

**BRINGING AN EVALUATIVE
COMPONENT TO YOUR AGENCY'S
DISPUTE RESOLUTION EFFORTS**

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OBJECTIVES

- ❑ Understand this growing technique in the field of ADR, especially mediation
- ❑ How does it fit in with general principles of mediation
- ❑ Pros and Cons
- ❑ What we are doing in Philadelphia

Types of Mediation

- ❑ To understand an Evaluative approach, let's first review the two other primary types of mediation:
 - ❑ Facilitative
 - ❑ Transformative

Facilitative Mediation

- In the 1960's and 1970's, this was the only type of mediation being taught and practiced – which is now being called “Facilitative Mediation”

Facilitative Mediation

- In a facilitative mediation, the mediator assists the parties in reaching a mutually agreeable resolution to their dispute

Facilitative Mediation

The Mediator:

- ❑ Asks questions
- ❑ Validates and normalizes parties' points of view
- ❑ Searches for interests underneath the positions taken by parties
- ❑ Assists parties in finding and analyzing options for resolution

Facilitative Mediation

- ❑ The facilitative mediator does not:
- ❑ make recommendations to the parties
- ❑ give his/her own advice or opinion as to possible outcome of the case
- ❑ predict what a court would do in the case

Bottom Line ...

The Facilitative mediator is in charge
of the **PROCESS**, while

The Parties are in charge of the
OUTCOME

Transformative Mediation

- Primary concern of the transformative mediator is to help the parties alter the way in which they relate to each other.
- Thus, while settlement is a possible outcome, it is not the only outcome or even the primary outcome

Transformative Mediation

- ❑ Empowers the parties
- ❑ Gives recognition by each of the parties of the other parties' needs, interests, values and points of view
- ❑ Goal: yielding a transformation in the parties' relationship

Transformative Mediation

The Mediator will:

- ❑ Listen
- ❑ Ask questions
- ❑ Summarize (without changing the meaning)
- ❑ Help the parties identify and understand the issues about which there is conflict
- ❑ Identify and assess options (including non-settlement options)

Evaluative Mediation

- ❑ A process modeled on settlement conferences held by judges
- ❑ The evaluative mediator assists parties in reaching resolution by pointing out the weaknesses of their cases and predicting what a judge or jury would be likely to do

Evaluative Mediation

- So what might an evaluative mediator do?
 - Make formal or informal recommendations to the parties as to the outcome of the issues
 - They are concerned with the legal rights of the parties as opposed to the needs and interests, you see, e.g. in facilitative or transformative

Evaluative Mediation

- ❑ The evaluation is based on legal concepts of fairness
- ❑ The evaluative mediator assists the parties and attorneys in evaluating their legal position, and the costs and benefits of pursuing a legal resolution rather than settling in mediation.

Evaluative Mediation

- ❑ In this type of mediation, the mediator is presumed to have *substantive* expertise or legal expertise in the substantive area of the dispute (v. *Process* in facilitative mediations)
- ❑ Many evaluative mediators are attorneys.

What form should the evaluation take?

- ❑ Ask pointed questions that raise issues or imply answers
- ❑ Give an analysis of the case, including strengths and weaknesses
- ❑ make predictions about likely court results
- ❑ Suggest possible resolutions or specific settlements
- ❑ Apply some pressure

So...

How does this fit in with general principles of ADR, including mediation?

Administrative Dispute Resolution Act of 1996 (“ADRA”)

- Governs ADR in the Federal executive branch
- Every ADR professional who works for a Federal agency must abide by it

Core Principles of Any Type of ADR

- ❑ Voluntary
- ❑ Neutral
- ❑ Confidential
- ❑ Enforceable

Pros of Evaluative Mediation

- (1). Clients get an answer if they cannot reach agreement, and they want to know their answer is fair.

Pros of Evaluative Mediation

(2). Provides a short form of mini-trial unencumbered by the many procedural rules attached to a full court process

Pros of Evaluative Mediation

(3). Provides a fresh insight into how an outsider, in a role play as a judge, may view certain aspects of the dispute ... while still allowing a party to “back out” if he or she does not agree with the mediator’s opinion.

Pros of Evaluative Mediation

- (4). Appears to provide relatively fast and inexpensive “production-line” settlement of cases
- (5). Gives justification for middle managers to settle disputes with the seal of approval of an expert

Pros of Evaluative Mediation

(6). Provides a comfortable environment for lawyers who are experienced with handling discussions about alleged facts, evidence, rules, monetary ranges, advice-giving officials and shuttle negotiations.

Pros of Evaluative Mediation

(7). Are the only models of mediation experienced by many lawyers and give the lawyers “control” of both content and process.

Cons of Evaluative Mediation

(1). The flip side of this last “Pro”: the popularity of this technique is due to the short-sightedness of attorneys who choose this method because of their familiarity with the process

Cons of Evaluative Mediation

(2). Concerns for loss of neutrality: it is not likely that an evaluation will please both parties and may please neither!

The result?

Cons of Evaluative Mediation

(3). Concerns for loss of confidentiality:

The mediator is in the privileged position of knowing confidential information and the evaluation will be made using that knowledge.

The result?

Cons of Evaluative Mediation

(4). Concern for loss of ownership by the parties: A key benefit to mediation is that it returns control to the parties.

Mediator evaluation challenges that benefit.

Cons of Evaluative Mediation

- (5). Entrenchment: While evaluation may overcome a deadlock, it may create entrenchment by one or all of the parties on their new position.
- (6). Collusion: A party may adopt the evaluation, perhaps insist that it vindicates their position, and try to enlist the mediator's help in persuading the other side to agree.

Cons of Evaluative Mediation

(7). Injury to client/lawyer relationship:

If the lawyer has been advising an outcome that significantly differs from that proposed by the mediator the evaluation may cause a problem between them.

What we are doing in the PDO?

Equal Employment Opportunity Commission

EASE

Administrative Settlement Envoy

What is EASE Initiative?

- EEOC Administrative Settlement Envoy
- Envoy: an official representative
 - Someone acting as a diplomat
 - the EASE envoy will be our “settlement official”
- A pilot program designed specifically for Federal sector cases

The Purpose of EASE

- ❑ It is a directed negotiations program
- ❑ Utilizes an evaluative approach
- ❑ Envoy functions to aid parties in resolving the dispute
- ❑ No vested interest in outcome
- ❑ Trained in ADR techniques and EEO law

What an EASE conference IS:

A Settlement Conference:

The parties, their attorneys, or both, appear before an impartial Envoy to discuss the issues and positions of the parties to the action in an attempt to resolve the dispute or issues in the dispute by *agreement or by means other than hearing*.

The Envoy is Encouraged:

- ❑ To explore strengths and weaknesses of the parties' positions and engage them in “reality checks”.
- ❑ This can be achieved without the Envoy formally stating their opinions of the likelihood of success at hearing
- ❑ Suggest terms of an agreement

STAKEHOLDERS

- Complainants
- Agency management (supervisors, mgrs.)
- EEO and HR representatives
- Private and Federal employment law practitioners

- **Bottom Line:**

- The EEOC Philadelphia District Office wants to work more closely with its stakeholders for mutual satisfaction

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THE END

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