

COMMITTEE NEWS

Dispute Resolution

Transforming Torts: How Can the Transformative Mediation Model be Applied in Torts Litigation?

“It’s not the destination; it’s the journey” – Ralph Waldo Emerson

Introduction

Attorneys and litigants gravitate towards the mediation process when resolving torts-related disputes, due to the cost and time effectiveness afforded compared to the litigation process. While the destination for most participants in mediation is resolution or settlement, the journey in how they get to that place will vary depending upon the mediator’s mediation model. The transformative mediation model is an attractive alternative to the evaluative and facilitative models. The model offers unique benefits for participants along the mediation journey, particularly related to party empowerment and recognition, and it surpasses other models when upholding the mediation value of self-determination. Due to transitions caused by the COVID-19 pandemic, social justice reforms, and technology, now the time may be ripe to revisit and to reconsider the mediation model used when resolving

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Courtney Chicvak

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Courtney Chicvak is an attorney, a mediator at Courtney Anne Chicvak Mediation LLC, a faculty member at Columbia University and Grand Canyon University, and a negotiation coach for the Women in Negotiation (WIN) Summit.



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Chair Message

Our Spring Newsletter is here!

With many thanks to Frederick Alimonti for his masterful work in developing the newsletter and identifying so many talented authors I am pleased to announce the publication of the Summer 2021 TIPS DR Committee Newsletter.

This issue is full of insightful, informative, and practical articles about types of mediation, mediation techniques, confronting challenging issues in mediation, and considering the mindset of the participants in working toward a successful mediation.

The articles cover the emotional component of mediations (where the amount at stake might not be huge but the where the nature of the dispute is tremendously important to the parties); the benefits of transformative mediation; important considerations in establishing the 'tenor' of the mediation; the importance of full explanations; the value of pre mediation sessions.

It is always interested to hear 'war stories' from others – whether you are a lawyer representing clients in the mediation process or a professional mediator.

Enjoy! ➤



Deborah Greenspan

Blank Rome

Deborah Greenspan is a leading advisor on mass claims strategy and resolution. Her practice focuses on class actions, mass claims, dispute resolution, insurance recovery, and mass tort bankruptcy. She has extensive experience in mass products liability matters, class actions, analysis of damages and future liability exposure, insurance recovery, alternative dispute resolution ("ADR"), claims evaluation and dispute analysis, settlement distribution design and implementation, claims management and risk analysis. Debby also has substantial experience in private mediation and is currently serving as the Chair of the Dispute Resolution Committee of the Tort Trial & Insurance Practice Section of the American Bar Association.

Deborah has been appointed several times by judges and government institutions to serve as a Special Master. These appointments include Special Master responsible for developing and implementing a settlement program to distribute funds to more than 100,000 Vietnam veterans; and Deputy Special Master for the September 11th Victim Compensation Fund of 2001, responsible for establishing the policies for and facilitating the distribution of more than \$9 billion to victims of the September 11th attacks. She currently serves as the Special Master in the Flint Water Cases litigation.

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The “Mediation Mindset”

I share a few thoughts from the middle seat on mediation preparation. Much has been written on factual and legal preparation, so I share some thoughts on the mediation mindset.

A lot depends upon the case, its emotional impact, and tension levels. Hopefully, these reflections have some value in most mediations.

Discard the “Winning” Trial Mindset

Mediation is not the place for attacks and withering cross-examinations. I am a strong proponent of the joint session and opening statements. But it must be approached with care. The opening statement in mediation is targeted to the other side, and they are not an objective recipient – they have very strong and probably differing views of the case. Note that I did not say that the opening is targeted to the mediator. While it may help the mediator, she is not the primary audience for the opening.

Since your adversary would never sit on a jury in your case, it makes little sense to open as you would before an unbiased jury. You are unlikely to convince the other side to agree with you. What you can accomplish is to respectfully set out your views and the risks to the parties in further litigation. I suggest you ALWAYS end with an olive branch – even if nothing more than an expression of your own open mind and willingness to listen, along with a thank you to the other side for embracing the mediation process.

It may well be that you have to make some arguments that the other side must reject and refute. It is always wise to temper these arguments with something conciliatory, such as recognizing the risks of trial and the jury process. The subject matter will vary from case to case, but the effect of these words can be transformative. Assuming you have agreed to mediate – as opposed to a mandatory court-annexed mediation – your willingness to settle and compromise is a given. There is no harm in expressing it openly.

I have attended many a mediation in which a party took the approach of announcing this was a case they were “sure” to win. Apparently, their voluntary appearance was nonetheless somehow coerced, or the other side should thank them just for showing up. This is NOT and auspicious beginning.

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Frederick Alimonti

Frederick (“Rick”) Alimonti is a Mediator and Arbitrator with offices in New York. His law practice emphasizes aviation law. His mediation practice areas include torts, insurance coverage, employment discrimination and, of course, aviation. Rick is a member of the Mediation Panel for the U.S. District Court for the Southern District of New York and a Co-Chair of the ADR Committee, TIPS Section, American Bar Association. www.alony.com (law practice); www.aloadr.com (mediation site).

