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Evaluative and Directive Mediation: All Mediators Give Advice

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This short paper discusses:

- A working description of evaluative, advisory, challenge or directive mediation
- Degrees of information, opinion and advice
- The variety of factors which contribute to the conflicts between “types” of mediation
- The advantages of evaluative mediation
- The disadvantages of evaluative mediation
- Predictive conclusion

Working description

“Evaluative”, “directive”, “advisory” or “challenge” mediation is a common type of mediation. Like all forms of mediation, health care, engineering, lawyering and management, it has many subtypes and variables.

A working description of evaluative mediation is a dispute resolution process whereby a person with some expertise in a particular field meets with two or more disputants, encourages them to negotiate within and across their respective teams; and collects alleged facts, evidence and arguments, and gives information, opinion and advice which varies in tone, timing and content.

The expertise of the advisory mediator may be for example, in farming, building, child development, “law” generally, or some specialisation of “law”.

Eventually, the different words, now used interchangeably, such as “directive”, “evaluative”, “advisory”, and “challenge” (there are probably more), may

acquire more precise meanings and create names for various sub categories of evaluative mediation. In this paper, the words are used interchangeably.

In many countries, including Canada, USA, UK, and Australia, there are flourishing pockets of advisory mediation, particularly in routine negotiations between personal injury claimants and insurers.

Human beings are accustomed to employ alleged experts to give information, opinion and advice—doctors, plumbers, financial advisers, mechanics, etc—so it is not surprising that mediators are also employed to give various forms of advice. Many conflict resolution processes obviously have “substantive opinions” introduced other than from a mediator. Sometimes this results in “duelling experts” such as engineers, lawyers, valuers, doctors or anthropologists. An evaluative mediator provides two roles for the price of one—as a process facilitator of the meeting, and as (another) substantive advice-giver.

Variety of Information, Opinion and Advice

The information, opinion and advice given by many mediators (like other professional helpers), whether offered in privacy, or in joint meetings, varies in timing, tone and content from the subtle to the very direct.

For example:

*“I’m confused”

* “Have I understood you correctly—“

* “How will you prove that --?”

*” What if your boss/judge/doctor disagrees with that statement?”

* “Which of the experts is wrong? At least one of them must be.”

* “Am I correct—there are three arguments each way?”

* “That is a novel argument.”

* “Your employer will have to give evidence”

* “Can I tell you what is the normal pattern in these kinds of disputes?”

- * “ Do you know the current statistics on how these disputes turn out?”
- * “ I could be wrong, but I can foresee four problems for your business if this dispute continues.”
- * “There are 3 popular methods at present to value businesses.”
- * “ On my maths, your costs exceed the probable returns”
- * “Please rank what you think are your two best arguments.”
- * “ As an outsider, only one of your arguments has impressed me so far.”
- * “What are the precedents for that kind of outcome.”
- * “ Why would a judge make that kind of order?”
- * “ I think that you are very optimistic.”
- * “ That suggestion does not have a snowball’s chance in hell—“ etc

Factors in the Fog of Debate between Various Mediation “Types”

The flourishing pockets of evaluative mediation have led to ongoing emotional debates –often more heat than light. This is fog is dense at least because—

1. There is an understandable tendency for commentators to compare a single type of evaluative mediation with a single type of facilitative or therapeutic mediation. Obviously, this need for stereotype misses the reality that each type has many shifting and subtle hybrids which reflect aspects of the others.
2. The best of one form of mediation service is often compared to the worst of other “types” (“wonder” versus “horror” stories; surgery versus chemotherapy stories).
3. Unemployed mediators of different “schools” are predictably disappointed by gossip that other “schools” appear to be more employed.
4. Mediation trainers tend to unjustifiably promote their own product as the “best”. The majority of trainers teach facilitative or therapeutic

models of mediation; and overrate their own usefulness, and discourage use of evaluative mediation types.

