

2-1-2004

Facillitative Mediation: The Classic Approach Retains Its Appeal

Carole J. Brown

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Carole J. Brown, *Facillitative Mediation: The Classic Approach Retains Its Appeal*, 4 Pepp. Disp. Resol. L.J. Iss. 2 (2004)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol4/iss2/9>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Facilitative Mediation: The Classic Approach Retains its Appeal

Carole J. Brown*

On January 4, 1999, Rule 24.1 of the Ontario Rules of Civil Procedure¹ came into effect and established the Ontario Mandatory Mediation Program for civil, non-family, case managed actions in the City of Toronto and the Regional Municipality of Ottawa-Carleton. The Mandatory Mediation Program was first introduced in 1997 in the Regional Municipality of Ottawa-Carleton as a pilot project and subsequently expanded to the City of Toronto. On September 1, 1999, Rule 75.1 of the Ontario Rules of Civil Procedure² also introduced mandatory mediation on a pilot project basis for contested estates, trusts and substitute decisions matters in Toronto and Ottawa. This rule closely paralleled the provisions of Rule 24.1, the general mandatory mediation rule. The pilot projects under Rules 24.1 and 75.1 were to be revoked on July 4, 2001. However, on July 3, 2001, following a positive independent evaluation of the impact of mandatory mediation on the administration of justice, which was conducted by an Evaluation Committee comprised of members of the Bench, Bar, mediation community and the public, the mandatory mediation program under Rule 24.1 was made permanent and Rule 75.1 was extended to July 3, 2004. Since December 31, 2002, Rule 24.1 has been extended to a third judicial district, the County of Essex, and it is anticipated that it will be extended throughout the province of Ontario over the next several years.

In this additional step in the civil litigation process in Ontario, the mediator is assigned a primarily “facilitative” role. This paper advances the position that mandatory mediation in Ontario was not designed as a process where a third

* Carole J. Brown is a Partner in the Ottawa, Ontario office of Borden Ladner Gervais LLP, a national Canadian law firm. She was admitted to the Ontario Bar in 1984. She obtained her LL.B. from the University of Toronto Faculty of Law in 1982, a B.A. from Middlebury College, Vermont in 1972 and a M.A. from Middlebury Graduate School of French at l'Université de Paris V (Sorbonne), Paris, France in 1974. She received her mediation training at the Harvard Mediation Course taught by F. Sander, L. Singer and M. Lewis, and was appointed a Roster Mediator of the Ontario Mandatory Mediation Program in both Ottawa and Toronto, Canada.

Brown's areas of practice include Civil Litigation, with particular emphasis on professional negligence, securities litigation, commercial litigation, insurance defence and Mediation/ADR. In the field of mediation, she has had extensive experience, both as a mediator and as an advocate in court-connected mediations. As a litigator, she has represented the interests of various stockbrokerage firms over the past 16 years in the areas of stockbroker liability and compliance, and the interests of various insurers in the area of insurance defence work.

1. R.R.O. 1990, Reg. 194.
2. *Id.*

party would offer an evaluation of the legal merits of a dispute. Instead, the goals of mandatory mediation are best achieved, and the parties know what to expect, when a mediator takes on the role of a neutral third party who facilitates communication, and takes an interest-based approach to problem-solving.

This paper further posits that the mandatory mediation process, which requires the attendance of clients as well as counsel,³ presents a challenge for counsel who are used to the traditional adversarial structure. In particular, as a result of increased client participation, the lawyer may not have the same degree of control over the civil litigation process as in the traditional adversarial system. Several results from a recent study of lawyers' reactions to mandatory mediation in Ontario are suggestive of an emerging trend among lawyers to attempt to re-shape the interest-based mandatory mediation process into a more familiar adversarial process by encouraging the adoption of a more evaluative style of mediation. This response may be more comfortable for, and possibly beneficial to, members of the Bar, but it is not necessarily the approach that best achieves the goals of the mandatory mediation process in Ontario, or the needs of clients.

In Ontario, our experience with mandatory mediation is, as yet, relatively new. As our experience matures, it may become apparent that certain types of disputes may require, or certain clients desire, a more evaluative procedure. However, these evaluative services should be clearly labelled as distinct from, and remain independent of, the mandatory mediation process.