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THE BRIEF



The Hard Question: When to Bring Evaluation into the Mediation

Introduction:

At some point in your mediation career, you will be asked this question. “What is your mediation style?” The question asks where one sits on the spectrum between facilitative or evaluative styles of mediation. It’s a hard question to answer because mediation is a dynamic process that requires different approaches throughout the session(s). Your style has to change and adjust to the needs of the parties, progress made (or not) and most importantly - what you are hearing.

Frequently, evaluative techniques have to be deployed to bring sides closer. Mediators use them throughout the day. Does being evaluative early in the day make one an “evaluative-style mediator?” Or does it simply mean that one side or another asked you for your opinion or assessment on an aspect of the litigation, and you gave it?

In this article, we consider some approaches when evaluation takes center stage. It’s a tricky area. Evaluative discussion can be a sobering experience for attorneys and clients. Discussing the weaknesses of one’s case, for example, often after having believed one was entirely in the right, is hard. Moreover, evaluative questions from the mediator can create tremendous defensiveness and reactivity. Attorneys do not back down easily. Often, neither do their clients. The parties are relying on you to help them get to a resolution, but the process is not an easy one. When the time comes, either because parties and counsel asked you, or because you feel it is necessary, how do you bring evaluation into the mediation room?

What is Evaluation?

There are many, many ways to help parties evaluate their case, but let’s break it down into the most critical piece. **Evaluation is when the mediator and/or the parties assess individual components or the overall outcome of a case.** Evaluation may be in the form of questions asked by the mediator, or when the mediator offers an opinion or an assessment on some aspect of the litigation. Mediators do this, or some of this, all the time, but when and how do we consider these critical issues?

Lay the Foundation for Evaluation with Strong Facilitation:

We have never begun a mediation with an aggressive evaluation of a party’s case. There are many reasons for leaving evaluative techniques and questions until later.

[Read more on page 16](#)



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Adam J. Halper is a mediator, arbitrator and attorney. He specializes in mediating family, matrimonial, employment, commercial and trust and estates disputes. In addition to his private practice, he is on the roster of neutrals for the American Arbitration Association and for several state and federal courts.



Bart J. Eagle, Esq.

Bart J. Eagle is an attorney in private practice focusing on commercial litigation, a mediator and an arbitrator. He is on the roster of mediators for the AAA, the NYC Supreme Court Commercial Division, the SONY, and the NYC Bar Association’s Co-op and Condo Mediation Project; and is on the roster of arbitrators for the AAA. Mr. eagle is co-chair of the NYSSA Dispute Resolution Section Mediation Committee., chair of the NYC Bar Association., s State Courts of Superior Jurisdiction Committee, a member of the NVSBA Commercial and Federal Litigation Section, and a member of the NYC Bar Association’s Council on Judicial Administration.



Three Strategies for Making the Most of a Mediated Settlement

With more than 40 years of mediation experience, BBB AUTO LINE, a division of BBB National Programs that resolves disputes between consumers and vehicle manufacturers, may have seen – and heard – it all.

There was one car owner, not too many years ago, who wanted a new luxury vehicle via her warranty because she was convinced that she heard the brakes squeak upon every push of her brake pedal.

Cases such as this end up being mediated with an outcome that lands someplace between the wishes of the manufacturer and the vehicle owner. And while often neither party walks away completely happy, rarely are both parties completely disappointed. After all, their voices were heard. And when the chips fell, both parties moved on with their business and personal lives.

The first step in the arbitration process, mediation, is a hallmark of the BBB AUTO LINE program, which launched in 1982. From 2015-2020, 65% of all eligible manufacturer claims were resolved via mediation between the parties.

Over the years, we have learned that success in mediation comes as much from utilizing emotional intelligence as it does from knowing the nuts and bolts – and the legalities – of the mediation process. Here are three strategies for making the most of a mediated settlement.

1: Recognize Different Points of View

One common equivalent in nearly all mediation cases is the need for everyone in the room to recognize that theirs is not the only valid point of view.

The vehicle owner is passionate about the vehicle they have chosen to drive. Owning a vehicle can be as much as – or more – a personal brand statement as it is functional transportation decision. Some people even “name” their car.

On the other side of the table is the manufacturer. While vehicle manufacturers always balance their need to provide quality customer service with more pragmatic internal objectives, we have come to recognize that the manufacturer’s heart is in their product as much as their head.

Recognizing and translating this emotional investment on both sides of the mediation table is essential to BBB AUTO LINE’s success within BBB National Programs that

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Juan Herrera
BBB National Programs

Juan Herrera is a 25-year veteran of BBB AUTO LINE who following service in the US Navy began his civilian career as a dispute resolution specialist, is VP, Dispute Resolution Programs, BBB National Programs. To follow up on this article, Juan can be reached at jherrera@bbbnp.org. To learn more about BBB National Programs, visit www.bbbprograms.org.



