NAVIGANT

CONSTRUCTION

# WHAT YOUR MEDIATOR IS THINKING

Abraham Maslow has been credited with saying, "If the only tool you have is a hammer, you tend to see every problem as a nail." Underlying this observation is, of course, an invitation to reach beyond our comfortable perspectives and to take a fresh look at the problems that we are trying to solve. While none of us would deny the wisdom of this ideal, many of us spend our lives hammering away at the same old problems in the same old way. This is because we often know of no other way until something makes us take notice. As the saying goes, "You don't know what you don't know."

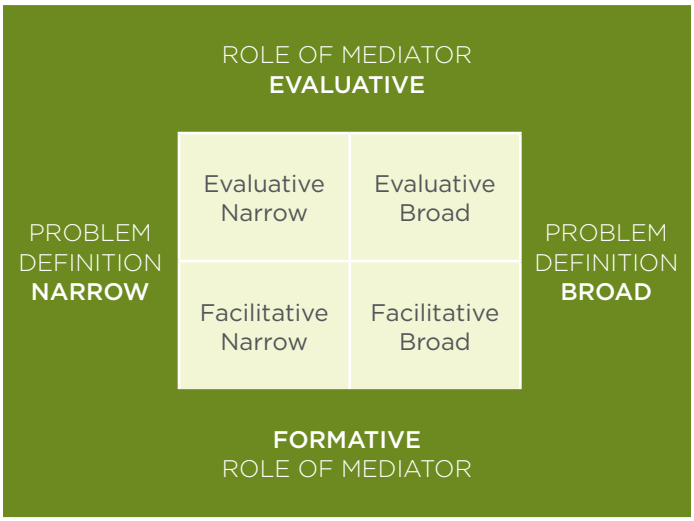
Recently, I had the opportunity to attend a course in mediation training offered by the Straus Institute for Dispute Resolution, through the Pepperdine University School of Law. For those of you imagining attending class at the beautiful campus in Malibu, Calif., I had no such luck, as the course I attended was offered in Washington, D.C. While the sand and surf would have been nice, the chance to appreciate the different aspects of the mediation process through the eyes of the mediators teaching the course was wonderfully edifying all by itself. Upon reflection, what struck me most was a new awareness of the many choices that are made, whether mindfully or not, when a dispute is mediated. Seen from the perspective of the mediator, each new choice presents an opportunity to meaningfully influence the process. This paper shares some of the issues you should consider when deciding how your mediation should be conducted.

## MEDIATOR STYLES AND SELECTING AN APPROACH THAT MEETS YOUR NEEDS

The risk when considering mediator styles is to over simplify because an effective mediator will undoubtedly employ numerous approaches when attempting to facilitate a settlement between the parties. Nonetheless, understanding the paradigmatic approaches and any particular mediator's tendencies will be instructive when shaping a process to meet the particular challenges presented by your dispute.

Law Professor Leonard L. Riskin developed a model to depict the basic approaches to the mediation process that is referred to as Riskin's Grid, which is set forth below as Figure 1. Leonard L. Riskin, *Who Decides What? Rethinking the Grid of Mediator Orientations*, Dispute Resolution Magazine, Winter 2003 at 23–25. The grid is formed at the intersection of the continuum addressing the role of the mediator (ranging from evaluative to facilitative) and the continuum addressing the mediator's definition of the problem (ranging from a narrow position-based approach to a broad interest-based approach). While Riskin's more recent scholarship suggests alternative grids to deal with more nuanced considerations, the basic model is a worthwhile reference when determining which mediator orientation is best-suited to resolve your dispute. *Ibid.*

**Figure 1. Orientations**




### Evaluative v. Facilitative Orientations

The evaluative approach has also been referred to as directive. *Ibid.* An evaluative mediator is commonly seen as the "head-banging" type that will push the parties toward resolution. Typical of this approach, the mediator may inject his or her own assessment of the strength and weaknesses of the issues being addressed and predict outcomes. To some, the influence exerted by an evaluative mediator stands at odds with the principle of party self-determination undergirding the mediation process. *Ibid.* You should expect the evaluative mediator to be very influential in the process and its outcome. When weighing the suitability of this approach in your mediation, you should consider whether your position can withstand the scrutiny of the mediator and whether your negotiation team is equipped to handle that type of pressure.