THE SUBSTANCE: RIGHTS-BASED V. INTEREST-BASED MEDIATION

There are many different normative approaches which can be applied to resolve disputes in the context of mediation. A "rights-based" approach focuses on the legal rights of the parties and attempts to achieve a resolution which meets the relevant legal criteria of the dispute in a manner that is consistent with resolutions achieved in a traditional court setting.⁴ An "interest-based" approach focuses on the underlying needs or interests of the parties and encourages a broader range of solutions or resolutions to the dispute which address the underlying interests, business or otherwise, of the parties instead of, or in addition to, legal interests.⁵ This approach may yield an outcome that satisfies the parties, yet may not be congruent with legal norms.

3. Rule 24.1.11 (1) of the Ontario *Rules of Civil Procedure*, *supra* note 1: The parties and their lawyers if the parties are represented, are required to attend the mediation session unless the court orders otherwise.

4. See Harry M. Webne-Behrman, *The Emergence of Ethical Codes and Standards of Practice in Mediation: The Current State of Affairs*, 1998 WIS. L. REV. 1289, 1290 (1998).

5. STEPHEN GOLDBERG, FRANK SANDER & NANCY ROGERS, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES*, (Aspen Law & Business, 1992).

Before focussing on the mediator's role, it is useful to examine some of the arguments in favour of taking an interest-based approach to problem-solving. The interest-based approach appears to have had its genesis in negotiation theory; indeed, mediation has been described by Leonard L. Riskin, a leading scholar in mediation theory, as facilitated negotiation.⁶ The theory underlying the interest-based approach is advanced by authors Roger Fisher, William Ury and Bruce Patton in their seminal book *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*.⁷ If the parties to a dispute are encouraged to explore their underlying interests, which are the needs that motivate any position taken, they are in effect defining the problem.⁸ Thus, by exploring parties' interests, the problem to be solved takes on new dimensions. By focussing on interests, parties who are at an impasse may discover several possible solutions to their problem, and may also discover shared compatible interests.⁹ Finally, the authors note that these interests must be communicated if negotiation is to serve the parties' interests.¹⁰ This last observation suggests that a mediator who facilitates communication would fit nicely with an interest-based approach to problem-solving.

THE PROCESS: EVALUATIVE V. FACILITATIVE MEDIATION

In assisting parties to reach a mutually acceptable resolution of their dispute, mediators take many different approaches. One useful means of classifying these approaches or styles is to employ the now-classic construct of mediator orientations first advanced by Leonard L. Riskin in a 1996 article published in the *Harvard Negotiation Law Review*.¹¹ Riskin defines mediation as "a process in which an impartial third party, who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction."¹² He employs a four-quadrant grid to categorize and discuss mediation styles, from facilitative to evaluative.¹³ Along the horizontal axis, Riskin places the different approaches to defining the problem to be resolved, from a narrow definition of the problem which focuses

6. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13 (1996).

7. ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (New York: Penguin Books, 2d ed., 1991).

8. *Id.* at 40.

9. *Id.* at 42.

10. *Id.* at 50.

11. Riskin, *supra* note 6, at 8.

12. *Id.* at 8.

13. *Id.* at 35.

on the strengths, weaknesses and likely outcomes of litigation, to a broad definition of the problem which considers increasingly broad arrays of interests.¹⁴ The vertical axis focuses on the mediator's style with, at one end of the continuum, techniques that facilitate negotiation and, at the other end, strategies employed to evaluate the matter at hand based on a particular set of standards. Riskin describes these facilitative and evaluative orientations generally, as follows:

The mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement - based on law, industry practice or technology - and that she is qualified to give such guidance by virtue of her training, experience, and objectivity.

The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can create better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.¹⁵

Riskin's use of these concepts and this terminology has served as a focal point in the continuing debate over the optimal style of mediation.

Riskin's categorization of mediation as including evaluative as well as facilitative approaches has not been universally embraced. Many academics and practitioners take the position that a facilitative approach is the essence of mediation and that any evaluative process should be identified not as mediation, but as a distinctly different type of alternative dispute resolution, such as "neutral evaluation". Lela P. Love of the Mediation Clinic, Cardozo Law School in New York City writes:

Evaluating, assessing, and deciding for others is radically different than helping others evaluate, assess, and decide for themselves. Judges, arbitrators, neutral experts, and advisors are evaluators. Their role is to make decisions and give opinions...In contrast, the role of mediators is to assist disputing parties in making their own decisions and evaluating their own situations.¹⁶

Love adopts the classic description of the mediator's role as one of facilitating communication, promoting understanding, focussing on interests, seeking creative solutions to problems, and enabling parties to reach their own agreements.¹⁷ She notes that evaluators and facilitators require different competencies, training, and ethical guidelines to perform these divergent roles.¹⁸

Similarly, Joseph B. Stulberg, Professor of Law, University of Missouri-Columbia Law School, writes:

14. *Id.* at 17.

