions.

Facilitative mediation offers a real alternative to many clients, precisely because it is not in the adversarial stance of most legal interactions. One of the important possibilities this model offers is its understanding of and attention to emotions. In contrast to traditional dispute resolution models, practitioners think of emotions as an important part of the resolution process, and their training includes how to help parties surface their feelings, voice them, validate them and honor them in the process.

Emotions

During a recent OSB CLE seminar on the topic of emotions, a panel of three experienced circuit judges agreed that the role of client emotions could not be overstated in the process of achieving settlement. As one judge observed, 'The bottom line of every case I've ever settled is one or both participants' perception that they have been dishonored or disrespected.' Those trained in the law rarely take the time to explore with clients how they feel about the matter. Some lawyers believe the whole idea might be disruptive or even dangerous, whereas facilitative mediators have been trained to open up the talk between parties and use the emotions that may flare up, validate them and work through them to a resolution. As one judicial panelist wryly noted, 'In many cases it isn't about the money or how many feet of property they are going to get or who caused the accident; it is about the apology and the recognition of fault and error in a society where we are not allowed to say, 'It is my fault and I am sorry.'" Research has shown that disputants rate the facilitative process with high satisfaction because they can participate and because they feel that they have been heard.

When does it work?

When, then, should facilitative mediation be considered? The key word is 'early.' Existing controversies that enter the litigation system soon sustain what have been aptly termed 'process injuries,' as flying demand letters, complaints, counterclaims, depositions and discovery efforts quickly escalate the adversarial posture (and blood pressures) of the respective 'opponents.' A lawyer might want to refer the client directly to a mediator, who will carry the other party and arrange a meeting to try to resolve the problem. A call or letter of that sort from a lawyer will usually be rejected or promptly provoke the appearance of an adversary, whereas facilitative mediators commonly arrange such meetings between individuals or with organizational representatives anxious to avoid expensive litigation. Insurance claim representatives and counsel might consider that option before wading in with Rule 21 motions and lengthy requests for production. Keep in mind that all mediators require confidentiality agreements prohibiting use of statements made in mediation in any other context.

However, lawyers may be hesitant to recommend such direct communication. As another settlement judge has observed about a situation where she brought the two parties together in chambers for a face-to-face dialogue followed by a successful resolution, 'Letting go of control can be very scary for the lawyers.' The fact is that the dispute arose between the parties themselves, not the lawyers, and they are frequently quite capable of working out a reasonable solution if given the chance to do so in a protected setting.

What kinds of cases

There are some kinds of cases that are particularly right for facilitative mediation: Situations where there needs to be an ongoing relationship between the parties — in the workplace, between neighbors, or disrupted business relationships such as supplier-customer. Some individual vs. institution situations — such as education, medical or alternative healing disputes could definitely benefit from facilitative mediation. Other situations which suggest facilitative

mediation as the best possible strategy are families who are planning for or negotiating elder care or guardianship issues and, of course, divorce/custody where it is already commonly utilized. Smaller contract disputes such as for services, real estate and building/remodeling work can frequently benefit from facilitated mediation. The Construction Contract Board has already incorporated mediation into its dispute mechanisms and other state agencies include mediation as part of their process as well.

New ways of thinking about the role of attorneys are being considered as a means of enhancing law practices. For instance, the acceptance of unbundled legal services or 'discrete task representation' permits an engagement limited to initial analysis and advice about applicable law (including cautions about statutes of limitation) with a referral directly to a mediator for attempted resolution. It could also include advice about explaining the position or helping to draft any ensuing agreement. Alternatively, if the monetary aspect is \$5,000 or less, it could include sending the client to small claims court where the results of facilitated mediation have been impressive. In some situations, an attorney could help prepare a pro se complaint in an effort to induce the other party to consider early dialogue — and perhaps, mediation.

Resources

There is a wealth of trained mediator resources available in Oregon. Some have law degrees and others do not, but many are highly effective in this type of dispute resolution. Some are skillful at either style of mediating, but it is hard for others to entirely relinquish the idea of evaluating the 'proper' legal outcome and then trying to sell it to both sides. It is entirely appropriate to discuss mediation experience and style with these specialists before referring a client or a matter to them. The OSB Alternative Dispute Resolution Section has increasingly begun to cooperate and offer presentations in cooperation with the Oregon Mediation Association, the largest organization of professional mediators in the state. See the website at www.omediate.org. Some of the mediators who advertise in the *OSB Bulletin* have training and experience in utilizing facilitative mediation techniques. Another local website, www.mediate.com, also lists Oregon mediators and publishes a great deal of information and interesting articles.

This state has a variety of community dispute resolution programs to help in neighbor vs. neighbor disputes, including residential and business problems. Information about these and other programs may be found on the website for the Oregon Dispute Resolution Commission at www.ordc.state.or.us. Lastly, the OSB ADR Section has an excellent site of its own for further information at www.osbadr.homestead.com.

When lawyers field initial inquiries from clients or potential clients, the more strategies they have available to address the situation, the more likely it is that they can be of help in truly resolving the issues that prompted the inquiry. Including facilitative mediation as one of these tools can open up some new possibilities.

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