III. The Evaluative Process

## Using Evaluations in Mediation

by Dwight Golann & Marjorie Corman Aaron[[1]](#footnote-1)\*

“Evaluation is a legitimate weapon in the mediator’s arsenal, one that can be either effective or explosive depending on how and when it is used,” say the authors. They provide recommendations for its effective employment as a means of resolving disputes between parties who hold unrealistic views of the merits. The use of evaluation, however, is not without risks, as Golann and Aaron point out. Their article is an effective map that guides readers safely around the potential pitfalls.

Evaluation is a controversial issue. Some mediation theorists believe that the technique has no place in “true” mediation, a purely facilitative process in which parties are left free to make their own judgments about the merits of a case without interference from the mediator.[[2]](#footnote-2) We hold a different view. Evaluation is a legitimate weapon in the mediator’s arsenal, one that can be either effective or explosive depending on how and when it is used.

What is evaluation? It is a process in which a neutral expresses an opinion as to the likely outcome or value of a legal claim or defense were it to be adjudicated. Evaluation can focus on either a single issue or on the overall result in a case. It can be expressed in ranges (“the damages could range from $25,000 to $75,000”), numeric probabilities (“40% chance”), or as a precise number (“a $100,000 case”). An evaluation can be expressed with certainty (“The plaintiff will win...”) or studied vagueness (“I have some doubts about...”).

Evaluation is sometimes hard to distinguish from “reality testing.” Almost all mediators are willing to reality test—that is, to question disputants about the strengths and weaknesses of their cases. In this role, a mediator acts as a devil’s advocate, pushing the disputants to become more realistic without completely revealing his or her personal opinion about the merits. However, as mediators become more and more familiar with the facts and arguments, it is almost inevitable that they will form views about how a court would rule on a case. Parties, not expecting mediators to be potted plants, aware that tjudgment-formation process is going on.

Mediators may be less successful than they think at hiding their opinions about the merits. Reality testing is a spectrum in which the line between mere testing and evaluation is not always clear. For example, a phrase such as “What are your thoughts on the causation issue?” is unlikely to be controversial. But such commonly-asked questions as “Do you think there’s a problem on causation?”; “What would you say in response to their argument on causation?”; “Don’t you have a causation problem here?”; or “You don’t think that’s an issue?” are increasingly likely to be interpreted as evaluative opinions. Even if the language used by a mediator is scrupulously neutral, his or her feelings about the strength of an argument may well show unconsciously in facial expressions and body language. It is likely that litigants perceive evaluation going on in many situations where a mediator would describe behavior as “reality testing.”

The fact that evaluative input of this nature is common in mediation makes it important for mediators to understand how to do an evaluation properly, and for lawyers to know when to request that such techniques be applied.

### Benefits and Dangers

Like most other tactics, evaluation has both potential benefits and dangers. In the case of evaluation, however, both the risks and the advantages are relatively large.

***Benefits****.* An evaluator’s primary goal is to change litigants’ assessments of the strength of their adjudication alternatives. Often both sides in a legal dispute honestly believe that they are likely to win in court. Mediators find that when parties put their predictions in terms of percentages, their forecasts often total 150% or more; that is, each side thinks that it has a much better than even chance of prevailing. Given these clashing predictions, it is not surprising that even good faith negotiations often reach impasse.

The causes of such misjudgments are complex. Psychologists have demonstrated, for example, that people tend to form perceptions of situations quickly, then unconsciously ignore any information that contradicts their view, a phenomenon called selective perception. People’s judgments are also influenced by their roles in litigation, an effect known as advocacy distortion.

For example, in an experiment at Harvard Law School, students were given identical files describing an auto accident, then asked to evaluate the plaintiff’s chance of winning in court. Those assigned the role of lawyer for the accident victim assessed her chances of prevailing at a mean of 65%. By contrast, students who were given the same case file but told that they represented the defendant insurance company gave the plaintiff only a 48% chance. Similar discrepancies appeared in the students’ estimates of the damages the plaintiff would recover if she won: “plaintiffs” placed the damages at a mean of $264,000, while “defendants” projected only $188,000. Harvard Business School students asked to carry out the same study showed very similar biases. These kinds of advocacy distortions are nearly universal.[[3]](#footnote-3)

Evaluation can cut through litigants’ misjudgments about the merits of a case. When disputants hear that a neutral person, after studying the facts and listening to the arguments, disagrees with their predictions of victory, they are motivated to look again at the case and ask what the evaluator has seen that they have not. Evaluation can thus help disputants overcome the impact of selective perception, advocacy bias and other factors that distort parties’ assessment of the merits.