15. *Id.* at 24.

16. Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 938 (1997).

17. *Id.* at 939.

18. *Id.*

Mediation is neither a process designed to marshal evidence leading to an advisory opinion by a third party, nor a rehearsal trial in front of judge or jury. Rather, mediation is a dialogue process designed to capture the parties' insights, imagination, and ideas that help them to participate in identifying and shaping their preferred outcomes.¹⁹

He asserts that "any orientation that is 'evaluative' as portrayed on the Riskin grid is conduct that is both conceptually different from, and operationally inconsistent with, the values and goals characteristically ascribed to the mediation process."²⁰ Thus, it is important to consider whether an evaluative approach should really be considered as a style of mediation, or a completely separate process. However, as it appears that evaluation does at times occur in the Ontario mandatory mediation process, for the purposes of discussion, the terms "facilitative" and "evaluative" mediation will be employed.

THE ROLE OF THE FACILITATIVE V. EVALUATIVE MEDIATOR

The facilitative mediator's role is to assist disputing parties to make their own decisions and evaluate their own situations. Facilitative mediation is based on two guiding principles: firstly, that of self-determination of the parties with respect to resolution of their disputes and, secondly, that of the neutral third party facilitator who facilitates communication among the parties, promotes understanding of the issues, focuses the parties on their interests and seeks creative problem-solving, including creative solutions outside the legal normative box, in order to enable the parties to reach their *own* agreements and resolutions to their problems.

In contrast, the classic role of the evaluator is to make decisions and give opinions with respect to the merits and likely outcomes of disputes, using predetermined criteria to evaluate evidence and arguments presented by adverse parties. The evaluative mediator's tasks include finding facts by properly weighing evidence, judging credibility and allocating burden of proof, determining and applying relevant law, rules or customs and rendering an opinion. The evaluator's tasks not only divert the mediator away from facilitation, but can also compromise a mediator's neutrality in actuality and/or in the eyes of the parties to the mediation by virtue of providing an evaluation or opinion of the case.

Ultimately, evaluation promotes positioning and polarisation which is antithetical to the goals of mediation. In the evaluative context, where the parties go to the mediation anticipating an evaluation of their case, they are more likely to

19. Joseph P. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 1001 (1997).

20. *Id.* at 986.

take a positional rather than a collaborative approach to the mediation process. They are more likely to not fully disclose their interests, despite the fact that the information provided in the mediation is clearly confidential and not to be used outside the mediation process unless it is otherwise discoverable. They also tend to perceive the lawyers' versus the parties' roles in a classic light, namely the lawyer as decision-maker controlling the process and the client as a passive party who does not participate in the decision-making process.

It is of note that early settlement efforts which include interest-based bargaining and mediation imply not only a different analysis of the conflict itself and its appropriate resolution, but also a reconceptualization of the traditional role of the lawyer as advocate. While the lawyer-advocate conceptualizes an action from a win/lose point of view and approaches mediation with a tendency to guard information, not reveal adverse facts and maximize gains for his or her client, the role of the lawyer as negotiator in a mediation requires a win/win approach to the problem and calls for creativity, focussing on the opposing sides' interests and on a broadening rather than a narrowing of the issues.²¹ Moreover, early settlement efforts require a reconceptualization of the lawyer/client relationship. While the traditional relationship posits a client who is passive, with the lawyer controlling the process, the interest-based approach envisages a client who plays a more active, participatory role in the decision-making process.

THE ONTARIO MANDATORY MEDIATION PROGRAM: A FACILITATIVE APPROACH

In Ontario, the statutory framework for mandatory mediation, as well as the guiding principles to which mediators are expected to adhere while fulfilling their role, strongly suggest that facilitative rather than evaluative mediation is the approach to be applied in the court-connected mediation process.

Based on the provisions of Rule 24.1 of the Ontario Rules of Civil Procedure, the Canadian Bar Association-Ontario [now Ontario Bar Association] Model Code of Conduct for Mediators²² and the Law Society of Upper Canada Rules of Professional Conduct²³, it appears that mediation in Ontario was designed by the Rules Committee as a facilitative process. While these provisions do not appear to clearly prohibit evaluative mediation techniques, the overall tone of the guiding principles suggests a facilitative orientation.

21. Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241 (2002).

22. Website of the Ministry of the Attorney-General: <http://www.attorneygeneral.jus.gov.on.ca/html/MANMED/codecncdt.htm> (hereinafter *OBA Mediation Code of Conduct*) (accessed April 19, 2004).