By contrast, facilitative or elicitive mediators seek to advance the process by helping the parties to make their own evaluations of proposals and assessment of risks. *Ibid.* The parties are assisted by a mediator ready to ask each party the probing questions, but reluctant to provide his or her own assessments. A facilitative mediator will allow the parties greater self-determination while serving as a learned guide throughout the process.

When deciding if an evaluative or facilitative mediator is the correct fit for your dispute, critical thought should be given to how increased party influence will affect the likelihood of reaching an acceptable negotiated result. This analysis will turn heavily on your assessment of the business acumen and ethos of the negotiating teams, both the parties and the lawyers, participating in the process. A facilitative mediator probably is not appropriate if you believe your opponent is likely to attempt to seize the moment by steamrolling all of the participants, including the mediator. Conversely, an evaluative approach is more conducive to a circumstance with an opponent who is likely to perform a reasoned case assessment and negotiate on that basis.

An often-overlooked consideration when selecting a mediator is the mediator's own view of his or her role in the process. Does the mediator believe that his or her essential purpose is to obtain a settlement? If so, be prepared to have some pressure applied if the opposing participant remains unyielding. Alternatively, is the mediator's aim to support sound decision-making, first and foremost, leaving the settlement as the parties' responsibility? As with all approaches that emphasize party self-determination, a consideration of this style should include whether or not the parties involved in your mediation (including your own negotiating team) are likely to respond well to having greater influence in the process.

### Narrow Problem Orientation v. Broad Problem Orientation

An important factor that influences a mediator's orientation is their definition of the problem. In Riskin's Grid, the question of problem definition is presented by establishing a continuum ranging from narrow to broad. *Ibid.* A narrow conception of the problem begets a process that proceeds "in the shadow of the law" with the parties' legal rights central to the debate. At the other end of the spectrum, a broad definition of the problem plumbs the parties' interests beyond the legal question presented by the immediate circumstance. The parties are viewed against the wider vista of their relationship to each other and the marketplace or community within which they participate. Care should be taken when framing your mediation as to which view of your dispute would promote the best resolution.

## BARGAINING MODELS FOR CONDUCTING A MEDIATION

Dispute resolution theory contrasts two bargaining models. The most familiar of these approaches is referred to as distributive or competitive bargaining. As the name suggests, this process involves each party seeking an advantage by maintaining a position that allows it to obtain the better part of a fixed sum. The opposing model is integrative or cooperative bargaining in which the possibility of a negotiated solution is sought beyond the parties' opposing positions on a particular issue. The dispute is recast against the broader context of the parties' interests, with less immediate emphasis placed upon the parties' differences. As most negotiations will involve elements of each of these bargaining methods, it is important to appreciate the subtleties of each.

## Distributive ("Competitive") Bargaining

In a distributive negotiation, the parties distribute between or among themselves the value being negotiated. In the context of commercial litigation, a distributive negotiation is often conducted concerning a monetary sum associated with the parties' respective responsibility for a particular legal problem. Distributive bargaining is characterized by competitive maneuvering to obtain the most advantageous position allowable with respect to the relatively fixed subject of their negotiations. Inherent in the distributive bargaining process is a tension between the competition generated by the "zero-sum" exchange and the desire to cooperate in reaching a solution of the problem. A successful negotiator recognizes the tension between competition and cooperation and manages it by being mindful of the dynamics of distributive bargaining and the tendencies of the participants in the particular negotiation.

There are a few operative principles that all negotiators must be aware of when engaged in distributive bargaining. The primary principle is that the matter tends to settle at the midpoint between the first two reasonable offers. Given this dynamic, it stands to reason that opening offers are critical in establishing the settlement bracket. A solid opening offer or "anchoring position" can go a long way toward determining the success of the ensuing negotiations. The best opening offer will be seen as credible, but without conceding more than is necessary to motivate the other party into making a credible counteroffer.

Equally important is the ability to choreograph the exchange of concessions building toward the final settlement amount. How to precisely plan your moves depends, in large measure, on the parties involved in the negotiation. Yet, there are certain negotiating norms that should inform your thought process. As an initial matter, always remember that the parties expect to exchange several offers. Any effort to circumvent the anticipated bargaining process by making a fair offer early will be interpreted as another step in the process and an opportunity to seize additional concessions. Further informing the pace of the negotiations, unless there is a specific deadline, the time taken between concessions increases as more concessions are made and the size of each successive concession becomes smaller. Prof. Peter Robinson of the Straus Institute was particularly engaging on this point by explaining to prospective mediators in the class that there are expected steps in this dance and that failing to honor them only causes a party to step on its own toes. Rather than being put off by a process conceived by some as antagonistic and coarse, he encouraged his students to revel in the sound of the "mariachi music" as the steps of the dance unfold.