An evaluation can also satisfy psychological needs. It may give litigants the emotional experience of having a day in court, in which they can present their arguments to a neutral person. If bargainers realize that concessions are necessary, but do not want to move from entrenched positions without having a rationale, an opinion can provide the necessary psychological cover. Similarly, insurance adjusters, government officials, and others who must answer to supervisors and constituencies outside the mediation, often welcome an evaluation because they can use it to deflect after-the-fact criticism of their decision to settle. Finally, evaluations can help to resolve internal disagreements within a bargaining team, for instance by assisting a litigator who sees serious risks in a case persuade an unrealistic client of the need to settle.

***Dangers***. Unfortunately, evaluations pose dangers that may outweigh their benefits. First, an evaluation may freeze the bargaining process. Once the parties to a mediation know that an evaluation is coming, they are likely to stop negotiating: After all, why confront painful decisions about concessions when the neutral will soon vindicate one’s position? But once the evaluation is given, it may be treated as a “take it or leave it” offer. After a respected outsider has stated the “right” or “fair” result in a case, it is very hard for a defendant to offer more, or a plaintiff to accept less, than the number the evaluator has set. The strength of this “take it or leave it” effect is inversely proportional to the confidence of the negotiators in themselves and in the evaluator. The more concerned a bargainer is about being second-guessed by a client or supervisor, the less willing he or she will be to accept a result less favorable than the evaluation.

Equally significant is the potential impact of an evaluation on the mediator’s credibility with the litigants. A neutral’s greatest asset in bringing about a settlement is the rapport and confidence that he or she develops with the parties and their counsel. As long as litigants see the mediator as an honest, neutral and competent facilitator of the process, they are willing to listen to tough questions, accept coaching about their bargaining tactics, and consider settlement recommendations that require painful compromises.

If, however, a mediator delivers an evaluation too quickly or in the wrong way, the “losers” in the evaluation are likely to react badly. A party, its lawyer, or both may decide that the neutral has “gone over to the other side.” Perhaps, they think, the neutral has been duped by clever arguments, or seduced by promises of future business. Indeed, if the evaluator disagrees with both sides, as is quite possible, everyone can be left angry. Once this happens, even the most innocent comment or gesture by the mediator will be filtered through feelings of suspicion and antagonism. A badly-done evaluation can destroy the mediator’s power to influence the losers, and perhaps everyone, in a case.

There are less dramatic dangers as well. Evaluators focus on the legal merits and may fail to address less obvious barriers which may be frustrating a settlement. If the problem, for example, is that a key decision maker in any settlement is not at the bargaining table, an evaluation is unlikely to uncover the issue. If the obstacle is a party’s unresolved feelings of grief, a lawyer’s anger, or other strong emotions, an evaluation, with its emphasis on legally-relevant facts, will not deal with it. In general, evaluation does not address the hidden issues that often drive lawsuits. More seriously, evaluation tends to hide these issues because it focuses the disputants solely on the legal merits of the case. Evaluation, in other words, often “solves” the wrong problem and, by doing so, obscures serious hidden causes of impasse.

All this said, the right kind of evaluation, done at the right point and handled in the right way, can be the ingredient that breaks a seemingly-hopeless deadlock.

### How to Give an Effective Evaluation

***Whether to evaluate***. Our basic advice about whether to evaluate is “only if necessary.” Unless required to break an impasse, evaluation’s inherent risks,make it unwise. .

The fundamental diagnostic questions that a mediator should ask in every dispute are the following:

• What obstacles are preventing the parties from settling this dispute themselves?

• What mediative strategies are most likely to overcome these barriers and bring about a settlement?