23. Website of the Law Society of Upper Canada: <http://www.lsuc.on.ca/services/contents/rule4.jsp> (hereinafter *LSUC Rules of Professional Conduct*) (accessed April 19, 2004).

The purpose of Rule 24.1.01 of the Ontario Rules of Civil Procedure is set out in the Rule itself:

This Rule establishes a pilot project for mandatory mediation in case managed actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes.²⁴

While the inclusion of the phrase “*to facilitate a fair resolution of disputes*” may arguably suggest some evaluation against an external or party-specific standard of fairness, the next subsection, which provides more guidance as to how to achieve a resolution to the dispute, suggests otherwise.²⁵ Subrule 24.1.02 describes the nature of mediation: “In mediation, a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution.”²⁶ While it may be argued that the language is broad enough to permit a legal evaluation where the parties request such “assistance” of the mediator in “reaching a mutually acceptable resolution”, the Rule does *not* explicitly encourage a mediator to offer an evaluation, but *does* explicitly encourage the mediator to be a neutral third-party, to facilitate communication, and to assist the parties to reach a resolution acceptable to *them*, not a resolution based on the prevailing legal norms governing the dispute.

The timing of the mandatory mediation is also suggestive of a facilitative approach. Rule 24.1.09(1) of the Ontario Rules of Civil Procedure states that “a mediation session shall take place within 90 days after the first defence has been filed, unless the court orders otherwise.”²⁷ At such an early stage, usually before examinations for discovery have been completed and often before documentary discovery has occurred, it is unlikely to be possible and indeed, may be problematic, for a mediator to offer an accurate evaluation of the legal merits of the case. As discussed later in this paper, lawyers are making use of Rule 24.1.09 to seek a court order to postpone the mandatory mediation, which suggests, at least in some cases, a preference for delaying mediation until there is a greater possibility for an evaluative approach. However, in the absence of an extension of time, the default rule is to have mediation occur at a very early stage in the litigation process, which is consistent with a facilitative approach to mediation.

24. *Supra* note 1, Rule 24.1.01.

25. *Supra* note 1, Rule 24.1.02.

26. *Id.*

27. *Supra* note 1, Rule 24.1.09(1).

The OBA Mediation Code of Conduct²⁸ also has a strong facilitative emphasis. The principle of party self-determination is fundamental,²⁹ and, in this regard, the Code provides as follows:

Self-determination is the right of parties in a mediation to make their own voluntary and non-coerced decisions regarding the possible resolution of any issue in dispute. It is a fundamental principle of mediation which mediators shall respect and encourage.³⁰

One might argue that the parties may choose voluntarily to have an evaluative mediator, yet this may be at odds with another provision in the Code which states that: "Mediators shall not provide legal advice to the parties."³¹ Similarly, the LSUC Rules of Professional Conduct, commentary to Rule 4.07, provides: "In acting as mediator, generally a lawyer should not give legal advice as opposed to legal information to the parties during the mediation process."³² These provisions appear to limit the evaluative parameters of the mediator's role. It must be questioned whether a mediator who offers an opinion on the likely legal outcome of a dispute, may be seen to be offering a type of legal advice.

Insight into the orientation of Ontario mandatory mediation may also be gleaned from examining what the Law Society of Upper Canada is teaching law students about the nature of this process. The 2003 Ontario Bar Admission Course materials state that mediation is "a co-operative, interest-based approach to conflict resolution."³³ The mediator is one "whose role it is to facilitate the negotiation process",³⁴ and further:

It is important to recognize that the mediator serves a different purpose than that of an arbitrator or a pre-trial judge. It is not the mediator's role to provide an expert evaluation of the case or to predict the outcome at trial (though some mediators will do so anyway).³⁵

Thus, the process is clearly explained as a facilitative, interest-based exercise in dispute resolution.

The Ontario Rules of Civil Procedure, the OBA Mediation Code of Conduct and the LSUC Rules of Professional Conduct do not explicitly prohibit evaluative mediation, but the orientation clearly is intended to be facilitative. It is of interest to compare the orientation of Ontario's court-connected mediation to that of the United States, where it has been used since the 1970s. While the

28. *OBA Mediation Code of Conduct*, *supra* note 22.

29. Other key principles include impartiality, confidentiality, refraining from situations involving a conflict of interest, and ensuring the quality of the process.

30. *OBA Mediation Code of Conduct*, *supra* note 22, Article III. 1.

31. *Id.*, Article III. 3.

32. *LSUC Rules of Professional Conduct*, *supra* note 23, Rule 4.07.