Earning Your Spurs in Small Claims Mediation: You Will be Wiser for the Wear

It was, quite literally, a war of the roses:

A New York socialite, known for throwing extravagant parties, had planned a 60th birthday brunch for a hundred of her friends in her penthouse apartment overlooking the city.¹ She hired an up-and-coming florist, and they made plans to adorn her living room and dining room with elaborate arrangements of orchids and hydrangea. Everything looked promising until the morning of the party. That's when the florist arrived with a truck full of wilted flowers, and only enough to decorate a fraction of the apartment. The hostess was stressed all morning, as the florist scrambled to procure new flowers. The end-result was nowhere near what the hostess had anticipated for her big day.

At least according to her. To hear the florist tell it, when he got to the party, he was met with a screaming client who demanded flowers to cover, not only the dining room and living room as planned, but also enough for a lobby area, bathroom, and entrance. According to him, although his floral arrangements were perfectly fresh, she insisted that he rush to the flower market to buy even fresher ones. As a result, he ended up spending more to meet her demands than he actually made that day.

Now, the florist and the socialite were sitting in front of me in a small claims court hearing room, both pouting as they tried – often unsuccessfully – to listen to the other one speak without interrupting. As is often the case in small claims cases, the parties had signed a contract, but it was too vague to address the dispute at issue. The florist was looking to recoup the extra money he claimed to have spent on additional flowers on the day of the brunch.

I don't remember how much the parties settled their case for that day, but I will always remember the fiery passion of the socialite, who blamed the florist for ruining, not only her party, but her reputation as a top hostess in her elite social circle. I also can't forget the indignance of the florist, who was adamant that he had done nothing wrong and was worried that his own reputation was not going to survive this ill-fated job and its aftermath. As he walked out of the hearing room that day, he turned to me sadly and said, "Flowers are supposed to bring beauty, not lawsuits."

Though Small Claims Court is so named because of the relatively low dollar value of the disputes brought there, the events that bring the parties to Small Claims often loom large in their lives and in their memories. And although many mediators bypass Small Claims in favor of more sophisticated venues, it can be a source of invaluable learning. Perhaps more than even "regular" court disputes, Small Claims



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The events that bring the parties to Small Claims often loom large in their lives and in their memories



cases ignite a special passion in the aggrieved parties. In many cases, the claimed amount – however modest – represents a small fortune for the claimant. And when the parties appear for mediation, they are often looking for more than a financial resolution. Sometimes, they are seeking out a listening ear and a way to process a distressing experience.

Take the college student whose roommate skipped town without paying her share of the monthly rent. Now the student was unable to cover her rent and was forced to move back home for her final months of college. Although the two roommates' dispute was ostensibly about money, it was also about friendship, betrayal, and the difficult life lessons learned in early adulthood.

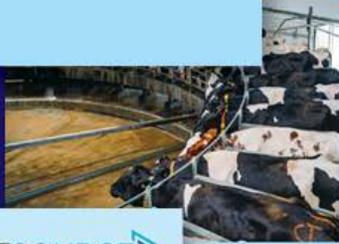
Then there was the woman who sued her dentist over what she claimed was poor dental work. She presented piles of paperwork that she said evidenced dental malpractice. The dentist had her own papers demonstrating that none of the claimed damage was her fault. Most of the technical information and the x-rays submitted by the parties were impossible for a lay person to understand. What was clear was the distress and pain – both emotional and physical – that the whole episode had caused the claimant.

In the scores of small claims cases I've mediated, I have never seen a litigant walk away with a lot of money, but I almost always leave with a good story, and a greater appreciation for our justice system, where there really are no small claims. It has also been a great training ground for dealing with emotionally charged cases, irrespective of the amount in controversy. ➤

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Endnotes

¹ Details have been changed throughout this article.



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torts-related disputes. This article describes the transformative mediation model, assesses how the transformative mediation model benefits attorneys and litigants and challenges those in the torts alternative dispute resolution community to rethink how disputes resolve.

The Transformative Mediation Model

The transformative mediation model defines the term conflict broadly as any “crisis in human interaction,” which leaves everyone involved in a state of weakness and self-absorption.¹ The transformative model views mediation as a conversation with the participants’ setting the goal of anything from promoting understanding among those participating to reaching an agreement or resolution.² Established early on through the mediator’s opening statement, the parties indicate their preferences for the conversation, and the mediator honors each party’s perspective and viewpoint on how they would like the conversation to take place.³

Through the mediator’s application of the four transformative intervention techniques, the parties shift from states of weakness and self-absorption to empowerment and recognition.⁴ Signs of weakness include confusion, fearfulness, or disorganization.⁵ When a shift to a state of empowerment occurs, the shift causes behaviors like clarity, confidence, and decisiveness.⁶ Examples of self-absorption include defensiveness, self-protectiveness, or suspicion of others, with the shift to recognition involving attentiveness and openness.⁷ Once the shifts from weakness to empowerment and self-absorption to recognition occur, there is an interaction between empowerment and recognition, multiplying the effect.⁸

In the transformative model, the mediator carefully listens and observes the parties’ behaviors and their communication, including wording and tone, to identify the behaviors and signals listed above, indicating weakness and self-absorption. Upon witnessing weakness and self-absorption, the mediator will apply one of the four transformative interventions: reflection, summary, check-in, or silence.⁹ Reflection is when the mediator repeats back to the parties what they hear, like a mirror, using both tone and words, to demonstrate understanding and to help both the speaker and other participants better understand what the speaker said.¹⁰ A summary provides a map to participants of the topics discussed and captures each person’s perspective on the topic.¹¹ A mediator uses silence when consciously refraining from adding to the parties’ conversations, and checking in involves seeing how the parties are doing during the conversation.¹² Check-ins assess whether there is anything else in the conversation that the parties need, and it is the only time a mediator will ask a question.¹³

The transformative mediation model defines the term conflict broadly as any “crisis in human interaction,” which leaves everyone involved in a state of weakness and self-absorption.