In most cases, the barriers that are frustrating agreement, such as procrastination, the need to vent arguments and emotions, poorly conducted positional bargaining, lack of information or hidden psychological issues, do not relate to the parties’ view of the merits. Specific mediative strategies are available to address these issues,[[4]](#footnote-4) making evaluation inappropriate. .

In some situations, however, even after other barriers have been diagnosed and treated, the major obstacle to settlement remains the parties’ (or their lawyers’) inability or refusal to accurately assess the value of their trial alternative. Even pointed reality testing has not (or is unlikely to) overcome the effects of selective perception, advocacy bias and other psychological forces that distort litigants’ perceptions.[[5]](#footnote-5) In such situations, a mediator’s only remaining options may be either to conduct an evaluation or admit defeat. If evaluation is the BATL (Best Alternative to Litigating[[6]](#footnote-6)),there’s no harm in the attempt. .

***When to evaluate***. As should be clear from this discussion, we believe in delaying an evaluation until as late in the mediation process as possible. Waiting serves several important purposes. First, it allows the mediator to explore fully the other possible obstacles to settlement. If, for example, a key issue in a dispute is a party’s need to express grief over a loss or anger at a business partner, deferring an evaluation allows the mediator to discover the issue and work on it. This kind of exploration is much more difficult after an evaluative “verdict” has been handed down.

Even if the problem is limited to the legal merits, it does not follow that an evaluation is always required. The cause of the parties’ differing assessments of the merits may be that one side lacks key information; if so, a mediator’s initial response should be to arrange a data exchange. If, instead, the problem is that one side fears that a settlement would create a precedent, a neutral should focus on confidentiality guarantees. In our experience, it is usually possible to solve many merits-related problems without the need for an explicit evaluation by the mediator.

A second reason not to evaluate quickly is that a mediator will have more time to build and strengthen the parties’ trust. As the process goes forward, parties and lawyers get to know the mediator much better on both a professional and a personal level. In formal sessions, the participants are able to watch the mediator in action and observe how he or she handles challenges. During informal conversations and telephone contacts, the parties and counsel begin to get to know the mediator as a person. In this way, an effective mediator can gradually build up the disputants’ trust and confidence. The mediator can then draw on this reserve to cushion the shock of an unwelcome opinion on the merits. Also, the mediator will have the opportunity to learn more about the parties in order to phrase his or her evaluation in terms that will be most palatable to the audience.

In addition, when a mediator prefaces the evaluation with questions and discussion of the merits, the parties often become more realistic about their cases, narrowing the scope of any opinion that the mediator must offer. The litigants may also realize that weaknesses in their case which they had hoped to keep hidden are in fact apparent to the other side. Finally, the disputants see that the mediator has heard them out and is seriously grappling with the facts and arguments they raise. The participants also learn that the mediator is raising their strongest arguments with their adversaries. As the mediation progresses, then, the disputants appreciate both that the mediator is giving them a fair hearing and has “done the homework.” They are able to come to terms with the fact that the holes in their case are known.

There is one final “when” issue: Should a mediator obtain the consent of the parties before going forward with an evaluation? At one level, this is an issue of contract. Some mediation agreements require neutrals to get the assent of all parties before offering an evaluation, while other forms leave the issue to the mediator’s discretion.[[7]](#footnote-7) A mediator owes participants the obligation to discuss process issues. But if, after this is done, the parties choose to remain in the mediation, it is best that the neutral retain the discretion to evaluate if necessary to stimulate a settlement.

Our overall advice about when to give an evaluation is this: Evaluate as late in the process as possible. As a rule of thumb, never do so until at least the first round of caucuses is completed. Only consider evaluating after you have had a reasonable chance to diagnose and treat other obstacles to agreement, using less risky tactics such as reality testing, and have talked with the disputants about your intentions. In our view, evaluation should usually be the final and almost never the first, arrow in a mediator’s quiver.

### What Standard to Apply?

The most common standard used in evaluations is one of prediction: The neutral attempts to forecast how an arbitrator, judge, or jury would resolve certain issues or the entire case, if the partie opted for a binding decision.

