

Distinguishing Evaluation From Prediction in Commercial Mediation

by
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When asked to describe their mediation approach, mediators often place themselves somewhere on a continuum, based on the role they play and in particular the degree to which they provide guidance to the parties about the appropriate resolution of the dispute.

The two ends of the continuum are most often described, following Leonard Riskin's 1994

formulation, as "facilitative" and "evaluative." Facilitative mediators often criticize evaluative mediation on the ground that it compromises the autonomy of the parties and the neutrality of the mediator. They see evaluative mediators as acting too much like judges in settlement conferences, who often use the power and authority of the bench to get cases resolved. Nevertheless, evaluative mediation approaches appear to be preferred by parties in commercial mediations, or at least by their legal counsel.

This article proposes that "evaluative" mediation of commercial disputes consists of two separate activities which are too often conflated: evaluation and prediction. Evaluation, properly understood, is part of the basic analytic work that a mediator must do in service to the parties. This analytic work, done in conversation, directly improves the parties' assessment of the case. Prediction, on the other hand, is an additional step that can—and often should—be minimized. The market expectation and demand for evaluative mediation can be satisfied without prediction.

Prediction, as used in this article, means the mediator's statement of an opinion about the likely outcome of the case: "This case will likely result in a judgment of approximately \$xxxx" or "I think the xxx claim will be thrown out by the court." Evaluation, on the other hand, includes the mediator's efforts to guide and nudge the parties' decision process and coach the parties toward better decisions through suggestions for evaluative and analytic approaches to decision testing. (See Table 1.)

Table 1

COMPARISON OF EVALUATION AND PREDICTION

EXAMPLES OF EVALUATION	EXAMPLES OF PREDICTION
Facilitating a joint conversation that clarifies the core factual and legal differences	Stating his/her opinion of how a court will rule on an issue
Drafting a decision tree of core decisions to be made if the case goes to trial and facilitating a joint discussion of what drives each component decision for the judge/jury	Stating what a likely court judgment would award for damages in a case
Aiding the parties in jointly developing a "family" of possible outcomes if the dispute is not resolved – and what would cause each outcome	Stating whether a claim will or will not be successful in court
Inquiring about the core interests of each party and creating a method for evaluating those interest	Opining about the likelihood of success of a motion, such as a motion for summary judgment
Facilitating a joint conversation about options for resolution and analyzing/arranging them to be more easily understood	Advising a party whether to accept or make an offer based on a prediction of a court outcome or range of outcomes

Figure 1

A MEDIATION FLOW, STAGES 1 THROUGH 3

STAGE 1.
Factual and legal inquiry;
What are the key factual and legal disputes? What standards likely apply to their resolution?

STAGE 2.
Evaluation through assessment and analysis;
What are the potential outcomes? What facts and law drive each potential outcome?

STAGE 3.
Outcome prediction;
"This case would likely result in a judgment of ..."

Evaluative mediators typically follow a path (that can, but need not, end with a final stage of outcome prediction – Stage 3 in Figure 1).

THE VALUE AND IMPORTANCE OF EVALUATION

The BATNA approach to negotiation in mediation is based on the parties' understanding their alternatives to a potential negotiated agreement, and determining whether any of those alternatives is better: in other words, evaluating their options. The mediator helps the parties by using her/his training and expertise to coach them about how they can better evaluate the risks and benefits of future events and adjust their negotiation stances as needed--without doing it for them. An evaluative mediator has many options and tools through which the mediator and parties/counsel can rigorously look in detail at the core disputed issues of fact and law (see examples of such tools below). The key here is to have a joint discussion of outcomes and outcome drivers – not to persuade one party. This joint conversation, led by the mediator, informs everyone what the dispute is about. On occasions, solely removing misunderstandings can greatly change the prospects for a good resolution.

A deeper understanding of the issues in mediation – in and of themselves and without a prediction – provides a much greater opportunity for a thoughtful resolution. This is what makes a jointly and simultaneously conducted “evaluation” superior to a unilaterally developed mediator’s “prediction.” Changing of minds and self-reflection is more likely when it arises from within – rather than when urged by the neutral.