Benefits of the Transformative Model

While all mediation processes share the foundational principles of confidentiality, voluntariness, self-determination, impartiality, and neutrality, the transformative model provides the participants the most significant opportunity for self-determination.¹⁴ The Model Standards of Conduct for Mediators defines self-determination as “the act of coming to a voluntary, uncoerced decision in which a party makes free and informed choices as to process and outcome.”¹⁵ Emphasizing individual empowerment and recognition over resolution places the least amount of pressure on the mediation participants in deciding an outcome that works best for them and that provides the maximum flexibility for results.

Similarly, the mediator’s interventions provide the least amount of intrusion on the parties. Narrowing the scope of interventions that the mediator uses moves the spotlight from the mediators and onto the parties, leaving the guiding voices in the conversation as those of the parties. Unlike other models, the mediator does not move ahead of the discussion by emphasizing settlement, nor does the mediator ask questions that could guide the conversation or offer legal opinions. Furthermore, the transformative mediation model rarely caucuses and places the power in the parties’ hands, having everyone in the conversation participating in their own, unique way. Additionally, attorneys have more flexibility in supporting their clients during the mediation process, because it provides more space for advocating for their clients in the way they see that best fits.

The concept of party self-determination is essential in torts-related disputes, because both an injured party and the alleged tortfeasor experience weakness and self-absorption and could benefit from experiencing the shifts offered in the transformative model. It’s not uncommon in a torts-related dispute for Plaintiffs to feel not only protective of themselves, a signal of self-absorption, but also fearful of what the future may hold for them after sustaining any injuries, a sign of weakness. Similarly, defendants may experience defensiveness for being accused and confusion over what the future holds if they do not prevail. Providing parties with the opportunity to make shifts allows for a more holistic solution than other models while also allowing for space for the participants to achieve their desired outcomes.

Conclusion

Because society is in a time of reset due to the COVID-19 pandemic, social justice campaigns and technology, tort dispute resolution may have to undergo a paradigm shift. Societal injustices and power inequities are overarching trends that will drive the expansion of holistic, person-centered resolution processes in the future,

Narrowing the scope of interventions that the mediator uses moves the spotlight from the mediators and onto the parties



which will likely extend to those in torts litigation. Although change will require time, patience, and education, and understanding, the outcome will probably be a better resolution process for all involved. ➤

Endnotes

- 1 Institute for the Study of Conflict Transformation, Inc., *Mediation: Principles & Practice (The Transformative Framework)* 9 (2010). Note that the definition of conflict is distinct in the transformative model and includes any interactions between people, including those involving legal claims and disputes, which sets it apart from many other perspectives on the definition of conflict.
- 2 See Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation* (2005); Institute for the Study of Conflict Transformation, Inc., *Mediation: Principles & Practice (The Transformative Framework)* (2010).
- 3 Id.
- 4 Id.
- 5 Id.
- 6 Id.
- 7 Id.
- 8 Id.
- 9 Id.
- 10 Id.
- 11 Id.
- 12 Id.
- 13 Id.
- 14 Robert A. Baruch Bush, *Hiding in Plain Sight: Mediation, Client-Centered Practice, And the Value of Human Agency*, 35 *Ohio State Journal on Dispute Resolution* 20 (2020).
- 15 American Bar Association, *Model Rules for Mediators* (2007), available at https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf

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The “Mediation Mindset”... continued from page 3

Bring the Right People.

The decision makers have to be there. Meet with your client beforehand to discuss the upcoming mediation. Your client may have misconceptions about the process, and perhaps a different agenda. It is important that you be on the same page. The uninitiated client should understand that this is a conciliatory process more than an adversarial one. (Nonetheless, as I will discuss in an upcoming article, sometimes a client needs the cathartic relief of a “day in court,” and some emotional release can actually help the mediation process.)

The Attorneys Should Confer.

It is always preferable to go into mediation with some goal post offers and demands. In addition, if the relationship among counsel is a productive one, some joint preparation – often facilitated pre-mediation with the mediator - can also add to the potential for success. Simply being told by one attorney that the client is angry or upset can help the other side prepare for some emotional outpouring.

Prepare Yourself and the Mediator.

The value of pre-mediation consultations cannot be overstated. Putting aside the technical aspects, these sessions enable the parties to build a rapport with the mediator and to address some of the potential obstacles to settlement. Perhaps the most important issue to address here is any issue with your own client. On plaintiff’s side, it may be that your client has unrealistic expectations and/or is very emotional about the matter. Perhaps including the client in a pre-mediation session will smooth this out? Nonetheless, just knowing this is invaluable to the mediator.