33. LAW SOCIETY OF UPPER CANADA: CIVIL LITIGATION MATERIALS, CHAPTER 17: ALTERNATIVE DISPUTE RESOLUTION, CASE MANAGEMENT AND MANDATORY MEDIATION 17-5 (2003) (hereinafter *CIVIL LITIGATION MATERIALS*).

34. *Id.* at 17-11.

35. *Id.* at 17-12.

majority of States have no specific statute relating to the issue of the propriety of evaluative mediation, in those States that have mediator rules and standards regarding self-determination, impartiality, and the giving of advice and opinions, the language of these provisions and the associated explanatory comments seem to put in question the propriety of evaluative mediation.³⁶

LAWYERS' REACTIONS TO FACILITATIVE MEDIATION IN ONTARIO

Facilitative mediation has not been universally accepted among lawyers in Ontario. Indeed, there appears to be some reluctance to embrace the facilitative, interest-based mediation model, with an apparent trend emerging in certain sectors of the Bar to reshape the mediation process in order to make it fit more comfortably into a traditional adversarial setting. Dr. Julie Macfarlane's recent study of commercial litigators' reactions to mandatory mediation in Ottawa and Toronto uncovered a range of attitudes toward mediation, from acceptance and acknowledgement of the benefits of the facilitative approach with greater client participation to rejection and the apparent longing for a return to the traditional adversarial lawyer-dominated model.³⁷

Facilitative mediation seems to have been more readily accepted in Ottawa than in Toronto to date. Dr. Macfarlane has observed:

Generally, it can be noted that the norms of mediation usage are both more settled, and more accepting of the use of mediation in Ottawa than they are in Toronto. ... Ottawa counsel were also more likely to talk about a positive active role that they had seen the client taking in mediation, and to suggest a deeper sense of comfort with this. This contrast between prevailing views at the two sites recurs throughout the data...³⁸

Those who embraced the mandatory mediation process saw it is a useful early opportunity for exploring settlement more expeditiously and less expensively to the benefit of the client.³⁹ Some welcomed the more active involvement of clients in the negotiation and settlement of their action.⁴⁰ Others highlighted the great benefit to clients of an early resolution of their action. Indeed, the more sophisticated institutional and business clients welcome the opportunity of a

36. Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. OF DISP. RESOL. 267, 286 (2001).

37. Macfarlane, *supra* note 21. In her study, Dr. Macfarlane conducted interviews with forty commercial litigators, twenty in Ottawa and Toronto respectively, who had participated in a minimum of ten mediations.

38. *Id.* at 279.

39. *Id.* at 268-69.

40. *Id.* at 259-60.

business solution that may offer a commercially viable end to a dispute without the accumulation of excess legal fees.⁴¹ In the end, a resolution to a legal action in which the client is an active participant and, in some cases, in which the client actually engineers the resolution, is not only a benefit to clients but to the judicial system at large.

On the other end of the spectrum were those who rejected the facilitative mediation model or simply perceived it as a tool to be “captured” and used (*e.g.* as early discovery or a fishing expedition) to advance their clients’ mostly unchanged adversarial goals.⁴² Other counsel sharing these attitudes indicated that they simply went to mediation, unprepared, with the intent of staying no more than 20 minutes to simply get the process over and move on to the next stage in the traditional adversarial model.⁴³ These attitudes and strategies were more prevalent among Toronto counsel, whereas Ottawa counsel seemed to regard such tactics and strategies as displays of bad faith.⁴⁴

Dr. Macfarlane found a preference for evaluative mediators among the sample of the 40 commercial litigators canvassed, which was particularly strong in Toronto.⁴⁵ For those groups most negative toward mediation, she observed that:

...mediation appears to be relatively “safe” when it is evaluative (emphasising the known, that is, anticipated legal outcomes) and especially “risky” when it is facilitative (emphasizing the unknown, that is, other factors in settlement besides legal evaluations).⁴⁶

In those groups, lawyers expressed a preference for lawyer-mediators and for an evaluation from a credible third person in order to assist in overcoming inflated client expectations in achieving settlement.⁴⁷

While there appeared to be a preference for an evaluative style among those canvassed, some counsel expressed a more nuanced view, in which they generally wanted facilitative mediation, but with the ability to call on an evaluative mediator in certain circumstances:

Moreover, while lawyers in Toronto and Ottawa expressed a strong preference for evaluative mediators, it is less clear that they see the function of these mediators as simply running a judicial-style settlement conference. Rather, many comments suggested that lawyers wanted the mediator to have a legal evaluation in their back pocket if all other efforts at settlement failed.⁴⁸

41. *Id.* at 268-69.