PROBLEMS UNDERLYING OUTCOME PREDICTION

The mediator who predicts the outcome (“I think this case will result in a judgment of about \$xxx to Syyy”) may do so with confidence, but that confidence may be misplaced. A mediator’s actual ability to predict trial outcome is limited by the many errors associated with predicting trial outcome including, among others:

- Effect on case outcome due to factors outside the control of participants
- Random events or unpredictable causes (scheduling, delays, identity of jurors or judge or unexpected conduct of a party or witness)
- Actual testimony in the hearing under oath as compared with arguments advanced in mediation
- The determination of which evidence will be admissible and judged credible

- Problems/challenges to or errors in expert testimony
- Case complexity including legal issues, contract interpretation or unclear precedent
- Changes in trial strategy that take place immediately before or in the course of the hearing
- Resolution (whether proper or not) of prehearing or evidentiary motions
- The role of decisional subjectivity/bias and its effect on the arbitrator, judge or jury
- Where applicable, the outcomes of, or disposition during, an appeal

Little data are presented that can prove the alleged accuracy of mediator outcome predictions. On the contrary, mediator predictions are subject to the mediator’s own cognitive biases. How objective is the mediator’s prediction? What may be presented at an ‘objective’ prediction of trial outcome may more like be a statement of “how I would rule on this if I were judge/arbitrator” – and hence subject to bias as well as the limits on and quality of data presented to the mediator. Although some cases lend more to prediction (for example based on summaries of jury verdicts in straightforward personal injury cases), many commercial cases involve complex facts, interrelated agreements and legal arguments that belie prediction.

Even if a predicted victory is realized in a favorable trial court judgment, appeals in civil cases are common (reportedly 15% in the 46 large counties in the US and 21% in contract cases in the period 2001-2005). Trial lawyers know an appeal is not always aimed at a reversal or remand but rather is a vehicle for continued negotiation. As such, the actual judgment, much less a prediction, is not necessarily the final stage in the process.

The questionable accuracy of mediator predictions may be known to mediators who also serve as arbitrators. They may have had the experience of wrestling with how to decide a case after a hearing lasting two weeks, when previously a mediator had made a prediction of the outcome based on perhaps a half day of unsworn statements and arguments. Can the prediction based on unsworn testimony and argument really be considered objective and sufficiently accurate to be relied upon by the parties for settlement decisions? Although mediators often tout the percentage of mediated cases that settle, there are no meaningful data to demonstrate

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the percentage of cases in which the mediator's settlement-producing prediction was accurate — obviously, as there is no feedback loop.

When mediators say they are “evaluative” mediators, do they really mean they are “predictive”?

Where the mediator uses a caucus method, the objectivity and utility of the prediction is further undermined by the fact that no party has heard all that was said privately to the mediator. The caucus model invites spin from the parties and counsel. Their exaggeration or strategic misrepresentation undercuts the objectivity of the mediator's prediction — as the only test of the facts asserted is the mediator's judgment. Therefore, although each party may have the mediator's outcome prediction, they do not know what “facts” were explained in caucus and how those affected the prediction.

Beyond questionable accuracy lies the issue of mediator neutrality. Factual and legal inquiry by the mediator (Stage 1 in Figure 1) and evaluation through assessment and analysis (Stage 2) are fully consistent with neutrality and absence of bias. In contrast, outcome prediction (Stage 3) dramatically changes the role of the “neutral” mediator. By making a prediction, the mediator is taking a position on the conflict and may be seen as more allied with one side of the dispute. (That may be one of the reasons mediator predictions are commonly done in caucus.) It might be difficult for the parties (especially a party who is disappointed in the prediction) to view the mediator's later statements as neutral.

Another key and often undiscussed problem with mediator outcome prediction is the dramatic change in power that results therefrom. Prior to the mediation session, parties and perhaps counsel have worked as teams to look at the conflict and how to resolve it (including whether it will be resolved through adjudication or negotiation). In Stages 1 and 2 above, the mediator joins the conversation, brings the parties together and adds both valuable expertise and the perspective of someone who is not vested in the conflict — a form of “positional objectivity.” However, when the mediator moves to Stage 3, there is a substantial shift of power from the parties to the mediator, whether it is obvious or subtle. No longer merely creating a healthy environment for a conversation, the mediator now takes on the power

of directly and consciously influencing the process by predicting the likely outcome. The dispute over what will likely happen at trial is near the core of the parties' collective conflict, and they have now given that power to the third party. The many assurances that “this process is voluntary” do not mitigate this significant power shift. Accordingly, something that was inherently in the domain of the parties (control over the outcome of the mediation process) has now shifted in some ways to the previously neutral and objective outsider. Those who have the greatest knowledge of their own interests and investment in the settlement now have a diminished role in creating it. This is so common and unquestioned in today's commercial mediation culture that it is doubtful that parties fully understand and consent to the power shift from them to the mediator.