This predictive standard may seem self-evident, but in practice it is not. Mediators sometimes focus on how they personally would decide a case. This is irrelevant, however, since neutrals rarely serve as judges in their own unsuccessful mediations.[[8]](#footnote-8) This standard is also dangerous because it puts the mediator into the position of personally rejecting one or both parties’ arguments, making it even more likely that they will come to view him or her as an enemy.

Another standard mediators sometimes apply is: “What will it take to settle this case?” In other words, given the negotiation dynamic, what package of terms is likely to be minimally acceptable to everyone in the dispute? If, for instance, one side is stubbornly unrealistic about the likely court outcome, a “What will it take?” opinion might bend the proposed terms toward that view in order to secure agreement that is easier for parties to accept. Although there is nothing inherently wrong with this approach, a serious problem arises when disputants think that they are hearing a pure merits-based evaluation but instead receive a “What will it take?” recommendation. For a mediator to offer a settlement recommendation under the guise of a legal evaluation is both unethical and capable of creating serious practical problems when parties discover that they have been misled.

Evaluators should give their best “straight” prediction of how the likely decision maker would resolve an issue or case. However, when the litigants explicitly agree to receive a settlement recommendation rather than a merits evaluation, then a “What will it take?” opinion is appropriate.

### Structuring the Evaluation

The first issue for a mediator to consider is whether he or she will perform the evaluation, or suggest a person outside the process. There are many advantages toan outsider’s evaluation. . First, it distances the mediator from the process, greatly reducing the risk that a disappointed disputant will hold the results against the mediator. Second, the mediator and lawyers can select an evaluator with the credentials most likely to impress the parties, without concern about balancing evaluative credentials with facilitative skills. If, for example, the parties would be most swayed by a prediction from an eminent jurist, they can retain a former chief justice without worrying about whether he or she knows how to mediate.

A third advantage of going outside is that it allows the mediator to focus energies on a single role: that of facilitator. Fourth, it solves the nagging issue of what a mediator who also evaluates should do with any information that may have been disclosed on a confidential basis in caucuses.[[9]](#footnote-9)

There are practical difficulties, however, with using an outside evaluator. First, unless the two roles are assigned at the outset, making arrangements for an outsider to come in will usually require adjournment of the process and disrupt its momentum. When parties are allowed to cool off, they may hardent their positions.. Second, retaining an outsider is more expensive than having the mediator give an opinion, and many cases will not support the cost and delay of additional briefing. Finally, even with the mediator’s assistance, the parties may be unable to agree on who should perform the evaluation. For these reasons, ,the parties almost always request that the mediator take on the task. .

*Limit the issues.* The next question is how much of the case to evaluate. Novices often assume that an evaluation must cover the entire dispute, but this is not so. The legal issue driving the parties’ impasse may be a relatively narrow one (for instance, will the liquidated damages clause of a contract be enforced?). If so, there is no need to evaluate other issues on which the parties are closer to agreement. Indeed, if the evaluator’s view of those other issues differs from that of the parties, evaluation would stimulate disagreement rather than resolve it.

*Piggyback whenever possible*. A corollary to not evaluating issues unnecessarily is to build on the parties’ opinions as much as possible. A plaintiff, for example, may have a realistic take on liability but an inflated view about damages. If so, it is more effective for an evaluator to say that he or she will accept the party’s liability percentage “for argument’s sake,” although perhaps noting mild disagreement with it, then press the evaluator’s opinion about the likely damages. It is easier to change a person’s mind on one issue than two, and an evaluator’s “concession” on one point will often induce disputants to accept his or her views about other, more controversial issues in the case.

*Think about who needs to be influenced.* One’s tendency is to assume that evaluations are done solely for people in the mediation room. This is often not true. The real cause of an impasse may be a decisionmaker in a distant city who has not participated in the mediation or felt its impact. Or negotiators may be hesitating out of fear that a decision to compromise will expose them to criticism from supervisors or outside constituencies. If the problem is absent decisionmakers, the evaluation can often be used as an event to get their attention, and sometimes their actual presence at the scene. There is something about the idea of even a non-binding “verdict” being handed down that brings a case onto the radar screens of persons who have felt too busy to pay attention to it before.