42. *Id.* at 256-57.

43. *Id.* at 268.

44. *Id.* at 257.

45. *Id.* at 284-85.

46. *Id.*

47. *Id.*

48. *Id.* at 310-11.

This attitude suggests an openness to facilitative mediation, with evaluation of the action, if necessary, at a later stage in the mediation process. This expressed preference for a mediator who could employ an evaluative style, where required, may signal a desire among some lawyers to move closer to the more familiar traditional rights-based model.

Disadvantages to the evaluative mediation model expressed among the lawyers participating in the study included the limited ability for an evaluator to accurately predict the outcome of a case; the tendency for a client to take a more positional approach in an evaluative mediation which tended to deter compromise and settlement; the inability of an evaluative mediator to find alternative principled bases for settlement when the traditional “legal” basis for settlement was not accepted by the parties; and a view expressed among a number of lawyers that while senior mediators and former judges could offer expertise and authority in an evaluative mediation, they were often ineffective at facilitating dialogue and compromise among parties.⁴⁹

Emerging from Dr. Macfarlane’s study is the suggestion that certain sectors of the Bar would like to re-shape the mediation process to at least offer the possibility of more evaluation. Dr. Macfarlane noted the tendency of some lawyers to change the timing of mandatory mediation. She observes that, “the problem of being obliged to attend mediation before counsel feel “ready” is obviated in Ottawa by the willingness of the Ottawa Case Management Master to be flexible in adjourning mediation until after discoveries.”⁵⁰ This approach has served to reduce resentment toward being obligated to mediate before discoveries, and appears to be a critical element of Ottawa’s local legal culture in relation to mandatory mediation.⁵¹ Dr. Macfarlane noted, “the same dispensation appears to be much less accessible in Toronto, and this contributes to a general sense of resentment about the mandatory mediation program.”⁵² She found that in Toronto, the difficulty in obtaining adjournments sometimes leads to the “20-minute mediation” where counsel agree to attend the mediation, but with no preparation and only to leave again after twenty minutes.⁵³

These two different responses suggest that while counsel are adapting to the mediation process, they are attempting to re-shape the process into one which occurs at a later stage, where evaluation is more of a possibility, or as sometimes occurs in Toronto, to simply continue with the dominant adversarial model. The

49. *Id.* at 286-87.

50. *Id.* at 281.

51. *Id.*

52. *Id.* at 315.

53. *Id.* at 268 & 281.

degree to which requests for a later mediation date reflect a desire for an evaluation, or simply provide the parties in a facilitative mediation with more information, is an interesting question to consider.

WHY FACILITATIVE MEDIATION REMAINS THE OPTIMAL MODEL FOR MANY CIVIL DISPUTES

In this section, many of the critiques of both facilitative and evaluative mediation will be explored. It is suggested that, overall, there are many reasons to favor mediations based on the facilitative model. At the same time, it is important to consider the arguments made by proponents of evaluative mediation and to ensure that valid concerns are addressed within the mandatory mediation program.

1. Facilitative, interest-based mediation offers a greater possibility for creative solutions to disputes than does a purely legal evaluation.

When a broader range of interests are considered, a broader array of possible outcomes can be created, with the potential for finding an outcome that is more satisfactory to both parties than any rights-based solution imposed by a third party. By focussing on their underlying needs and interests, the parties may create a unique solution which is most appropriate for their situation.

Proponents of evaluative mediation may argue that justice is better served and fairness ensured where decisions are based on legal rights and entitlements and in accordance with legal norms. Without embarking on an exploration of the nature of justice, it must be asked whether a settlement is necessarily more fair simply because it accords strictly with legal norms or reflects the remedies available at trial. Our system of civil litigation should strive to achieve justice, yet there appear to be a broad range of solutions falling outside the traditional legal solutions and remedies that may be considered fair by disputants. While knowledge about relevant and applicable legal norms shapes the process, congruence with legal norms does not appear to be the sole concern of parties, nor the only standard against which to measure the fairness of a solution that emerges from a mediated settlement.

2. An evaluative opinion may hinder communication between parties and between the parties and the mediator.

Instead of facilitating communication, which is one of the goals of subrule 24.1.02 of the Ontario Rules of Civil Procedure, the parties to a mediation who anticipate an evaluation from the mediator may only put their best case forward, without acknowledging complexities or weaknesses in their positions. They are more likely to approach the mediation with a positional bargaining stance rather

than being willing to think outside the legal box and explore their underlying needs and interests.⁵⁴

3. An evaluative, rights-based approach can lead to greater positional bargaining and may shut down discussion and the possibility of settlement.

