

Moving the Goalposts 2, The Blowback

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In my last blog post, I described, at length, my personal methodology in crafting a mediator's proposal. Today, I'm going to consider what I call the "blowback," which is the downside of the method itself. It's something that's always on my front burner whenever I'm actively involved in "moving the goalposts."

There's an important ideological divide between facilitative and evaluative mediation, and it's one that I'm not entirely comfortable with. Let's examine the relative strengths of each in the context of the mediation of a matter, currently in litigation, which the parties are paying you to help bring to resolution.

Facilitative Mediation

The obvious advantage here is that the solution is controlled by the parties themselves. Because the mediator acts as a facilitator and, perhaps, a referee, the his/her input is limited to being a sounding board, and, perhaps, engaging in brainstorming with the parties, whether in caucus or in joint session. To the degree that a facilitative mediator suggests his/her own ideas, it is generally in order to widen the scope within which a party can seek their own solutions.

Another "advantage" can be the lack of confrontation. Because a facilitative mediator doesn't have a position of his/her own, there oughtn't be a reason for any party to feel the necessity of defending a position vis a vis the mediator.

Evaluative Mediation

A key advantage here is that the mediator is able to both broaden and narrow the discussion.

Broadening the discussion can be important when each party has limited itself in such a way that there is no common basis for a settlement. In such a case, an evaluative mediator is often able to step in with suggestions that neither party may have considered, but which can form a nexus upon which each party can reach a consensus. In a similar vein, a good mediator, by evaluating the importance of various issues, can often persuade the parties to narrow the discussion and, in so doing, prevent tangential issues from becoming deal breakers.

And, of course, evaluative mediation very often shortens the length of the process, saving the parties money.

My Dilemma

The problem that I always find myself facing is that, while I almost always act evaluatively, I'm very uncomfortable with the exercise of power that that method requires. I always wonder whether, by my evaluations and resultant statements, I'm not predetermining the terms of the settlement itself. Because this invariably occurs, and re-occurs to me during the mediation itself, I feel, for lack of a better word, haunted by my own choices. Do I stay evaluative, risking that my technique will, even subconsciously, impose my opinions on the process? Or do I revert to facilitative, allowing nature to take its course, presumably getting fewer settlements and spending more time in session?

My Solution

I'm clearly a work in progress. Some of the time, the dilemma resolves itself, as the parties take a little bit of evaluation, run with it, and come to their own settlement. More often, I continue to move the parties, using evaluative techniques among the many in my mediator's toolbox.

My Request

Help!! I'd really like some feedback from those of you reading this blog post. What's your reaction to this post? What are your experiences in this area? Do you have any suggestions for the rest of us?