**How Mediators Evaluate, Through Words, Gestures and Sometimes Silence**

By Dwight Golann[[1]](#footnote-1)

Do you give evaluations when you mediate? I suspect most of us do, although we may not consider what we do to be “evaluation” at all. In this link, excellent mediators present their viewpoints about a wide variety of topics, and in different ways: [www.tinyurl.com/IAMMay2020](http://www.tinyurl.com/IAMMay2020)) As I viewed these videos I was surprised by what I found.

First, even mediators I had been told were strongly evaluative never placed a specific value on a case. No one said, for example, “Based what I’ve heard today, I think the court is likely to return a plaintiff verdict of around $500,000,” or “I see a 4 out of 10 chance of your winning,” much less “this case should settle at $900,000.” Almost everyone limited themselves to adjectives, saying at most, and only after hours of mediation, “I see a real risk here that a judge/jury might….” The only exception is me, demonstrating decision analysis, although even then I give only a range of probabilities (“I can’t predict what would happen any one time, but if this case were tried, say, ten times…it may be worth 150 to $200,000 in the American legal system”) and then point out costs of litigation that exceed the likely recovery.

This vagueness has a consequence: We know that disputants interpret what they hear differently, depending on their situations and states of mind. (To test this, ask any group what an opinion like “real risk” means in percentage terms. You’ll find the answers almost always cover a spread of 30 to 40 points). Avoiding numbers, in other words, allows disputants to put their own meaning on what a mediator says. In a sense, neutrals speaking this way expect to be misunderstood, allowing room for disputants to hear only as much of a viewpoint as they are ready to accept. We know we can make our opinions more specific later if necessary, but that it’s almost impossible to take back a precise statement once it’s out in the room.

Often mediators deliver opinions without using use words at all. The videotaped mediators raise an eyebrow, frown, pause, squint, dip their head, lean back….using expressions and body language to express viewpoints silently and tactfully, allowing the listener to accept bad news gracefully, or even ignore or fail to perceive an opinion they are not ready to accept.

I wonder, though, if we are always aware of the signals we are sending? Teachers tell novices how important it is to take note of disputants’ body language, but how often do we observe our own? In the “Gestures” segment of the videos, for example, you’ll see me momentarily close my eyes as a CEO reacts to insulting language from an opposing lawyer (I call it my “Dr. Birx moment”). I was never aware of it, however, until recently. (On the other hand, when I responded by dropping my head and pushing my chair back, I certainly knew what I was signaling.) Perhaps at a future CPR meeting we could point cellphones at ourselves as we engage in difficult discussions. We might learn from what we see.

Facilitative mediators advocate responding to unrealistic disputants with exploratory questions and “reality testing,” taking care not to do so in a way that could be seen as evaluative. But again, I wonder. Professor Deborah Kolb once observed that deciding to reality test implies that the mediator has developed an opinion about what reality is, the disputant’s view is different, and the mediator thinks the disputant’s view would benefit from testing.

As I observe mediators talking with disputants in what seems on the surface to be a facilitative dialogue, I often see different statements made in imaginary bubbles above the neutral’s head. For instance when a videotaped mediator, in response to a low first offer, asks the lawyer and executive in a thoughtful tone, “What do you suspect their response is going to be?”, some might say she’s simply encouraging them to assess their counterparts’ thinking. The lawyer, however, understands exactly what the mediator is saying, responding: “I don’t think they’re going to be *thrilled* with it, but…” And even if questions themselves are neutral, if you return to a topic repeatedly disputants will read a message into it (“You notice he keeps asking about causation—I don’t think he’s buying our argument…”). As I think about my own efforts to raise questions in mediation, I can’t help but wonder what bubbles the disputants have been placing above my own head.

Offering opinions through questions, I hasten to emphasize, is often good practice. Like gestures, questions allow listeners to hear a viewpoint without having to confront it directly. Your tact may be appreciated, especially in a high-context culture in which people don’t want others to “put all our cards on the table,” as we Americans like to say. Again, if a viewpoint expressed indirectly is especially hard to accept, the listener can politely ignore or not perceive it at all.

Let me close by noting that no one who hires a mediator expects them to be merely a “potted plant.” Sophisticated parties know that we’re constantly evaluating as we work. They expect us to keep our opinions to ourselves, however, letting them show only as, and to the extent, needed to help the process move forward, all while preserving the parties’ dignity. Expressing opinions well is, I think, one of the most important ways in which we practice our craft.

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