

## **Mom Always Liked You Best (or The Biased Mediator)**

By

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In the early 60s, the Smothers Brothers comedy team emerged into the entertainment world (today they make wine in Northern California). A common refrain in their act was when Tommy Smothers would complain to brother Dickie, that “Mom always liked you best.” That was the premise for some very funny stuff.

Even though many of us with siblings probably felt the same as Tommy when we were kids, those of us with children have probably found that in spite of the perceptions of our children, it usually isn’t so. Of course, it is also true that sometimes one child is consistently rowdier than the other and requiring more correction. Also, there are certainly times when we actually do like Billy more than Bobby. But, I suggest, that is generally situational and temporary.

Mediators are trained that the “facilitative” approach is the ideal that mediations should — to the maxim extent possible — be party-driven with the mediator simply facilitating the negotiation. Perhaps the facilitative approach is most appropriate in some situations, but more and more, I am finding in my cases that counsel are frequently seeking an evaluative approach. There are risks to the mediator in both approaches. The risk discussed in this article is the *perception* that the mediator is biased. Let me express for myself and my fellow mediators, I DON’T CARE HOW YOUR CASE SETTLES! I am not concerned that one side is paying too much; I am not concerned that one side is receiving too little; I do not worry myself about lopsided negotiation moves as long as the process remains fair. At the end of every mediation I “post-mortem” the mediation to try to figure out what I could have done better, but never lament the terms of the settlement. I realize that the parties make the decisions they do in mediation for their own reasons and that, even when the compromise may be painful, they have made a personal decision to resolve a case.

My experience is that many attorneys and most litigants want a pro-active mediator who does a lot of “reality checking,” and, from time to time, “calls a bluff.” However, in spite of the situation that in doing so the mediator is usually complying with the wishes of counsel (I rarely would call an attorney’s bluff in the presence of a client), such mediator moves are sometimes misperceived by counsel (or the litigant). Also, when the temperature in one caucus room rises, so it tends to do in the other room. Seldom are intense mediations one-sided with the tension. In fact, I will commonly leave one caucus room containing unhappy parties and counsel to enter the other with people just as unhappy. Therein lies one of the rubs. Since the parties and attorneys generally do not know what is happening in the other room they will, at times, think that they are the sole recipients of what they perceive to be arm-twisting. Though I commonly arm-wrestle with recalcitrant litigants or counsel, I try not to arm-twist. Nevertheless, in their misunderstanding about what is happening in the other room, the litigant/attorney may perceive the mediator as being [other side] oriented and, thus, biased. Interestingly, in the course of

difficult mediations, I have had counsel on both sides of the same case tell me that they believed that I was favoring the other side. By the way, that complaint usually fades when the case settles.

Hence, the title lament that “Mom always liked you best!”

Mediators are most often the neutral to whom the parties look for guidance and assistance in settling their cases and, sometimes, it is much as a parent trying to resolve a dispute between warring siblings. The first one of them to hear something he or she doesn't like, suspects favoritism. I have often told the parties to litigation that one of my jobs is to tell the parties in both rooms how lousy their side of a case might be. I don't think I have ever actually used the words, “you have a lousy case,” or similar, but I know that a reality check can be misperceived.

I also use the paraphrased question, “what will your best day in court be?” Seasoned attorneys, particularly those who want to settle, give the question real thought and, generally, come up with pretty good assessments of their chances at trial. Some, on the other hand, do like to posture thus demanding further reality checks. (i.e., “are you crazy?”---- Well, maybe not.) The point is that if the parties or attorneys want a purely facilitative mediator, they should tell the mediator up front or, when choosing a mediator, shop for one who specializes in that style. Conversely, if an evaluative mediator is desired, care in picking a mediator who can deliver that service should be employed. Then, when an evaluative mediator is selected, counsel and the parties have to be willing to accept the bad with the good, i.e., hearing opinions or assessments that s/he may not welcome without jumping to the conclusion that the mediator is biased.

Sometimes mediators “buy in” to the first part of the case that is presented (either in caucus or briefing) and approach the other party with a jaundiced eye. This is natural, but we must be able to be spry enough that when we do learn of the whole story, we can moderate our views and go forward. After all, Mediators tend to be human beings and most of us chose this career path because we care about the process, the litigants and about a good result (whatever that may be). We mediators have to be very careful not only to recognize that phenomenon happening but also that we not communicate that initial impression as between the parties. Doing so may, of course, put the mediator and the process on the defensive making it much more difficult to gain the trust of the participants so that a resolution can be reached.

I hope that the light discussion of these issues that I have presented above will illuminate the fact that few mediators are position oriented, i.e., they do not, as a rule, favor one side or the other in mediation. I also hope that the reader will accept that it is common for us to hear that we are biased in favor of the other guy from both parties in mediation. Remember also that the majority of us are advocates for the process and while we hope that your case settles when you bring your cases to us for mediation, our goal is to assist the parties find their way to a resolution of their case under terms that are mutually acceptable--no matter how painful the compromise may be.

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