Midstream Mediator Evaluations and Informed Consent

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By John W. Cooley and Lela P. Love

Angel and her brothers, Martin and Christophe, are engaged in the mediation of a will controversy, involving the estate of their father. They are the only beneficiaries under the will. Five years before the testator’s death, he had provided his grandchild $50,000 for the down payment on a house. At the time of the payment, he had told his grandchild and Angel, the child’s mother, that the money was a gift; nonetheless, he required his grandchild to sign a promissory note for the full amount, saying the note was merely a formality to avoid gift taxes. Martin, the executor of the estate, found the promissory note among the testator’s papers and has deducted the full amount due on the note, plus interest, from Angel’s one-third share of the estate, giving her the note so that she can choose to collect it or not from her own daughter. Angel vehemently objected to her unequal share and to the characterization of the payment as a loan. After a heated discussion, the parties ask the mediator for his or her opinion on how the matter would be resolved in court. Both Angel and Martin feel sure they will be vindicated by the mediator; Christophe wants the mediator’s opinion to guide his own conduct. What should a mediator do, assuming he or she is competent to give the sort of opinion that is being asked for?

Anyone who dares to explore the field of informed consent in alternative dispute resolution quickly comes to appreciate the quagmire of differing expert viewpoints; of conflicting or silent codes of conduct, statutes, and rules; of divergent definitions of processes; and of the complexity of the topic generally. This article explores only one facet of informed consent: what principles guide a mediator in responsibly performing the duty of ensuring that parties give their informed consent prior to a mediator providing an opinion on the merits of a question once a mediation is underway. If the mediator was chosen because he or she would provide an opinion (a former judge, for example) or the parties contracted for evaluative mediation, then the analysis here would not apply. This article focuses on a mediator giving an evaluation when that was not an agreed-upon service when the mediation began. A similar analysis should be applied to any neutral performing a “new” service that is importantly different from what was expected: an arbitrator, for example, who takes on mediation services. There are dangers, in...
every case, in changing horses midstream. Both as a matter of responsible practice and to avoid liability, those dangers best be known and consciously accepted prior to undertaking the move.

In articulating principles and guidelines, we will have to answer: What are the dangers of providing an opinion or case evaluation while serving as a mediator? If there are dangers, what duties does a mediator have to warn parties? What should be said? What is informed consent in this context? Additionally, once consent is given, how careful must a mediator be in providing an opinion or professional advice?

Before proceeding, we should define what we mean by mediator evaluation that would merit warning and informed consent. We do not mean reality-testing questions (e.g., Have you considered getting legal advice about deducting the value of the note from Angel's share of the estate? How do you think a judge might view a signed note compared to a recollection of a verbal statement?). Nor do we include mediator role-reversal strategies to ensure that parties understand one another's perspectives and arguments (e.g., Did you understand Angel's point about honoring the representations and intentions of your father? Do you appreciate that Martin is more persuaded by a signed note than by your report about a statement made many years ago?) Despite an evaluative component in these questions, the questions call for party evaluation. If the mediator's tone is consistent with that call—as opposed to a tone that asserts a mediator's conclusion—such questions do not comprise mediator evaluation as the term is used here. A facilitative mediator regularly asks for party analysis about applicable law, leads a discussion about the strengths and weaknesses of their cases, and probes for alternatives and options. Examples of evaluative mediator behavior that would require informed consent include:

- Advising parties about their legal rights and responsibilities by applying legal rules and precedents to the specific facts of the dispute. (E.g., Angel is not liable on her adult daughter's promissory note. The testator's granddaughter will probably be found liable on the written promissory note despite parole evidence to the contrary.)
- Offering a personal or professional opinion on how the court will resolve the dispute. (E.g., You will not win this case in court. You have a very slim chance of prevailing with that argument.)

In these examples, the mediator is stepping into the decisional role of a neutral expert. While this article focuses on legal opinions, the same analysis would apply to other situations. For example, if the mediator comes from a different professional background (e.g., psychology, accounting), rendering evaluations based on expert knowledge would require the same treatment.

The Dangers of Mediator Evaluations

The benefits of a neutral (particularly expert) evaluation may be more intuitively obvious than the dangers. The benefits, from a party's perspective, might include enhancing the information base for decision making; reality-checking the overconfidence of the other side; using the trusted neutral mediator instead of needing to hire another neutral for an evaluation; and bringing public norms (the law) into the conversation to provide an acceptable basis for a resolution.