5. Mediation students who have invested time and money into training, tend to faithfully insist, based on their own sunk costs, that their learned model and guru are “best”.
6. All mediators give information and advice, despite protestations to the contrary, and have not studied the many gradations of tone, timing and content of “advice” which they are giving.
7. It has been a convenient historic fiction for a young profession to suggest that mediators do not give “advice”---rather only information, or advice on “process”. This fiction has assisted a young and developing profession to survive the fear campaigns and turf protection of older monopolies, such as (especially) **lawyers**, (“Do not give legal advice, or else---“—whatever that under- analysed concept means?); **psychologists** (“Do not give advice about the emotional realm”--ouch); **financial advisers** (“Do not give advice or information about financial or tax topics”—aargh); **valuers** (“Do not give information or advice on how to value anything”---woops); **cultural experts** (“Do not stumble into the multiple errors of advice giving across cultures”—oh no); **child development experts** (“Do not give advice about what is helpful for children”—but, but--); **life coaches** (“Do not negligently reduce life conflicts to legal categories when conflict is about the meaning of life”—would I do that?); etc.

These truths, pontifications, bluffs, threats, lies and turf wars for the last 30 years have not led to a single successful lawsuit on the planet against any brand of mediator for once only or systematic boundary crossing into other alleged professional monopolies.

Arguably, the vast majority of judges are reluctant to scare mediators when these people are relieving the courts of the majority of the difficult cases languishing in their lists; when many mediators are providing dispute resolution services for the poor and middle class when no one else is doing so; judges are probably not interested in the flood of satellite disputes about what was or was not said by mediators at mediation meetings, and when this crossed some vague professional boundary, and whether any comments were the “cause” of behaviour

and loss. No doubt there will be an occasional crucifixion of an evaluative mediator or two in the next few decades where the boundary crossing is blatant, and disaster follows.

8. Funding agencies tend not to care about turf protection and labels between professional groups. They just want a high rate of settlement for low dollar expenditure.
9. The poor and middle class in western societies can rarely afford the services of courts, lawyers, or lawyer-mediators. They will continue to seek and receive “all kinds of advice” from cheap mediators (or anyone else who is free or cheap), who are trying to provide some kind of service, as compared to none. Some lawyers and judges may complain informally about “advice-giving”, but they have neither the will or resources to provide low or no cost negotiation, mediation or “legal” services to the poor and middle class.
10. National accreditation authorities, (influenced by facilitative mediation trainers—including the writer), have predictably favoured accreditation in one model of mediation---namely a broad or narrow version of facilitative mediation. It is a challenge to examine and accredit the multiple different substantive specialties used by advice giving mediators—eg construction, child development, negligence, change management in organisations etc.
11. Lawyers are obviously more comfortable with lawyer-mediators, who are in turn more comfortable with traditional shuttle and advice- giving negotiations. This pattern of comfort gives evaluative-lawyer mediators market dominance in any conflicts which have been converted into “legal” categories. Of course, these are statistically a tiny minority of social conflicts.
12. Judges are always managing conflicts which have been squeezed into legal categories, and are usually comfortable when references are made to mediators with an evaluative “legal” perspective---preferably respected legal colleagues who will cover all “legal” loopholes, and therefore minimise chances of return to the judicial list of “problems-to-be-solved”.

13. The strengths and weaknesses of each competent model of mediation service are often not discussed, written about or researched in a balanced manner (compare again the health professions).
14. Some experienced mediation services, reluctantly and against their own ideological convictions, have decided to change their commitment solely to facilitative mediation models. In what direction?
Towards using an alternative advice giving model for those clients diagnosed as uneducated, or violent, or mentally ill, or alcoholic, or drug addicted—perhaps at least 50% of the population in industrialised modern societies?
Such a conclusion has not fitted well with their historic commitment to brainstorming and problem-solving by consensus.
15. Even though evaluative mediators give advice on facts, evidence, “rules” and conventions in their own area of expertise, they **inevitably** (as do other professional advisers), wander or leap into giving advice concerning topics about which they have no professional qualification--- such as publicity, loss of business, deterioration of health, value of money, behaviour of officials, what is normal---especially when clients reach the “last gap” in negotiation and decision-making.

The above factors suggest that the debates about “types” of mediation and negotiation will continue—How many? What boundaries? Who provides? When?

Such debates have arguably matured in other professions such as health care, where tensions, competition, limited funding and research exist, sometimes helpfully, between surgical, chemical, psychological, exercise and do-nothing interventions.

The writer suggests that as these ongoing similar mediation debates are unpackaged, the debates become more helpful, rather than fog and noise.