With no commonly accepted standards that govern how mediation predictions are made and transmitted, a question arises as to whether the prediction is one that is: (a) an objective, logical prediction provided with a reasonable certainty or (b) a prediction that, rather than being objective, is more intended to adjust parties' risk analysis and settlement offers, in keeping with the efficiency model of mediation which seems to focus more on whether a case is settled (e.g., docket control) than on the quality of the settlement from the perspective of the parties' interests. If prediction is used, do the parties and counsel know which of the two they are receiving?

MARKET EXPECTATIONS

Unfortunately, the marketplace tees up mediation as being either “evaluative” (often meaning predictive) or facilitative. In that context, facilitative seems rather weak (“Why do I want the weak version — let's get the full strength.”). However, as noted above, there is a great deal of evaluative and analytical/assessment efforts that a mediator can undertake in joint sessions without taking the final step to outcome prediction.

That there is a “demand” for predictive approaches to commercial mediation seems clear although the reasons therefor are not as clear. There are perhaps at least six reasons for the demand.

First, it has become the culture — “it's just the way we do it.” Perhaps begun in court “settlement conferences” of the 1980s, the predictive practice moved quickly to commercial mediation — likely as a consequent of the legalized approach to mediation and even the transition of judges to mediation — bringing the settlement conference model along. The use of private and confidential caucuses with

the mediator is well aligned with outcome prediction – i.e., “we are alone now so let me tell you how I see this case.”

Second is the matter of conflict avoidance. Some say conflict avoidance is the most universal response to conflict. As such, the comfort zone for attorneys tends to be one of separate caucuses that eventually often include a mediator’s outcome prediction. An element of avoidance in some attorney–client relationships is that the attorney finds it difficult or impossible to discuss some issues with her/his client (such as case weaknesses) and the settlement conference/predictive approach moves that responsibility from the attorney to the mediator. This tendency can be quite strong if the attorney has oversold the case in early client conferences and now finds a retreat from those early positions to be difficult and awkward. It is not uncommon for attorneys to confide in a mediator, “I need some help dealing with my client.”

A third factor that supports predictive mediation is that the attorney, the client, or both have failed to conduct their own thorough case analysis. That could perhaps be due to stubbornness, ineptitude or lack of time. Or perhaps the attorney did not have knowledgeable colleagues or others with whom her/his case analysis could be tested, providing a reality check. In that situation an attorney’s response may be to “see what the mediator thinks of our case.”

Fourth, there may be asymmetric interests between client and counsel. The attorney may “just want this case to be over” and seek a predictive mediator to help push the client into settlement.

Fifth is the factor of frustration over the opposing party’s conduct. Whether in fact or through stereotyping, parties and their counsel may feel that the opposing party is just too difficult to speak with, and has great misperceptions of the merits of their case. They may hope that a predictive mediator can “bring the other side to their senses” by making outcome predictions on specific claims or the entire case.

Lastly, some parties or counsel accept the claimed objectivity and accuracy of the mediator’s prediction, notwithstanding the deficiencies noted above. And, of course, two or more of these reasons may be combined.

TOOLS FOR EVALUATIVE YET NONPREDICTIVE MEDIATION

Mediation can be highly and effectively evaluative without trying to be outcome predictive, including through use of one or more of the tools described below. In my experience, the evaluative discussion

best occurs in joint session, to ensure that all parties are working with the same information in their decision making. I work principally in joint session to ensure that all key communications are heard and understood by all participants, and find the evaluative part of the session is such a key communication. I find that, when evaluative discussions are in joint session, counsel and parties are able to make further clarifications directly to each other. That increases the understanding of the mediator and the other party.