Those possible benefits must be weighed, however, against dangers that may not be as obvious, particularly to inexperienced parties. Unsolicited opinions often provoke defensive, even hostile, reactions, particularly if the opinion is unfavorable. Even solicited opinions can be unwelcome if they importantly differ from what is expected. Consider the following list of potential dangers in mediator evaluation:

- An evaluation might jeopardize the actual or perceived neutrality of the mediator, which in turn jeopardizes a mediator's continued usefulness;
- An evaluation might interfere with party self-determination (insofar as parties bow to a neutral's expertise and opinion rather than exercising their own judgment), detracting from the focus on party responsibility for critical analysis and creative problem-solving;
- An evaluation made on the basis of incomplete or limited information or based on inadequate research can be highly speculative and more likely wrong compared to an evaluation of a neutral specifically hired for that purpose; even if the evaluator is right, a subsequent arbitrator, judge or jury may not reach the same conclusion;
- Evaluation focuses the outcome on the criteria used by a third party (e.g., legal norms) when other norms—such as family or religious values—may be more important to the parties;
- An evaluation based in some part on information obtained in caucuses, without the opportunity for rebuttal by the other side, rests on inferior—or at least different—evidence than the evidence that an arbitrator, judge, or jury would have;
- An evaluation may end negotiations by polarizing the parties and entrenching their positions, in effect prolonging rather than shortening disputes where the party favored by the evaluation becomes more entrenched and the disfavored party loses confidence in the mediator;
In light of these dangers, one might imagine a mediator's opinion that disfavored Angel or her daughter, for example, ending negotiations, perhaps further damaging the already fragile family, and leading to litigation costs for the estate and parties that might exceed the $50,000 that Angel, Martin, and Christophe are arguing about.

The Mediator's Duty to Warn and Informed Consent

These significant dangers suggest a duty to warn. Under both torts and contract theories, a mediator's failure to warn might be actionable. In torts, the parties' reasonable expectation that the mediator will not change the agreed-upon or expected process absent meaningful disclosure and consent arguably creates a duty to warn. Negligence or malpractice liability could arise from a breach of this duty where there are damaging repercussions on the disputants' lives. Under contract theory, a failure to warn about a change in the agreed-upon process and its potential repercussions and to gain party consent might be a breach of either an express or implied term in the mediation contract.

With respect to a party's informed understanding of what evaluation by a mediator means, informed consent is a relatively straightforward concept. Simply put, parties are entitled to understand what they are requesting, or what is being proposed by the mediator, and to be forewarned of dangers they might face prior to their consenting to the mediator's provision of an evaluation. Once adequately warned, parties are deemed to have assumed the risk voluntarily if they consent and hence be responsible for the consequences of their choice.

What, then, constitutes consent to engage in an evaluative process? Any definition of informed consent should be carefully crafted to describe the precise scope of the consent to an evaluative process. At a minimum, a party's consent should cover elements that current mediation court rules generally require when an evaluation is contemplated, requested, or proffered. The scope of a party's consent should encompass a freely made, voluntary decision: (1) to participate in a specific type of evaluative process based on a clear understanding of the benefits, limitations, and risks associated with the process; (2) to be satisfied with the specifically described role of the neutral and the neutral's related ethical responsibilities in the evaluative process; and (3) to be satisfied with the nature and amount of any additional fees and costs charged by the neutral in conducting the evaluative process.

Principles for Adequate Disclosure

So we arrive back at the questions: What principles guide mediators in providing parties with information relevant to the parties' consent to a mediator's changing role? When must a mediator obtain consent to step near (or over) the line into a decisional, evaluative role into what has become known as "evaluative mediation"?

Responding to a Request for an Evaluation

You have asked me to give an opinion on the likely court outcome of this matter, and I am willing to do that if you both agree to my providing that service. However, you should understand that at least one of you may not like my opinion and may feel I am no longer impartial. If that happens, I may be unable to assist you further or may be less effective as a mediator. Also, particularly if you think my opinion is wrong, you may be disadvantaged by it in subsequent negotiations.

While I will do my best to give you a thoughtful opinion, you should understand I might be wrong—different lawyers come to different conclusions—and my analysis will be based on information that is different from what a judge, arbitrator, or jury would hear. While I have practiced in the area of trusts and estates, I do not consider myself a specialist. Also, my opinion will be based on more limited evidence than the evidence available in adjudication, since you have not completed discovery. In addition, because I have learned information in caucus and from confidential submissions that you have not heard or seen and hence cannot rebut, you must rely on me to separate that out from information I hear in joint session.

In any case, it is very speculative to predict what a particular judge might do. I advise you to listen to your own counsel (or to get legal counsel) to inform you and protect your legal rights.

