October 2016, Volume 24, Issue 5

RESOLUTIONS

SUPREME COURT OF VIRGINIA

OFFICE OF THE EXECUTIVE SECRETARY

Department of Judicial Services
Division of Dispute Resolution

100 North Ninth Street
Richmond, Virginia 23219

EVALUATIVE MEDIATION:
Friend or Foe?

The mere mention of "evaluative mediation" makes many mediators cringe and cry out, "That's not mediation! Mediation isn't telling people what to do!" To a certain extent, this criticism is fair, and to a certain extent it is not. Evaluative mediation can accomplish some valuable goals. The larger issue is: how do we practice evaluative mediation while staying true to core mediation principles?

According to Virginia Code § 8.01-581.21, mediation is "a process in which a mediator facilitates communication between the parties and, *without deciding the issues or imposing a solution on the parties*, enables them to understand and to reach a mutually agreeable resolution to their dispute" (emphasis added). Furthering this concept is Virginia Code § 8.01-581.24, which allows a mediator to "encourage and assist the parties in reaching a resolution of their dispute" but not to "compel or coerce the parties into entering into a settlement agreement." All of this squares nicely with mediation's overarching goal of self-determination – that the parties come to their own solution instead of having one imposed on them. These concepts are continually re-enforced during the Virginia certification process, both in classes and in co-mediations.

Juxtaposed to all of this is a form of mediation typically conducted by retired judges (some certified, some not) that follows a different practice. The pattern typically includes a short introductory meeting with the mediator, the parties and counsel; the parties splitting up in different

[1] This same concept is echoed in Section E(3) of Virginia's Standards of Ethics and Professional Responsibility for Certified Mediators, which states that "[t]he mediator may not coerce a party into an agreement, and shall not make decisions for any party to the mediation process."

conference rooms; the judge spending extended time with each party to get to know them; and a full day of offers and counter offers shuttled between conference rooms by the judge, which hopefully (and often) results in a settlement. The judge's role can vary from listening to the parties and counsel – gently guiding them toward settlement, to essentially telling them how and why he or she would decide the case if it came before them in court. Lawyers seem to prefer more of the second approach since they may have been advising their client in one direction and need the judge's "amen" to get the client to finally take their advice.

This hardly fits the classic definition of mediation; however, very few participants in this process – probably best described as "directed settlement" – really care since it has a very high rate of settlement, much to the frustration of those practicing within the fundamental principles of mediation. Despite its approach, the directed settlement process is in demand.

Combining the directed settlement approach with mediation has created tremendous tension between mediators practicing within the mediation community. For instance, some mediators are frustrated that the parties are split up into different rooms, and do not actually hear each other or are not able to express thoughts and feelings directly to the other disputant. In order to respect their model, facilitative mediators preach self-determination regardless of whether it results in settlement; the legal community counters with, "don't be sanctimonious; these folks are going to end up in an expensive and nasty trial if we don't get a settlement today. Who cares how they do it?"

So, who's right? To answer the question directly – neither side is completely right or wrong. If directed settlement – where the parties are separated and the mediator shuttles between them – should not be characterized as mediation (as some claim), is there an evaluative mediation model that integrates the fundamental principles of mediation? Much of it comes down to how you view evaluative mediation and how evaluative mediation is conducted.

When evaluative mediation is conducted properly, those claiming it is not really mediation are wrong. It is a recognized and legitimate mediation model. In evaluative mediation, the mediator discusses the relative strengths and weaknesses of the each party's position and possible outcomes in court for the dispute at hand based on the mediator's training and experience. An evaluation does not involve the mediator rendering a decision. Rule 2.11(c) of the Rules of the Supreme Court of Virginia (which governs lawyers) allows a lawyer-mediator to give legal information to the client. Rule 2.11(d) goes on to allow a lawyer-mediator "to offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties." This same rule requires the lawyer-mediator to consult with the parties about the limitations of the evaluative style of mediation and to enter into an agreement with regard to which style(s) of mediation will be used. Furthermore, Section E (Self-Determination) of Virginia's Standards of Ethics and Professional Responsibility for Certified Mediators requires all mediators to adhere to this same standard.

When lawyers serve as mediators, they find it useful to be evaluative at times. For example, if the mediator is an experienced family lawyer, he or she can meet in separate caucuses with the parties to go over the likely outcomes if the matter went to court. Assume a mother yearns to relocate her children near her extended family in Ohio, but the father objects because he is an involved parent and the children are firmly rooted in their present schools and community in Virginia. The lawyer-mediator may go over Virginia Code § 20-124.2 (requiring courts to "assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children"), other statutes and various reported relocation cases, and discuss how all of these may affect a judge's decision. The lawyer-mediator's role is not to replace or act as the mother's counsel, nor is it to be a judge. However, disputants often find it valuable to get insight from an experienced neutral, especially if it avoids a costly, high-conflict court battle.