If the issue is fear of being second-guessed, and the potential critic cannot be brought to the mediation, it may make sense to put the evaluation in the form of a written opinion that a party can take to his or her constituency or place in a case file. If an evaluation is to be used to convince persons outside the process, the credentials and public reputation of the evaluator become more important than his or her personal qualities. In such circumstances, a mediator will not be able to use the trust he or she has built up during the proceeding to sell the result, and may want to select a third person whose resumé will impress an absent decisionmaker.

***Example***: A mediator was working on a dispute between a government loan agency and a borrower who had defaulted on his mortgage. As the mediation went forward, it became clear that the loan foreclosure had been handled badly by the original lender, making it difficult now for the agency, which had inherited the loan, to collect on it. Still, the agency refused to settle the case. In caucus, the agency disclosed that it needed a letter from the mediator evaluating the case and endorsing the result in order to settle. The agency was not willing to have the letter shown to the borrower; instead, it would be used by the agency to convince a review board to approve the deal. The borrower’s counsel agreed to these terms, the mediator wrote the letter, and the case was settled.

Choices in Effective Format. Before undertaking an evaluation, consider what format will maximize its contribution to a settlement.

• What data will the evaluator receive? For example, will the parties rely on existing documents or prepare special briefs? Note that special briefing is more likely to be necessary if an outsider is brought in to do the evaluation.

• Do the parties need the feeling of having a “day in court”? Will the evaluation have more weight if they are allowed to make formal arguments? If so, consider conducting the process in a “moot court” format.

• Should the opinion be delivered in caucuses or during a joint session? If it is delivered to the disputants in each others’ presence, the losers may feel humiliated, creating anger that will disrupt the process. If, on the other hand, the evaluation is presented in separate caucuses, the disputants may suspect that the evaluator is delivering different opinions to the two sides.

Dwight: I couldn’t read your handwriting here, you wanted to add something like “we rarely ask for special briefing (delay) or ask formal\_\_?????

We rarely ask for special briefing because it would usually require adjourning the process. We also avoid “moot courts,” because to hold one risks elevating the importance of an evaluation from impasse-breaking tool to final pronouncement in a case.We also strongly favor delivering evaluations in caucus. This is not in order to deliver different legal analysis or numerical evaluations to each side. Rather, it is because evaluating in caucus allows us to use phrasing and arguments calculated to help the listeners to accept our opinion. In caucus one can, for example, piggyback one’s views on bits of confidential information that party has shared. The mediator-evaluator could, for instance, concede that an opposing witness might be lying as that party has been arguing but go on to say that the witness has a demeanor that would impress a jury. Evaluating in caucus allows us to more frankly acknowledge strengths in each side’s arguments, and build on that foundation to deal with more controversial issues.

The problem of demonstrating that the evaluator is delivering the same opinion in each caucus is a real one. It can be addressed, for example, by writing a bullet point form of the evaluation on a flip chart or notepad and carrying it from one caucus room to another. Putting the opinion in writing has the extra benefit of giving visual reinforcement to unwelcome news and reduces opportunities for the parties to engage in “selective perception” of the evaluation..

*Consider language, culture and commonality.*. A mediator’s choice of language, tone and cultural referents in presenting an evaluation will greatly influence its impact on the parties. One’s individual and cultural background is what it is. But a bit of chameleonship in style and manner can increase the persuasiveness of the opinion, particularly when its content is critical. If, for example, one party (whose team may include a lawyer, expert and several client representatives) is informal, given to slang and colorful metaphor, it may be effective to use that style in their caucus. If the other party is more formal, deliberate and analytical, the mediator will do well to choose a tone and language likely to resonate with that group. In short, this advice on choice of style and manner is “When in Rome...,” particularly when the substance of the message is relatively unfavorable. This is another reason to present evaluations in private caucuses with each side.

*Be empathetic.* Acknowledge the listening party’s concerns and arguments and why a result you see as likely or possibly may seem unfair or surreal. Predictions are not pronouncements of right and wrong; you can actively listen to and reflect or empathize with a party’s feelings and responses.