Several evaluative tools for facilitating a discussion of the “more likely outcomes” without a specific need to also predict which outcome is most likely:

- A classic decision tree of key decisions to be made by the judge/jury/arbitrator, and resulting outcomes
- Decision matrix (Microsoft Excel or otherwise)
- Create and jointly assess the 4–6 most likely outcomes of trial
- Create a side by side list of party interests and jointly evaluate where there is overlap and competition
- Use scenarios to test differing future outcomes – both for litigation and settlement and conduct joint assessments of the reasons that underlie the different “futures”
- Create a set of “success criteria” for a good outcome, jointly discuss options for outcomes and then compare against the success criteria.

Each is discussed below, and others or combinations can be developed and used. Each works toward a thorough “evaluation” and analysis of the core issues in the dispute so as to: (a) ensure that the mediator and parties are discussing the same dispute; (b) obtain a better understanding of the various and most likely outcomes that would result from continuing to litigation; and (c) discuss the factors and decisions that would drive each such outcome.

In this evaluative approach the parties and counsel work toward a facilitated understanding of the driving factors – thereby giving them better tools and understandings with which to make their own predictions of outcome (or better ranges of outcome and sensitivities) so they can adjust their ideas about settlement. Each tool below works to enable and support improved party assessments of the respective risks and benefits of proceeding

to litigation – rather than relying on the mediator’s prediction. For those parties and counsel who have anticipated an evaluation and prediction, having gone in detail through Stages 1 and 2 they may make their own Stage 3 “prediction” in their own meetings.

TOOL #1:

DECISION TREE CONVERSATION

In joint session, the mediator can facilitate a conversation among the parties and counsel, if applicable, about potential outcomes from the dispute, using a classic decision tree. The conversation can first work to see if, though disagreeing on which outcome is most likely, the parties/counsel at least agree on the core issues and the construct of the decision tree. For example: “Is this decision tree correct? If not, what is needed to make it more correct? What key decisions are missing? Even if not perfect, is it suitable to better understand the most important issues in this conflict?”

As the next step, the evaluative mediator then reviews in joint session each key decision in the tree, examining what factors, documents, testimony or

law drive the decision in one way or the other. This step does not seek agreement on what will be the outcome of each key decision but rather some level of agreement on what drives each decision. That alone can be of great value.

In the example in Table 2, the dispute involves two key issues that may be litigated leading to four possible “outcomes.” The discussion of the outcomes also give the parties a better understanding of what the potential outcomes are and their implications. Even the most complex matter can often be simplified to 3–5 key issues. The value of the decision tree is that it can objectively facilitate a conversation about litigated risk. The key in a nonpredictive approach is that the facilitator/mediator helps the parties create the decision tree yet does not attach percentages or predictions about which outcomes are more likely – that is the province of the parties.

TOOL #2:

CONVERSATION BASED ON FUTURE “SCENARIOS”

Consider the mediation of a breakup of a business such as a medical practice or marketing firm and disputes arise over fair valuation of the entity. Although

the parties may eventually use accountants or economic consultants for the final valuation, they may have very differing ideas about how the business would develop in the future – and hence its current value. A facilitated discussion of the several more likely scenarios may help parties better understand the more likely future scenarios and use such to guide the eventual economic valuation.

The mediator could guide the parties through the identification of the more likely scenarios and the factors/forces that make them more or less likely to occur. Experts in scenario building report that often scenarios fall into three more likely outcomes – this could guide the mediated discussion.

Table 2

SAMPLE DECISION TREE MATRIX

DECISION 1		DECISION 2	OUTCOMES
FACTS THAT DRIVE THIS DECISION			
[What causes Issue 1 to be decided “yes” or “no”?]	What causes Issue 2 to be decided “yes” or “no”?	[What is the nature of this outcome?]	
RELEVANT LAY OR EXPERT TESTIMONY			
[What testimony causes Issue 1 to be decided “yes” or “no”?]	What testimony causes Issue 2 to be decided “yes” or “no”?		
APPLICABLE LAW OR OTHER GUIDANCE			
[What law or other guidance drives the decision on this issue?]	[What law or other guidance drives the decision on this issue?]	[What law or other guidance affects this outcome?]	

TOOL #3:**CONVERSATION BASED ON THE POTENTIAL “FAMILY OF TRIAL OUTCOMES”**

For most litigated disputes, even complex ones, there exists a family of potential and more likely trial outcomes. This is often in three or four categories: low or no payment to plaintiff, midlevel payment, high payment and perhaps a “home run” outcome for the plaintiff. The mediator may conduct a joint session in which the parties discuss this family – in effect, a simplified version of the decision tree. What are those potential outcomes and what makes one more likely than the other? As noted above, the mediator is not predicting which is more likely but rather facilitating a discussion of the parties’ views. Of course they disagree, but do they know why and on what bases they disagree? In such conversation, they do not reach agreement on likelihood (for if so, the case would be resolved) but seek to understand their own and the other parties’ views. This information can be used to make settlement decisions.

