

How Much Evaluation Should Be Mixed into a Mediation Session?

By Tom Arnold

The Alternatives ADR Ethics Forum on ethics issues appears quarterly. The column is produced in affiliation with the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR. If you have a question about ADR and ethical obligations or a scenario has arisen in your practice that you would like to submit for analysis, please send it to Alternatives c/o CPR Institute for Dispute Resolution, 366 Madison Ave., New York, N.Y. 10017-3122 or E-mail it to <<Alternatives@cpradr.org>>.



Florida is embroiled in the question of whether its rules should permit a mix of evaluation and advice into the mediation process. The state's proposed Rule 10.037 is in hot debate. There are well-known proponents on both sides.

Some of the people against mixing evaluation and advice into a mediation are those most skilled in getting settlements without evaluation and advice. Some of the persons who are for mixing evaluation and advice into a mediation are, by personality and low questioning skills, neutrals who tend to skip the careful testing questions for the parties and counsel, and arrive at their own conclusion and try to push the parties toward it.

Let's go back to the beginning.

From about 1987 to about 1990, essentially all U.S. students of mediation were taught the classical concept of pure facilitation by the mediator. That is, no evaluation or advice in mediation. "Early neutral evaluation" was thought of as a separate ADR process, or several alternative ADR processes, such as moderated settlement conferences, summary jury trials, etc., and for some reason not to be mixed with mediation. The bias this way was in part because it had a different label, and the different name served to be a place to keep the mediation process pure.

The author is the founder and a name partner in Houston's Arnold, White & Durkee. He is past president of each of the A.A. White Dispute Resolution Institute, the American Intellectual Property Law Association, and the Executives' Association of Houston, and is coauthor of a patent ADR treatise and four other intellectual property law books.

But at conference after conference in recent years, where the big consumer-users of mediation occupied the podium, I have heard repeatedly from users expressions like:

- "I want the mediator to beat up on me, because that is the only way I can have confidence that he is beating up on the other guy. I want that."

"Beating up on" is a form of advice and coercion I don't usually indulge, but many users

want it. In some styles it is not always bad. More quotes:

- "Early neutral evaluation is a mediocre process as a stand alone, but is a marvelous mix into mediation. It is stupid to preclude the use of neutral evaluation as a mix into mediation when we users want and need it."
- "Where did the stupid idea that mediation users don't want a heavy mix of evaluation and advice come from? I expect it. And I've many times seen my adversary turn squarely to the mediator and ask, 'What should I do?'"

And from extremely well-known mediators with terrific reputations, I've heard words like:

- "They pay me, so they are entitled to what I think, right or wrong. That's part of what they are paying for. They expect that from me."

IT'S WHAT CUSTOMERS WANT

My son, a 38-year-old lawyer who has taken mediator training for about 80 or more classroom hours and who has served as a mediator, said to me recently about a case in which he was counsel looking for a mediator: "Dad, the parties have negotiated to exhaustion. What we need is a mediator who will evaluate the case and give some very strong advice. If we have only a facilitator of further pure party negotiations, it will be a waste of time. Do you know any good mediators who work in a highly evaluative and directive style?"

I did, and I named some well-known names for him, like Eric Green, who heads Resolutions LLC in Boston, Harvard Law School Prof. Robert Mnookin [an *Alternatives* editorial board member], and Washington, D.C.-based mediator and neutral

(continued on page 62)

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TO THE HIGH COSTS OF LITIGATION

Publisher
James F. Henry

Editor
Russ Bleemer

Staff Editor
Elizabeth S. Plapinger

Alternatives to the High Costs of Litigation
(ISSN 0736-3613) is published monthly
by the CPR Institute for Dispute Resolution.

Editorial and Business Offices:
366 Madison Avenue,
New York, NY 10017-3122.
Tel: (212) 949-6490.
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Internet: www.cpradr.org

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