Evaluative mediation can accomplish some valuable goals. Most importantly, it can resolve the case and get the disputants out of their conflict. Pride may cause a party to resist conceding their position, but they may shift their position if they find reason in what the lawyer-mediator is saying, despite it resulting in more of what the other disputant wants. This allows for "psychological integrity." That is, the party did not concede, but merely re-aligned their position based on the evaluation.

Evaluative mediation also gives the disputants a real relationship with the person reviewing the matter. There is little, if any, interaction between a litigant and a judge. Judges are often uncomfortable speaking directly with litigants or asking questions for fear of being labeled an "activist" judge. Also, while judges are often required to explain their rulings, the litigant generally cannot ask questions if he or she does not agree with the ruling. It is not an interactive process. In contrast, evaluative mediation allows for the disputants and mediator to discuss the evaluation. This can allow the disputants to feel more connected to the process.

There are inherent dangers with evaluative mediation, and this is where the proponents of the other mediation models are right. First, it can contradict the prime directive of self-determination. While evaluative mediation is meant to give the parties additional information to help them resolve their dispute, it may appear that the mediator is formulating the solution instead of the parties. It also directs people away from the facilitative model where the parties are expressing their own thoughts and values. It can discourage disputants from discovering new ways to deal with their conflict on their own; they may feel the mediator is always needed to help resolve their conflicts. Finally, evaluative mediation inserts the mediator into the parties' conflict and can very rightly be perceived as the mediator taking one party's side – not because the

mediator agrees with that party, but simply because that party's position is consistent with the law or judges' tendencies.

The Standards of Ethics and Professional Responsibility for Certified Mediators protects against a controlling evaluative mediation approach. Section E(2) dictates that "[t]he mediator may not recommend a particular solution to any of the issues in dispute between the parties." Evaluative mediation cannot amount to telling people what to do. It should only be giving them more information to help them resolve their dispute consistent with the Standards.[2] When parties need to know what tax consequences might result from the sale of rental property or are anxious about how a particular custody schedule might affect their child, the mediator refers the parties to a tax specialist or child psychologist for an evaluation of those issues. Likewise, an experienced lawyer-mediator can go over the law; talk about similar reported cases or cases they have tried; and analyze the strengths and weaknesses of each party's position. If done correctly, this can be an effective tool.

There are several prerequisites to evaluative mediation. The mediator must be qualified to evaluate the case. This means the mediator has an extensive background in the subject area, especially in the law if the matter could end up in a courtroom. The mediator must have established a good relationship with the disputants, and have a good grasp of all relevant facts. Additionally, all other methods of mediation must have been exhausted or appear nonviable. Then, and only then, should evaluative mediation be considered.

The Rules of Professional Conduct are very clear about what the lawyer-mediator may and may not do when conducting evaluative mediation. Comment 8 to Rule 2.11 provides that:

> The lawyer-mediator shall not, however, make decisions for any party to the mediation process nor shall the lawyer-mediator use a neutral evaluation to coerce or influence the parties to settle their dispute or to accept a particular solution to their dispute. Paragraphs (d), (e), and (f) restrict the use of evaluative techniques by the lawyer-mediator to situations where the parties have given their informed consent to the use of such techniques and where a neutral evaluation will assist, rather than interfere with the ability of the parties to reach a mutually agreeable solution to their dispute.

If a lawyer-mediator – whether a retired judge or a lawyer-mediator – attempts to force his or her solution on the disputants, it would be a violation of the Rules of Professional Conduct. Certainly, evaluative mediation is contemplated by the Rules and by mediator ethics, so it is more of *how* the mediation is conducted rather than *whether* it is conducted. This means that

[2] Section F of The Virginia Standards of Ethics and Professional Responsibility for Certified Mediators allows for a mediator to provide information where qualified, but warns at Section F(2) that a mediator "may give information only in those areas where qualified by training or experience and only if the mediator can do so consistent with these Standards."

the “evaluation” part of the mediation should be presented as additional information for the disputants to consider in formulating their resolution. If a disputant rejects the information, the mediator can answer questions or try to further explain his or her position. However, it would be patently wrong for a mediator to try to coerce or influence the parties toward the evaluation.

There is room for everyone at the mediation table, but we all need to respect and learn from each other. Non-lawyer-mediators need to accept that lawyer-mediators do have valuable education, training and experience to support evaluative mediation that they may lack. The lawyer-mediators need to understand that the facilitative mediation model is based on a wealth of social science and proven history of helping pull people out of conflict. While law schools and bar associations may offer a course or two on conflict resolution, many of the non-lawyer-mediators have studied and practiced non-evaluative mediation models with years of great success. Having this dialogue in an open, honest and respectful fashion will begin to bridge the gap between these schools of thought.

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