The mediator can facilitate a joint discussion of the contents of each cell in Table 3 without asking a party to agree on how likely that outcome is. For example, the mediator might ask the plaintiff, “however unlikely you believe this outcome to be, what could cause a trial outcome in which the plaintiff receives little or no recovery?” The question to the defendant might be, “however unlikely you believe it to be, what would cause a trial outcome in which the plaintiff recovers their full demanded recovery?”

Another and even more basic approach is to have a facilitated joint conversation on the spectrum of outcomes in the case – on a linear spectrum of increasing levels of recovery for the plaintiff. What causes trial outcomes to fall at the various points along the recovery spectrum – such as in the four “zones” shown in Figure 2? As noted above, the mediator ensures that each potential outcome is discussed – but he/she does not predict which is the most likely. Nor is there any expectation of agreement on which is most likely – just the identification

of the factors and drivers that support or detract from the likelihood of each. The goal is to allow a simultaneous and joint assessment of claims while at the same time not requiring any party to concede a defeat on any claim. The mediator should find ways to discuss claims and defenses to bring clarity while letting each participant place on the discussion the weight they believe it deserves.

The mediator could also use a bar chart (generated in Microsoft Excel) that shows the relative value of the theoretical four trial outcomes, as shown in Figure 3 below.

Table 3:

POTENTIAL TRIAL OUTCOMES IN

POTENTIAL OUTCOMES	RECOVERY FOR PLAINTIFF			PLAINTIFF “HOME RUN” FULL RECOVERY
	LOW LEVEL	MID-LEVEL	HIGH LEVEL	
Facts that drive the outcome				
Law that supports the outcome				
What the judge or jury must have determined to reach this outcome				

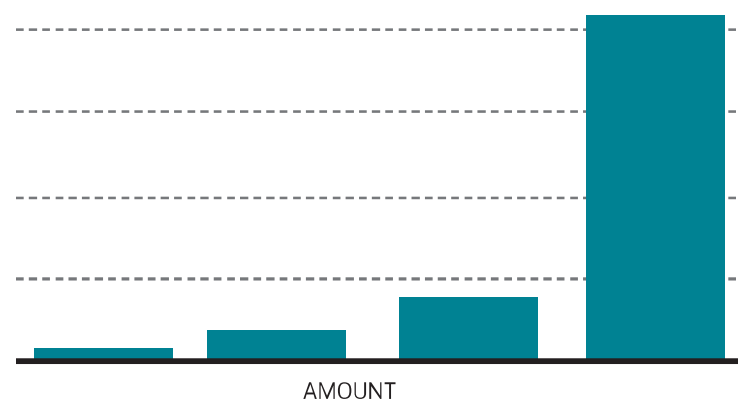
Figure 2:

FAMILY OF POSSIBLE TRIAL OUTCOMES

INCREASING PLAINTIFF RECOVERY ➡



Figure 3:

FAMILY OF OUTCOMES

TOOL #4: USING “SUCCESS CRITERIA” TO TEST OUTCOMES

With this tool, the mediator facilitates a discussion among the parties to create a comprehensive and relatively objective list of the criteria against which settlement “success” could be measured. This needs to be carefully done to ensure the criteria have some level of objectivity and recognizable value – meaning success cannot be “party A loses the suit” or “gives up their claim for x.” Rather the success criteria need to both satisfy the core interests of each party leaving the subjective details for later. The later details are important but the initial purpose of the list of criteria is for all participants to know “what is in play.” A very simple example is below on an example oil and gas dispute:

Table 4

EXAMPLE OF SUCCESS CRITERIA FOR SETTLEMENT OF AN OIL & GAS DISPUTE

Dismissal of the suit with prejudice
Payment by Party A to Party B (amount to be later determined)
Party A agrees to provide to Party B the data requested by Party B
Party A is fairly credited with prior expenditures on the subject parcel
Party B agrees to convey rights to parcel Y to Party A
Party A will promptly commence drilling on Parcel C
Party B will approve all previously requested Authorizations for Expenditure from Party A
Parties A and B will cooperate to actions to ensure lease operators do not withhold resources or payments as a result of this lawsuit.