*Emphasize differences in perspective*  It is sometimes difficult for disputants to accept that someone who has the same information as they do nevertheless disagrees strongly with their judgments. One defense is to emphasize that in doing an evaluation, you are not giving your personal opinion about what is a fair resolution, but instead are predicting how other people whom the dipustants have never met (a judge or jury) would react.

We also note the special advantages of being neutral. Because we are not arguing the case and have no personal stake in its outcome, we are free to think about it from the perspective of an uninvolved person. It is difficult for disputants to admit that their judgment may be distorted by their roles in the case (although they readily see that the condition affects their opponents and perhaps their clients). Our practice is to mention the point but not to stress it heavily.

Distance yourself from the opinion. As we have noted, it is very important that the mediator not become personally identified with an unwelcome opinion. One method of doing this is to follow the guidelines set out above: empathize with the problem that this creates, note that you will never sit in judgment on the matter, use the language of prediction, and so on.

Another way for mediators to distance themselves is to use the technique known as decision analysis. Decision analysis is a mathematical technique that allows analysts to break down a case into a series of choices and chances (win on summary judgment or not; win or lose at trial; recover a high, medium or low verdict; etc.). The case is then “graphed out” in a way that lets the parties see the possible outcomes in the litigation and weigh the probabilities of each one. Individual choices and chances are then multiplied out, yielding an overall monetary value for the case. Decision analysis allows mediators to talk with disputants in a relatively dispassionate way about what could happen if a dispute is adjudicated. It allows both the neutral and the parties to “let go” of emotional arguments and consider litigation risks in a logical manner. Also, because participants are asked to discuss and estimate the percentage likelihood of success on each issue before calculating its impact on the case’s overall discounted value, they may provide more honest assessments. For this reason, decision analysis can be a constructive vehicle for discussing the parties’ or the mediator’s case evaluation.[[10]](#footnote-10)

### Conclusion

Evaluations rarely end cases themselves. Rather, they provide a strong “dose of reality” that helps break down differences in how the parties assess their no-agreement alternatives. Assuming an evaluation is necessary, therefore, mediators need to think in advance about how to use them to promote further negotiations.

1. Is reflection or consultation time needed? In simpler cases where the decisionmakers are present, a mediator can give an evaluation orally and then ask for a new offer. But when the case is complex, the results shocking to the listeners, or the evaluation calls for an offer outside a negotiator’s authority to settle, an adjournment will probably be needed.

2. What kind of bargaining should occur after the evaluation? Who should make the next concession? Are inventive terms possible that would obscure or cushion one side’s defeat in the evaluation? Should the mediator make a compromise proposal, to some degree influenced by evaluation results? If so, should the proposal be presented as a “mediator’s proposal”? basis that allows each side to conceal its willingness to agree unless the other side has assented as well?[[11]](#footnote-11)

Evaluations can help break through seemingly impassable merits-based barriers. A mediator should not evaluate , however, without some plan for what he or she will do on the other side to bring the negotiation to closure.

We do not advocate that evaluation be used in most cases, or even as a tool of first (or second) resort in those situations where it is likely to be helpful. Nor do we contemplate a model in which evaluation overshadows the facilitative aspects of mediation: quite the contrary. We do suggest that evaluation is merely a more transparent, honest extension of the practice of “reality testing” which has long been a part of legal mediation orthodoxy. When traditional techniques fail to persuade a party holding a deeply-held, but unrealistic, view of the merits, direct evaluation may be the mediator’s only alternative to declaring an impasse. Then, evaluation is appropriate. Because of its inherent risks, however, evaluation should be undertaken only with skill and careful attention to its role within the mediation process.