Also, to the degree we focus on legal rights and the likely court outcome, it may distract you from looking for more creative solutions that might serve your interests better. This situation involves three generations of your family, and your family's values might be a more important basis for decisions than the likely legal outcome.

Are you sure you want me to give an evaluation?
A Clear Description

Any warning must indicate, with precision, the service being proffered and the various dangers to the mediation that are entailed. A mediator who begins in a facilitative mode and subsequently agrees to provide an evaluation might obtain informed consent by a statement similar to the boxed statement. (See Sidebar, "Responding to a Request for an Evaluation."

Early Warning

Because the caucus strategy of the mediator, the advocacy approach of any attorneys, and the willingness to share certain types of information of parties may depend on their expectations regarding the role of the neutral, that role should be clarified at the earliest point possible.

Often, however, it is at “final” impasse that mediators offer an evaluation as a last-resort impasse-breaking device. If the evaluation was not anticipated, then the mediator would simply give appropriate warnings before the evaluation is made—as early as possible under these circumstances.

Two points need to be made about “final” impasse. First, it’s not over until it’s over. Determining what constitutes final impasse is a tricky—and perhaps illusory—affair. Parties can always recommence negotiations and mediation after a particular session fails to achieve resolution. Consequently, the warnings are in order despite the feeling that the mediator may not be needed again. Second, parties frequently want an evaluation because they believe it will be favorable to them. Attorney want an evaluation because they believe it will make their clients more flexible or will benefit their clients. Evaluations, however, are likely to disappoint one (or sometimes all) of the players. Parties need clear, accurate, and reasonable expectations or a disservice can be rendered. A mediator does not want the final act, if it is the final act, of the mediation to do harm.

Standard of Care in Providing Opinions

How careful must a mediator be in providing an opinion or professional advice? If there is general disagreement and confusion about the required scope and content of informed consent relative to mediator evaluation, the question of what standard of care applies to the evaluation mirrors that disagreement and confusion. Some of the various theories that apply to informed consent are relevant to the degree of care that must be exercised in providing an evaluation. These include tort and contract law, as discussed above. Under any theory, one would expect the provision of an opinion to be done with care. Negligence law would apply a "reasonableness" standard. Contract law would ask about the agreement or reasonable expectation of the parties. We add to these points some principles:

- Always provide the basis and context of the evaluation. What information will the evaluation be based upon? What expertise does the mediator have? What research is being undertaken?
- Always urge parties to get independent evaluations, listen to their own lawyers (if applicable), and consult their own judgment.
- Go to the library or its electronic equivalent. That is, base the evaluation on a mode of thinking and conduct that an evaluator or opinion-giver would engage in. No lawyer, for example, should give an off-the-cuff opinion without research unless he identifies it as such and warns about its potential fallibility.

For Angel, Martin, and Christophe, the evaluation and its quality might have a dramatic impact on their relationships going forward. Their sense of entitlement, their ability to live with or be influenced by a certain conclusion, and their confidence in the neutral providing the opinion will all depend on the care that is displayed in the rendering of the evaluation.

Minimizing the Risks of Evaluation

Evaluation can be a risky move, and mediators should, as a baseline, do no harm in their practice. They should foster—and not undermine—party self-determination. Ensuring informed consent for mediator evaluation both minimizes the possibility of harm and maximizes the possibility of self-determination. Put another way, parties should have a meaningful choice regarding whether their mediator uses the tool of opinion-giving and should be aware of the dangers involved when they make that choice.

When mediators do provide requested opinions, they should do so with care. They should consider what information they are basing their opinion on. Is some of the “evidence” unreliable? That is, was it offered in a caucus where the other side had no opportunity to respond? Opinions based on such information are more likely to be unfair. Mediators should, metaphorically speaking, “go to the library” before giving advice. They should review, take time, and consult professional resources that would normally be double-checked before a professional opinion is provided. At the very least, the parties should understand what the decision is based on and its qualitative difference from an opinion a judge, arbitrator, or neutral expert would make.

Ideally, Angel, Martin, and Christophe—and other parties in mediation—will come away from the mediation process with a better understanding of one another and of the values that each brings to the dispute. They will feel that their expectations regarding the mediation process were honored and that the outcome of the process is a result of decisions that each freely made. If they requested a mediator evaluation, they will have no regrets because they understood the downside of that process before the evaluation. In short, they will have given informed consent based on adequate disclosures, and the evaluation will enhance, rather than compromise, party self-determination.

Note: This article is a condensed version of an article that appeared in the Ohio State Journal of Dispute Resolution in 2005: Lela P. Love and John W. Cooley, The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary, 21 OHIO ST. J. ON Disp. Resol. 45 (2005).