If an issue is truly needed by a party for settlement, it is placed in the list of settlement criteria. Table 4 assumes after a mediated conversation, the parties agree that with satisfactory details (such as on Criteria 2 and 4) and any contingencies for action taken (such as on Criteria 3, 5, 6, 7 and 8), leading the parties to settlement.

TOOL #5: CREATING AND USING A TABLE OF PARTY INTERESTS

This tool is similar to the “success criteria” but focuses on each party and their individual interests rather than the joint interests of all regarding the settlement. The mediator facilitates a discussion of the interests of each party in joint session – regarding the current dispute, the larger relationship and its individual long term goals. The concept is that if each party understands its own interests and those of the other parties, they can better create

a package of options that may adequately satisfy all relevant, bona fide interests. Once such a list has been created, the mediator may encourage parties to put some level of priority on each of its interest. The underlying goal here is helping each party better meet the interests of the others by clarify what those interests are and their relative importance.

CLARIFYING THE GOAL OF THOUGHTFUL PARTY EVALUATIONS OVER MEDIATOR PREDICTIONS

Whatever tool or approach may be used, an evaluative approach to mediation that coaches the parties on how to make their own thoughtful evaluation is very different from the mediator predicting outcomes. Care should be used even in the terminology. When the parties and counsel seek evaluation: (a) do they know what they really want? (b) do they mean predictive? (c) if predictive, are they seeking an independent logic driven prediction or rather a prediction intended to increase the likelihood that the prediction will result in a settlement?

The approaches recommended in this article should be addressed in the initial communications leading to the mediation session rather than disclosed later. They can be included in the mediator’s brochure, web site and phone calls with parties and counsel. As the culture in commercial mediation calls for mediator prediction, a mediator needs to explain that the approaches recommended herein are intended to ensure the primacy of party judgment but also adding the mediator’s analytical tools to improve that judgment.

Because this is far from a trivial distinction in mediation style, it should be thoroughly discussed. Where counsel are involved, it is important that they are not preparing clients for a different mediation style. Experience shows that when thoughtfully explained and carefully implemented, both counsel and parties learn a great deal from the use of the tools described above. The heavily evaluative and analytic mediator uses each of the tools above to probe the arguments and facts presented. This deep probing and questioning does not require prediction but works to shine light on the opposing arguments.

After engaging the parties in such a process, it can then be useful for each party team to meet separately to consider what they have learned from the process and how it should affect their approach to settlement. After such meetings, the mediator may wish to reconvene the discussion to address questions that have recently arisen.

Having replaced Stage 3 (mediator prediction) with party evaluations of trial risk and benefits, the mediation process can turn to the subject of developing possible avenues for settlement. There also can the mediator suggest different analytic tools to clarify the conversation and improve decision making.

The evaluative processes described above are intended to be a complete substitute for mediator predictions. The mediator roles do not overlap. If parties continue to need prediction, the mediator should:

- Keep party assessments of the case distinct from mediator predictions – do not mix the two.
- Make predictions only if the quality of data provided to the mediation meets some minimum level of adequacy and quality. Where trial outcomes are highly dependent on witness testimony, predictions should be made cautiously if at all.
- Explain the change in role “I will end my role as a neutral facilitator and change to that of providing an advisory opinion.”
- State clearly that the prediction is based only on the facts as presented to the mediator, and that while it reflects the mediator’s experience it may also reflect his or her biases.

Experience shows that, when parties and counsel are given the benefit of highly analytic and evaluative mediative processes that do not include mediator predictions, they are more than willing to take and digest the data provided so as to make their own predictions to be used in settlement. They leave the conversation with a more clear understanding of the conflict itself, the opposing parties’ view of the conflict and a better understanding of their own position. They are clearer about what will be presented to the judge/jury/arbitrator and its connection with the various potential outcomes if the case were to go to trial. This data gives them a great deal to consider when looking at their own risks and benefits of litigation.

The parties’ own assessment of risk/benefits resulting from a well facilitated joint session on such is more valuable than the mediator’s subjective outcome prediction – no matter how thoughtfully prepared. This moves the power of resolution back where it originated and where it belongs. 🌱

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