Here are some of the pros and cons of the various schools of “evaluative mediation”.

Advantages of Evaluative Mediation

Evaluative mediation (and hybrids thereof):

1. Provide a short form of mini-trial unencumbered by the many procedural rules attached to a full court process. Thereby there is often helpful clarification of alleged facts, evidence, rules and monetary ranges, which have previously been blurred by noise and tactics.
2. Provide a fresh insight into how an outsider, in a role play as a judge, may view certain aspects of the dispute. Yet mediation also enables a disputant to “back-out” if (s)he does not agree with the mediator’s opinion.
3. Provide a helpful second opinion when one or more of the disputants are not listening to their “first” expert.
4. Appear to provide relatively fast and cheap production-line settlement of thousands of negotiations between personal injury claimants and insurers.
5. Give justification for middle managers to settle disputes with the seal of approval of an expert. (“The mediator confirmed that the outcome is in the normal range”).
6. Provide a comfortable environment for lawyers who are experienced with handling discussions about alleged facts, evidence, rules, monetary ranges, advice-giving officials, and shuttle negotiations.
7. Are the only models of mediation experienced by many lawyers and give the lawyers “control” of both content and process. Therefore any other models are usually resisted.

Disadvantages of Evaluative Mediation include:

1. Some disputes, especially those involving ongoing relationships, are unhelpfully referred by habit to evaluative mediation (“misdiagnosis”).
2. Many lawyers have not been exposed to different models of mediation, and are not motivated to have such experiences with unknown risks to clients (chicken and egg). They do not have a stable of mediation “types”.
3. Once at an evaluative mediation, the mediator by habit may do minimal preparation, and allow the negotiation to continue on the lines of alleged facts, evidence, rules and monetary ranges. This habit fails to systematically analyse other causes, risks and goals, appropriate interventions, and other than monetary solutions.

4. The tendency to favour shuttle negotiations and lawyer control. Thereby key information exchange and brainstorming between the disputants in joint meetings does not take place.
5. These first four disadvantages have led many (important?) clients to label their experience of mediation as “isolating”, “lawyer dominated”, “unhelpful”, “a waste of time”, “too focussed on money”, and worst of all for any service industry—“not –to-be-repeated”. As lawyers “lost” the businesses of tax advice and litigation, will they also gradually “lose” the mediation sector of the market to more diverse and client-oriented providers?
6. Importantly, evaluative mediators move between the negotiating groups or tribes carrying messages, offers and persuasion to “move”. Therefore, by strategy and habit, each group lies to the mediator about alleged facts, evidence, rules and monetary ranges on each “line” of the negotiation. Then the mediator routinely carries lies and deception. (S)he is deceived by the sender; and distrusted by the receiver. Accordingly, the mediator usually rewords or softens each message in ways unknown to the sender—“This is their first offer”; “Their current view is---”. Thereby the usefulness of the mediator as a trusted adviser decreases; and each party carefully hides any life or business goals from the mediator, fearing that (s)he will “leak” in his/her role as persuader in the other room. Standardly lawyers ask the mediator to “leave the room”, so that they can have the allegedly “real” and confidential conversations with their clients about their actual goals and risks, before resuming the deceptive role play when the mediator returns!
7. Evaluative mediators who rely predominantly on their substantive expertise become unemployable outside that narrow specialised area. This is not a problem where there is a steady flow of work in that area. Anecdotally, the most employed evaluative mediators also appear to be highly competent in “process” and “people” skills. If this last sentence is more than anecdotally correct, there is yet another overlap between the “types” of mediation, and the behaviour of all regularly hired skilled helpers.

Conclusion and Prediction

As mediation continues to be used in interesting and different ways in many areas of conflict, remarkable diversity in practice is inevitable. The labels for mediation will probably expand beyond twenty—still well short of the over 400! “types” of therapeutic counselling. Evaluative mediation and an array of derivative hybrids will continue to be popular both with some users and funding bodies.

This pattern will lead to some minor turf struggles, and unhelpful attempts to create mini-monopolies by certain mediators and trainers.

The writer is confident that with the passage of time, repeat users of mediation services will slowly expand their repertoire of “types” of mediation and personalities of mediators, and use more sophisticated diagnosis and preparation to match the “right” disputes with the appropriate mediation service and personality.