An evaluation of an action provided by a mediator may serve to entrench positions and to prevent a final resolution of the matter, instead of facilitating negotiation. Once an evaluation is given in the context of a mediation, the party in whose favour the evaluation is given may decide not to compromise further and the party against whom the evaluation goes may perceive the mediator as biased or may dismiss the opinion as not well founded. One lawyer in Dr. Macfarlane's study expressed this idea as follows:

I've discovered to my astonishment, that it (a legal evaluation) doesn't help both ways in terms of trying to settle a case. If you're the one he (the evaluator) has told "You're going to win," you'd say, "Why should I compromise?" And if you're the one he's told "You're going to lose", you say, "What does he know?"⁵⁵

4. A mediator may not be able to maintain the key quality of neutrality, especially in the eyes of the disputants, once an evaluation is offered.

Scott H. Hughes explored this idea in a recent article, and his comment follows nicely the observation made above about the parties' reactions to an evaluation. He writes that any opinions or evaluations threaten the mediator's impartiality as "[t]he natural tendency of those whose 'ox is being gored' by a mediator opinion is to discount its validity and to attribute it to mediator bias."⁵⁶

Once a mediator is perceived as biased, the entire process is undermined. It is a central feature of Rule 24.1 of the Ontario Rules of Civil Procedure that a mediator be a neutral third party.

54. See also Riskin, *supra* note 6, at 45.

55. Macfarlane, *supra* note 21, at 286.

56. Scott H. Hughes, *Alternative Dispute Resolution: Facilitative Mediation or Evaluative Mediation: May Your Choice be a Wise One*, 59 ALA. L. REV. 246, 247 (1998).

5. There are concerns about the quality of an evaluative opinion, especially one that is offered at an early stage of the process, before discoveries have been completed.

It is clear that a fully-informed evaluation can only occur after examinations for discovery have been completed, or at least after the main facts in dispute have been established or agreed upon. In Ontario, the Rules of Civil Procedure provide for mandatory mediation to occur early in the process prior to examinations for discovery and prior to a full canvassing of the facts.

Even where mediation occurs after examinations for discovery, there is reason to doubt the ability of an evaluative mediator to predict likely outcomes of litigation. Murray S. Levin's article on the propriety of evaluative mediation cites numerous studies that measure the outcome of negotiations and the predictability of jury trials, which all highlight the highly unpredictable outcomes of some legal disputes.⁵⁷ Also, if a mediator offers an evaluation that influences the settlement of a case which is based on incomplete information or an incomplete understanding of the law, how will she or he be held accountable? Would issues of liability arise? What kind of training and expertise must an evaluative mediator possess? These questions must be confronted.

6. Non-lawyers may be disqualified from practising evaluative mediation.

It is self-evident that if someone offers an evaluation they must be qualified to do so. Where evaluative mediation is adopted or incorporated into the mandatory mediation process, this will, of necessity, eliminate non-lawyers from the field of mediation.⁵⁸ If evaluation is to be a standard part of the mediation process, then non-lawyers who may be excellent at facilitative mediation would not be qualified to render the evaluative aspect of the service.

MANDATORY MEDIATION IN ONTARIO: LESSONS FROM THE PAST AND
SUGGESTIONS FOR THE FUTURE

Although we do not as yet have statistics that compare the rates of settlement between facilitative and evaluative approaches to mediation in Ontario, we do know that the Mandatory Mediation Program is leading to settlements. The 2003 Ontario Bar Admission Course materials state that in 1997, the pilot mediation project in Ottawa resulted in 66 percent of cases settling within 60 days after mediation.⁵⁹ Similarly, Dr. Macfarlane, in her recent study, reports several

57. Levin, *supra* note 35, at 287.

58. See e.g. Love, *supra* note 16, at 939.

59. *Civil Litigation Materials*, *supra* note 33, at 17-8.

results of the Hann, Barr, and Associates Evaluation of the Ontario Mandatory Mediation Program,⁶⁰ which found that 41% of Ottawa mediations and 38% of Toronto mediations reported a full settlement within seven days of the mediation session. Also when partial reported settlements were added, the overall rate was 59% in Toronto, and 54% in Ottawa.⁶¹ While something in the process is clearly working to achieve settlements, it is not, at this juncture, possible to determine whether one mediator style is predominantly responsible for these settlement outcomes.