On the defense side, perhaps we need more money on the table? Maybe the case is under reserved and a mediator’s imprimatur can help an adjustment. Many mediations involve negotiations both between and within the parties. Knowing this in advance will help the mediator’s mindset.

Understand the Ying and Yang.

Nearly all mediations, when we get to offers and demands, begin with the parties far apart. Often, each party considers the opposing figures coming at them to be, at least initially, unproductive and perhaps even insulting. Be prepared and prepare your client for this. The mediator can help here. However, particularly in the case of an emotional plaintiff, having reduced expectations for the early negotiations can take some of the edge off. I often tell the plaintiff that the other room is here to pay as little as possible to settle the case. That’s their job, and you should not take

The opening statement in mediation is targeted to the other side, and they are not an objective recipient – they have very strong and probably differing views of the case.

Perhaps the most important issue to address here is any issue with your own client.



it personally – just as it is your lawyer's job to recover as much as possible. This obvious and candid comment has never been poorly received. To the contrary, the parties often seem to find it refreshing.

Be Patient.

Trust the mediator to set the pace. It may often be true that the parties come to mediation with some overlap in their positions such that [you would think] the mediation can be completed in short order. This is unlikely. Progress is typically perceived as slow. The parties may be in different emotional places. Hopefully, the half day or day will be marked by productive discussions, effective input from the mediator, de-escalating tensions, and finally a settlement.

I hope these somewhat random commentaries are hopeful. See you at the big table! ➤

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The Hard Question... continued from page 5

First, there is great value in **developing trust and rapport** with each side. Caucus sessions are an opportunity to do so, and to have candid conversations with parties and attorneys. That rapport is often established by listening, actively, and trying to understand not only a side's positions – their “wants,” but also the “whys.” Helping counsel and parties to evaluate where they stand in a litigation (or potential litigation) is much easier when you have heard from them, in confidence, how and why they are in mediation. Second, facilitative techniques, such as using open-ended questions in caucus and developing options for movement, provide clients and attorneys with what they bargained for by coming to mediation, **self-determination**. Conversely, the more evaluation there is from the mediator, the more easily self-determination can slip away. Finally, a key component of caucusing is some element of **traditional bargaining**. The need to bargain is practically biological. Traditional bargaining is a form of communication and to skip to the end, through evaluation, is to neglect a piece of the conflict.

Know When to Begin Evaluating:

All of the above are why the traditional mediation model is facilitative, not evaluative. Most mediation training, at the very least, begins there, stressing how the process is intended to be party driven; that achieving a resolution is, and should be, the result of the self-determination of the parties. And for many mediators, and perhaps for many parties, the process should never veer from this approach. So, when to evaluate?

The Story Has Been Told: You have had an opportunity to talk with each side and their counsel. They have clarified various pieces of the litigation, or what led up to the present conflict. They have vented. You are confident that listening to the sides discuss only why they are right is not going to get you any farther. Also, the offers and numbers are not moving. You will know the moment when it comes. This is the moment to change the energy a little bit, state as much, and begin by stating affirmatively, “I'd like to look at this through their eyes. Let's do it together.”

They Ask You: Conversely, experienced counsel (and experienced clients) may simply ask you to evaluate the case with them. The best counsel (our personal favorites) ask you to walk through the steps of litigation, the risks involved, and your thoughts on possible next offers. The hope for every mediation is that it resolves the matter completely. In order of having any hope of getting there, parties recognize that it is invaluable to have a fresh pair of eyes review the strengths and weaknesses of a case. When a party or counsel turns to you and says, “what do you think,” begin slowly but surely on where you think they are right and where you think they may be overconfident.

Evaluation is when the mediator and/or the parties assess individual components or the overall outcome of a case.

Conversely, the more evaluation there is from the mediator, the more easily self-determination can slip away.



It Would Be Impossible Not to Evaluate: Confidence in one's case is important. Overconfidence can create blind spots. On occasion, a side will demonstrate a catastrophic miscalculation that can be seen from space. A common example, one we have seen, is where one party does not understand the law completely and dramatically miscalculates the strength of the case. In this moment, it is incumbent upon the mediator to assist by shining a light on this misunderstanding. The critical decision for the mediator is how to do this constructively and productively.

How to Evaluate:

Regardless of whether they proceed to mediation voluntarily, or are directed to attend by a court, parties and attorneys are coming for resolution. If you don't provide some evaluation of their positions, especially where they want and expect it, you may lose the chance. And rest assured, many want and expect it. Begin with questions.

Be Specific. Be specific and ask the parties to get specific as well. We begin by asking the parties and their attorneys to reality test their own case. For example, if the case relies heavily on documentary evidence, ask about what it really shows and what it does not. Often, parties have exchanged documents (or at least initial disclosures) and sometimes a blizzard of documents prior to the mediation. Unsurprisingly, they often have different opinions about what the documents mean for their side. At the appropriate time, give an opinion as to what the documents may look like to others, including a trier of fact. For example, "can't this document also be interpreted to mean 'X'?" For an attorney, being engaged in litigation can mean putting advocacy "blindness" on your eyes. Being a mediator requires you to help an attorney take them off for just a few moments. Likely, it will be enough. Get specific with your reality-testing questions and the doors to different ways of thinking about the risk may open.