1. \* Mr. Golann is a professor of law at Suffolk University Law School in Boston. He is an active mediator of legal disputes and serves as a distinguished neutral for the CPR Institute and panels in Europe and Asia. Professor Golann is the principal author of Mediating Legal Disputes *(*2009) and co-author of Resolving Disputes(2010). Additional information is available at golannadr.com. **Ms. Aaron is a Professor of Clinical Law at the University of Cincinnati College of Law and Director of its Center for Practice. Also a mediator and arbitrator based in Cincinnati, Ohio, she was formerly Executive Director of the Program on Negotiation at Harvard Law School and Vice President and Senior Mediator at Endispute, Inc.** Ms. Aaron received a B.A. from Princeton University and a J.D. from Harvard Law School. She is the co-author of Mediating Legal Disputes (2009), from which this article is drawn. [↑](#footnote-ref-1)
2. Some commentators believe that for a mediator ever to evaluate raises ethical questions. For example, the Standards of Conduct for Mediatorspromulgated by the American Arbitration Association and the American Bar Association, state that “A mediator shall conduct the mediation fairly, diligently and in a manner consistent with the principle of self-determination by the parties.”

   The ABA/AAA standards do not say explicitly whether or not mediators are allowed to evaluate, but the commentary to them states that “Mixing the role of a mediator and the role of a professional advising a client is problematic...A mediator should, therefore, refrain from providing professional advice” and refers to the option of sending parties outside the process for a “neutral evaluation.” For an interesting discussion of the practice-of-law issue, *see* Carrie Menkel-Meadow, *Is Mediation the Practice of Law*? and Bruce Meyerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 Alternatives 57, 74 (June 1996).

   At the same time, many of the nation’s most respected mediators use evaluation in their work, considering it an appropriate tool in certain situations. *See*, *for* *example*, Jonathan Marks, *Evaluative Mediation—Oxymoron or Essential Tool*?, Am. Law. (May 1996). [↑](#footnote-ref-2)
3. These findings are consistent with the results of a long series of experiments showing that the roles people adopt in both litigation and non-litigation contexts often impair their ability to analyze data accurately. *See*, *for* *example*, Max. H. Bazerman, *Negotiator Judgment: A Critical Look at the Rationality Assumption*, 27 Am. Behav. Sci. 211, 220-22 (1983). [↑](#footnote-ref-3)
4. For a discussion of these and other barriers and specific strategies to address them, *see* Golann et al., Mediating Legal Disputes, (. [↑](#footnote-ref-4)
5. For a discussion of other psychological forces that can distort a litigant’s assessment of the legal merits, and methods to deal with them other than evaluation, *see* Golann et al., Mediating Legal Disputes, *id*. [↑](#footnote-ref-5)
6. Our apologies to Roger Fisher and William Ury, the inventors of the concept of Best Alternative to a Negotiated Agreement, or “BATNA.” *See* R. Fisher, W. Ury and B. Patton, Getting to Yes (1991) pp. 97-106. [↑](#footnote-ref-6)
7. For example, the model agreement developed by the CPR Institute of Dispute Resolution requires that all parties assent before an evaluation can be given, but the standard JAMS agreement leaves the issue to the mediator. The American Arbitration Association has no specific rule on the subject, but as noted in note1, the ABA/AAAACR Standards of Conduct for Mediators can be read to define “neutral evaluation” as a process separate from mediation. [↑](#footnote-ref-7)
8. The exception, of course, is the process known as “med-arb,” in which the disputants consent to have the mediator render a binding decision if they cannot reach agreement. [↑](#footnote-ref-8)
9. One possible solution is for the mediator to disclose that his or her assessment rests in part on “secret ammunition” confided by one side. Among other things, this makes it easier for each party to understand the neutral’s opinion. [↑](#footnote-ref-9)
10. For an explanation of how decision analysis can be used in mediation, *see* Marjorie C. Aaron, *The Value of Decision Analysis in Mediation Practice*, 11 Negotiation J. 123 (1995) and M. C. Aaron,, Chapter 8 *in* Mediating Legal Disputes. [↑](#footnote-ref-10)
11. The essence of a “mediator’s proposal” l is that the mediator proposes the same package of settlement terms to all sides, but under the ground rule that each side can tell the mediator in confidence whether the package is acceptable. If so, there is a deal. If not, the rejecting party will never learn whether its adversary was willing to compromise. This format makes it easier for a party to explore a compromise without endangering its bargaining position if an agreement is not reached. [↑](#footnote-ref-11)