It would appear from Dr. Macfarlane's study that there is some demand for a rights-based evaluation of actions in Ontario as opposed to the interest-based facilitative approach conceived by the Rules Committee for mandatory mediation. It would further appear that there is a growing trend among some mediators toward a mixed or hybrid form of dispute resolution being used under the rubric of mediation in the Ontario Mediation Program. A similar trend appears to have emerged in the United States experience of court-connected mediation.

It is submitted that while an evaluation rather than facilitative mediation may better suit the needs of some clients and achieve settlement in certain circumstances, it should be obtained in the context of a clearly labelled alternative process that is separate and distinct from mediation. An evaluation should be clearly recognized as an entirely different activity, requiring a focus and technical skills different from those employed in a mediation. As previously indicated, while the mediator assists others in evaluating, assessing and deciding upon their own resolution to disputes, an evaluator assesses and provides a decision or opinion with respect to the merits of a dispute. These two activities require not only different mental processes, techniques and skills, but also require or should require different rules, regulations, guidelines and standards to regulate the mediators' and evaluators' roles and actions. By clearly distinguishing among different dispute resolution processes of mediation or evaluation, a consumer of legal services would know what they are getting, and clarity and definition would be given to the dispute resolution process.⁶²

It must also be remembered that other, traditional, evaluative steps in the litigation process are currently available, including the settlement conference and, upon request, the judicial pre-trial. Further, opportunities exist to seek a

60. Macfarlane, *supra* note 21 at 314 n.64 (citing R. Hann, C. Barr & Associates, Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1) Final Report - the First 23 Months (Queen's Printer 2001)).

61. *Id.*

62. See e.g. Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2 J. DISP. RESOL. 295 (2000).

neutral evaluation from a former judge or other qualified person working in the field of alternate dispute resolution, whose services are clearly labelled as those of a “neutral evaluator”. The parties to a legal dispute should know what to expect out of the process, and an accurate labelling rather than a mixed or hybrid form of evaluative mediation will help to achieve this goal.

Lela P. Love and Kimberlee K. Kovach argue strongly in favour of permitting an array of dispute resolution processes which are clearly labelled and defined:

Having an eclectic mix of processes from which parties and counsel can choose will promote party choice and self-determination. A range of processes will promote different values and allow for refinement of different paradigms and skill sets. ...

However, allowing an eclectic mix of neutral activities to all be deemed mediation creates a process which is amorphous and rudderless.⁶³

As we continue to learn from our experience of mandatory mediation in Ontario, several alternative dispute resolution processes may begin to emerge. Ensuring that each is clearly identified with respect to process and approach will help to better serve all parties and the system of justice generally. If evaluative services are clearly labelled, it will also assist in the task of ensuring that those who offer such services are adequately qualified and trained in practising evaluative mediation.

Further study may yet discern a pattern as to which cases are most likely to be usefully resolved at an early stage using facilitative mediation, and which may benefit from an evaluation. Cases where there is an ongoing relationship between the parties, such as employment matters, or business/commercial relations would lend themselves well to facilitative mediation. In complicated personal injury cases, where the long-term prognosis of the plaintiff is in doubt, it may be better to wait until after time has passed and examinations for discovery have occurred before any meaningful discussions can begin. In cases involving a very specific monetary dispute, a more evaluative approach can be useful in achieving a settlement. With time, it will become apparent whether there are, indeed, certain classes of cases which are better suited to one particular style of mediation.

CONCLUSION

With all of the problematic aspects of an evaluative approach to mediation, it seems that the facilitative approach has earned its place as the preferred model for the Ontario Mandatory Mediation Program. It may well be that, in time, we will come to recognize that certain classes of cases are not well-suited to facilitative mediation and some element of an evaluation will be employed in order to

63. *Id.* at 306.

encourage settlement. It is submitted that evaluation should be offered as a separate form of dispute resolution, and should be clearly labelled, for example as “neutral evaluation”, rather than as a hybrid form of ‘evaluative’ mediation, so that all parties know what to expect out of the process. This evaluative process should be subject to separate rules and guidelines within the context of court-connected dispute resolution.

Facilitative mediation responds to the needs and interests of the parties, and does require lawyers to give up some of the traditional control that they have had over the conduct of a civil action. The natural reaction of the litigator is to attempt to re-shape this new step in the civil litigation process to fit into a traditional adversarial model. It may well be that, with time, an array of dispute resolution processes will be established in Ontario. However, mediation should not be re-shaped into a more familiar and comfortable adversarial rights-based process before facilitative mediation has been given the opportunity to develop its own unique place in civil litigation in Ontario.