Similarly, throughout the day, attorneys often ask for assistance in crafting settlement offers and counteroffers. Regardless of the settlement range, when the parties ask for help, they may be implicitly asking for some evaluative thoughts. If you feel comfortable doing this as a mediator, provide your thoughts on where other, similar cases have settled and work backwards to craft the next proposal. If you're not comfortable with this approach, even better, ask the attorneys to discuss where they think the cases in this particular area usually settle.

Moreover, if you are engaging in an evaluative discussion in caucus, it can be helpful to take the case analysis a step further. Discuss the likelihood of success on the merits and discuss what it will take to get there. Even where one side has assessed the probability of success as being very high, attorneys and clients may discount



the time, money and energy it may take to get there. At various times, we have offered opinions regarding witnesses (and their continued availability), the chances of actually collecting on a judgment, and the very real possibility that counterclaims will be seen as more than just a retaliatory gesture. We find that evaluation is critical as to everyone's understanding of the ultimate outcome of a case. Questions we have asked recently in caucus include — “What is the best-case scenario for a win and what is the likelihood of actually achieving the best-case scenario?” “If you get a judgment for half (or less), will it still be worth it to pursue the litigation?” “If you get a quarter of your best-case scenario, three years from now, and then have to try and collect, would you still want to litigate?” And an overriding question, “What will it cost to succeed?” What we ask counsel in evaluative discussion is to make sure they are not litigating themselves to the point of potentially winning the battle but losing the war. Our personal favorite, because no one ever seems to consider this, is “would you please tell me what will happen if you lose?” It is remarkable how distant a possibility that is for attorneys and for clients.

Be Broad: One way of bringing evaluation into the room, and to do so earlier, is to take a broader approach on the evaluative questions you ask as a mediator. We recommend using “softer” questions, such as those which raise the external pressures that impact every civil case. “Tell me about what this case means for you or your business.” “The litigation cost will be X, right?” “What would you give this matter, percentage wise, for prevailing or losing?”

By way of example, never has it been more appropriate to ask and provide some comment on the issue of time. “How much time will it take to get to a dispositive motion, trial and appeal?” “What are the costs per step?” “What are the costs to your business of having an on-going litigation; to produce documents; to appear for depositions; to prepare for and appear at trial?” Counsel may answer these questions broadly. Parties - their clients - on the other hand, can be devastatingly specific. Moreover, parties in an ongoing litigation may already be intimately familiar with the economic costs of a litigation and the disruptive power it has on the rest of business, or even one's life. However, if a party is new to litigation, generally, or if the mediation takes place at an early stage of a litigation, they should be made aware of it. The threat of a judgment that has to be paid, maybe for years, or to a plaintiff, one that may never be collected, is an ever-present issue. Further, no matter how business-oriented is any client or entity, there is another issue which needs to be evaluated. “How much longer do you want to wait while the court sits in judgment, not only as to the ultimate issue of right and wrong, but as to all of the other issues that may have to be decided to get there – such as a dispositive motion?”



Discussing, gently, the impact of a continuing conflict on parties, business, customers and other interests may be seen as a waste of time by counsel. So, a critical element of asking soft questions is to include a question about how much the answer to the question will cost. For example, how much does it cost for two or three people at a business to be dealing with the conflict for the next two years... roughly? For counsel, there is the fight and often, only the fight. And counsel may only be viewing the discussion of cost as limited to attorney’s fees and litigation expenses. For the client, the cost to their business is a real consideration, and one that they may not have thought about or discussed previously with their attorney. As mentioned previously, the reasons for settling in mediation may surprise you and may not be completely connected to the dollar amount at issue.

Offer Statements: We like questions, because it places the responsibility for the answers in the hands of counsel and parties – which is where it should be. Still, you have been hired for your expertise and your insights, in the form of statements, will likely be a piece of an evaluative discussion. We encourage you to tread lightly. Statements and opinions, if not given carefully, can have the effect of eroding the appearance of neutrality. By way of example, we offer some evaluative questions and statements, side by side:

Question	Statement
What are the strengths and weaknesses of our case here?	I think that this record (or lack thereof) is very significant.
If we try this case (motion) 100 times, what is the likely outcome for the majority of those times?	Given how many facts are in dispute, this is going to trial.
What don't they understand?	I don't think your arguments are as persuasive as you think.
What if the jury does not accept your position?	I want to help you resolve this so that you don't have to roll the dice with people you have never met.

These are different and the same, right? The question and related statement are intended to convey the same thought. However, how it is delivered – as a question or as a statement – may have a profound effect on how it is received. As a mediator, you can ask these questions or make these statements in an infinite number of ways. Be careful.

