

EVALUATIVE MEDIATION : Q&A

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1) Do you think that evaluative mediation can cause friction between disputing parties, and therefore should be avoided during the early stages of a construction project, to avoid the risk of damaging relations?

Much here depends upon one's interpretation of the term "evaluative" mediation. The question assumes that facilitation and evaluation are mutually exclusive, whereas in reality that need not be the case. A mediator may drift backwards and forwards between approaches in response to feedback by the parties, as appropriate.

- a) *If by evaluative one means judgemental, providing the parties with a preferred, advised or mandated outcome as in conciliation then the parties can hardly complain if that is what they wanted and contracted for. It must be a matter of choice for them whether or not such a process would be valuable to them. On the other hand, it might be disconcerting for the parties to discover that this is what the mediator offers, without prior warning. Such mediation techniques have value in respect of social disputes and may be more useful for final account disputes than for the early stages of construction projects, since by taking the matter out of the hands of the parties, a dissatisfied party may find it difficult to subsequently maintain relationships with the other party. However, such an approach can be useful for those who sense that they are in the wrong to justify making concessions to their superiors.*
- b) *If by evaluative one means inviting the parties to engage in a reality check, brainstorming potential liability and judicial outcomes and factoring those considerations into their negotiations there is no reason why this should risk damaging relations. The parties remain in control at all times of the terms of the settlement. However, it may equally be beneficial to explore what the perceived cause of the problem is and potential solutions. If the parties can arrive at an agreed solution and a negotiated share of costs / responsibilities there may be no need to go down the line of evaluating litigation risks.*
- c) *Whether facilitative or evaluative mediation techniques are most appropriate depends very much on how and why the parties have arrived at mediation. In the Resolex format of on-going partnership negotiations cooperation must be the basic starting point. If relations are already strained a more robust approach may be needed.*

2) Do you think that evaluative mediation has an advantage over the facilitative approach at the end of a construction project, where the resolution is usually limited to a monetary outcome?

To the extent that facilitative approaches, as propounded by Fisher et al, concentrate on wider on-going commercial interests and relationships, the validity of such an approach is dependent upon whether or not there is likely to be a future on-going relationship. This is closely linked to the concept of fairness in mediation and equality of bargaining power. The danger is that where one party needs the other but not vice-versa, the facilitative approach emphasises the need for one sided compromise. If the mediator highlights the fact that one party has the other over a barrel, this is likely to fuel antagonisms rather than calm them down. Whether the evaluative or facilitative approach is adopted, much of the skill of the mediator is in creating the correct climate for negotiation, taking the temperature out of dialogue and opening up minds to avenues of discussion that might lead to settlement. Where neither party wants or needs an on-going relationship, personal interests will rise to the fore, leaving evaluative techniques as the primary tool available to the mediator. This is particularly so where one party is in or close to receivership or where much of the burden of settlement will be borne by a third party insurer or investor.

3) In your opinion, does the evaluative mediator need to be experienced in the area of the dispute?

The question as to whether or not a mediator needs to be an expert begs the question as to expertise in what? Firstly the mediator should be experienced and skilled at mediation. Further than that there may be expertise in the industry and or expertise in the settlement of and legal aspects of settlement in that industry. These are not one and the same. Which might be called for depends upon whether the disputed underlying issues are technical or legal/contractual or a bit of both. Often evaluative problem is reliant on the mediator having the necessary level of understanding to prompt discussion and evaluation in the first place. However, the big danger is of the so-called expert who thinks he knows the answer and is hell bent upon imposing it upon the parties and letting them know that he is the superior force in the equation.

4) If so, would a facilitative mediator, with little knowledge in the area, be less effective in resolving a construction disputes with their inherent technical issues?

The problem for a mediator who does not know much about the underlying industry and relevant legal issues is that he will be unable to direct the parties towards relevant factors they need to explore. Any efforts he makes to gaining an insight into issues will be reliant on the persuasive talents of the parties, which may not be equally effective, resulting in lopsided negotiations and will what ever else, use up valuable time that could better be used to develop a momentum towards settlement. Loss of momentum can be fatal to negotiations.