The relationship you have developed with the parties will inform how comfortable you are with either approach. Remember, the proposition in either column is always the same, “Are you certain about this position?” Looked at through the prism of



the absolute, the answer simply has to be, “no.” If the answer is “no,” then the field of discussion is less black and white than the arguments suggest. Maybe it is more gray. Arguments are discussed in the spectrum of bold colors. A mediated settlement takes place in a more nuanced shade of light.

Assessing Outcomes and the Cost to Achieve: Sometimes, counsel and the parties will need a more guided approach. During an evaluative discussion, we often discuss the likely outcomes of a case and the cost to get there, in very detailed terms. Some mediators work with decision trees, which diagram the percentages, and costs of different stages of the litigation to arrive at a “weighted cost,” or the expected cost per outcome. This can be a very effective exercise to do with counsel, especially in complex cases where there is a range of possible outcomes.

A simpler and perhaps, more commonly used approach, is to each party estimate the best and lesser potential outcomes of a case at different stages and the cost of getting there. For example, what is the cost of a plaintiff winning 100% of its claim on summary judgment? Or, of 50% of its claim? What would that net after legal fees? If they lose on summary judgement, how much more would it cost to prevail at trial? And of course, what if they lose the whole case?

You can make these analyses as complicated or as simple as you wish. As an exercise, they provide a valuable opportunity to walk through the litigation process and assign real numbers and values to pieces of the case. In writing this piece, we concluded that we, as mediators, do this type of exercise constantly in mediation. We think that the greatest value of doing so is that it forces everyone to start thinking in terms of numbers and hard realities. Whether you draw it on a piece of paper, use software, or simply talk it through, this cost/risk litigation analysis is a critical part of the evaluation process.

Make a Mediator’s Proposal: Finally, seen from a certain perspective, the mediator’s proposal is an evaluation of how the case can be settled. Full disclosure: some mediators do not agree that a mediator’s proposal is ever appropriate; that it is inapposite to the basic tenet of mediation – party self-determination.

For those of you who are not opposed to it, or who have not used it, or who do not engage in mediator’s proposals, it goes like this: The mediator, privately, suggests a settlement proposal to resolve the dispute to each side¹; it may just be a number, it may be, or include, the resolution of other issues. The parties are told that it is not negotiable. Each side, privately, tells the mediator whether or not they will accept it or reject it. If both sides accept the mediator’s proposed resolution, the parties are told that they have an agreement, and it’s time for drinks. If one party, or neither



party does, there is no agreement. If one side does accept and the other does not accept, the mediator simply tells both sides, “no deal.” The side that accepted the proposal is not prejudiced, because neither side knows the decision of the other.

We suggest not proceeding with a mediator’s proposal unless, after explaining how it would work, all of the parties agree to it. **We are very careful to communicate that our proposals are not evaluations of the merits.** In fact, we write those very words into the letter that goes with the proposal. We suggest that the mediator’s proposal is best used as the very last step in the day. By that point, hopefully, you have worked with both sides to come to a place where the gap between them is relatively small. At that point, what you have likely done as a mediator is to help both sides evaluate their own case and make moves towards each other. In some cases, the elements of a settlement, after significant time is spent in mediation, is apparent to everyone. However, one or both parties may not be able to make the offer or counteroffer that bridges the gap – pride, or ego, or anger, gets in the way. The mediator’s proposal can overcome this reluctance – the parties can say “yes,” while saving face. The mediator’s proposal is not the ultimate evaluation of the case. Rather, it is simply an avenue to cut through the dance of negotiations at the end of the day.

Conclusion:

If mediation begins with a facilitated discussion focused on party interests, think of evaluation as the end of the beginning. Evaluation can be difficult because it can be interpreted, by mediator, counsel, and parties alike, as a challenge to the present thinking of one’s case. We offer these approaches so that you may begin the evaluative part of a mediation, armed with the knowledge that you have laid the proper groundwork for the inquiry, and so that you can proceed deliberately. The suggestions we have outlined above are some of the tools that help make evaluation effective. At times, in caucus, it is very challenging to engage in this discussion. Still, evaluation, in many ways, is a natural part of a facilitative discussion. We think it adds to the building of rapport; to productive negotiation and, most importantly, to assist the parties to achieve a mutually satisfactory resolution of their dispute. ➤

Endnotes

¹ For purposes of this example, we are assuming a mediation involving two parties. However, the approach would be the same with a mediation involving multiple parties.

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Three Strategies... continued from page 6

was created in 2019 following a restructuring of what was previously known as the Council of Better Business Bureaus.

To assist in our assessment of the merits of a consumer's dispute, BBB AUTO LINE will always endeavor to provide the manufacturer with some context about the consumer's experience. This context will include details of the relevant lemon law, including number of repair attempts, or days out of service. It may also include why the consumer chose a particular vehicle, their history with the brand, how they have been impacted because of the problems, and how they have attempted to work with a dealership towards a successful resolution.

Our program is not a one-size-fits-all model, so case assessment is essential to ascertain whether mediation or arbitration might be the best fit for the desired outcome. Often, we provide both. The hope is that through robust education, both consumers and vehicle manufacturers can make an informed decision, void of emotions, about how best to achieve optimal results.

2: Establish Various Approaches to Shift Perspectives

As dispute resolution professionals, we know that disputants may routinely slip into a reality in which it is challenging to appreciate the perspectives of the other side, or they may come to the table with a pre-determined solution they seek without a full understanding of what it entails. Either way, their mind is relatively closed to discussion, and we need to open it.

BBB AUTO LINE mediators focus on finding ways to strategically highlight and share multiple dimensions about a dispute with each side, aiming to view the dispute through a collaborative lens. For example, we might explain to the consumer the difference between local dealership and corporate vehicle manufacturer, or that a warranty is a promise to repair the vehicle, but not a promise that it will be free of defects.

Often, our conversations with consumers address the requirements of a state's lemon law. If the consumer comes to the table not interested in mediation, determined to move to arbitration, we can help the consumer understand the questions an arbitrator will raise and then help bridge that situation with the manufacturer to avoid escalation to arbitration or to court, which is a final option that is always available to consumers in our program.

We will share with the manufacturer's representative the consumer's perspective of the case and why they believe their desired outcome is appropriate. We might

One common equivalent in nearly all mediation cases is the need for everyone in the room to recognize that theirs is not the only valid point of view.

You simply cannot do the work of building a safe and professional forum for dialogue without first building rapport and trust.



also touch on key requirements of the relevant lemon law to share the consumer's lemon law analysis and to highlight areas of arbitrator discretion. We often support this perspective shift by using a series of preparation discussions privately with each party before a mediated teleconference with both parties present.

3: Focus on Neutrality and Building Trust

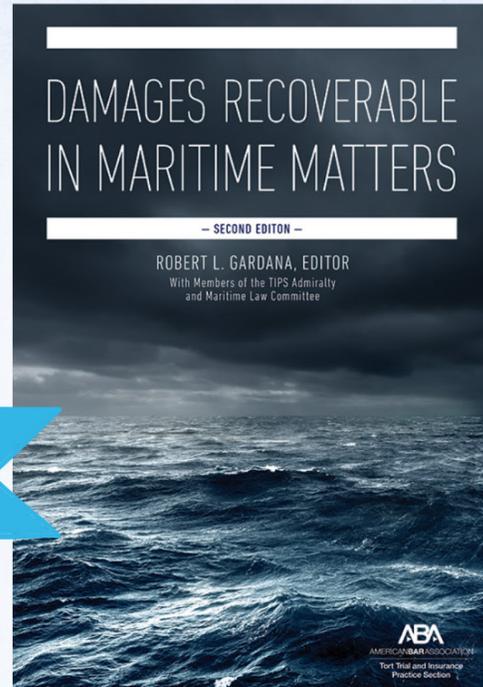
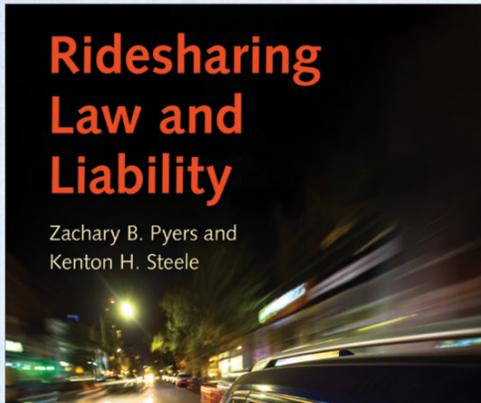
Particularly when a conflict concerns a basic human need like safe, reliable transportation, successful mediation can only be accomplished when the mediator is able to establish trust with both parties.

Our mediators spend time getting to know the needs of the consumer as well as the manufacturer, with each step of the process intentionally designed to keep the mediator in a neutral role, down to the location where in-person mediation takes place.

Though challenging, given our 40-day case timeline, we set out to intentionally build rapport with each disputant to encourage trust in us and our process. We spend considerable time describing our role and then work to help each party come to a better understanding of the other's position, all within the specific parameters of our program.

You cannot do the work of building a safe and professional forum for dialogue without first building rapport and trust. Creating a safe and professional forum for dialogue has led to tens of thousands of BBB AUTO LINE mediated settlements – more than 14,000 in 2020 alone. ➤

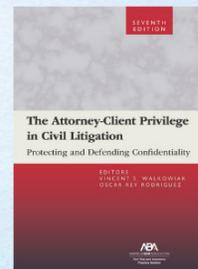
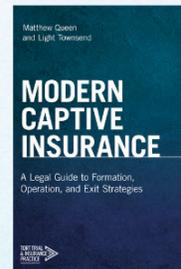
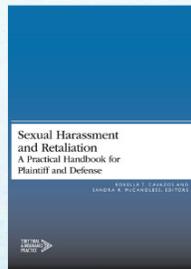
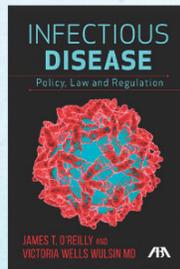
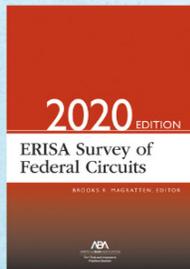
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