## Integrative ("Cooperative") Bargaining

The concept underlying integrative or cooperative bargaining is to help the parties to view their dispute in a broader context. Consideration is given to the parties' interests beyond the resolution of the issue(s) presented by their dispute. Understanding a party's broader interests presents each party with the opportunity to satisfy the other's needs without necessarily making a concession of their own. Reaching a negotiated solution is no longer a zero-sum game. Instead of a competition pitting the parties in a battle over a defined issue, the focus is expanded by inviting the parties to consider alternative ways they can create value for each other without necessarily losing in that exchange. In theory, the competition animating distributive bargaining is replaced by a more cooperative model where the parties can increase the possible benefits to be shared, while also increasing the likelihood of reaching a negotiated settlement.

The integrative bargaining process begins with an effort to create a list of the interests underlying each party's negotiating stance on the defined issues. The mediator also accounts for the parties' overarching needs as presented by the commercial circumstance. A skilled mediator is invaluable at identifying interests that lie below the surface of the dispute. Dispute resolution theory refers to these interests as the "below the line" interests. Fertile areas to examine include the value the parties ascribe to: (1) their relationship; (2) their standing in the industry or business community; and (3) the principles at issue in the dispute to be decided. After defining each party's interests in a negotiated solution, the varying means of satisfying these needs are explored during discussions with the parties.

The benefits of integrative bargaining are most readily realized when the parties value an ongoing relationship. Relatedly, the success of an integrative approach relies on capturing or developing trust between the negotiating parties. Attempts at innovation almost always rest on the ability of the parties to trust each other. For surety professionals, situations where maintaining an ongoing relationship is at a premium include: (1) negotiations to take over and perform a project; (2) disputes on an ongoing project; and (3) a dispute with a principal who the surety has bonded on other projects. Even if your project does not appear suited toward integrative bargaining, underlying interests should not be ignored because creative negotiators can oftentimes gain some advantage by utilizing interest-based techniques.

## TECHNIQUES FOR BREAKING THE IMPASSE

A mediator's skills are most ardently tested when the parties' negotiations reach an impasse. As the frustration between the parties rises, a mediator's ability to instill hope, supply energy, and present new approaches is essential. Indeed, it is at the point of impasse when the credibility established by the mediator throughout the process needs to be leveraged into results. Set forth below are some oft-used mediator techniques for jump-starting negotiations that are stuck.

### Narrow The Gap By Proposing Linked Moves

Parties are often reluctant to move toward their bottom-line position out of a concern that a further concession will be interpreted as a lack of resolve and, thus, will fail to garner a corresponding move from their negotiating partner. In this circumstance, the mediator can bridge the gap by proposing linked moves. While there are many variations of this technique, the purpose is to gain further concessions from each party by establishing the value of the corresponding moves. Dwight Golann, *Nearing the Finish Line: Dealing with Impasse in Commercial Mediation*, Dispute Resolution Magazine, Winter 2009 at 4–10. When effective, a new narrower bracket is established as the basis for further bargaining. *Ibid.* This mediator strategy is often implemented through the use of hypothetical questions posed to the parties in their separate caucus rooms. "What-if" questions are used to obtain a commitment, which should a certain offer be forthcoming, an agreement could be struck or a contemplated simultaneous move would then be made. *Ibid.*

### Revisiting The Litigation Risks

One of the essential benefits of a mediated solution is that the parties retain control over the resolution of their dispute. Suffice to say, this element of party control is ceded to others when a case is submitted to litigation or arbitration. While this concept is usually presented by the mediator in the convening or opening stages of the mediation, the value of party self-determination and the attendant risks in trying the case are often lost in the tussle of competitive bargaining. At the point of impasse, the parties are toeing the edge of the "litigation cliff" and it is the mediator's job to remind them of the risk of jumping. This is the point in the mediation were a stark review of the litigation risks will be most instructive.

Prof. Jim Craven of the Straus Institute refers to this review of the litigation risks as the "Parade of Horribles." A review of the risks of litigation can include: (1) the uncertainty of the result; (2) a review of the legal and expert costs; (3) a discussion of the lost opportunity costs associated with management's involvement in a time-consuming and emotionally draining dispute; and (4) the reputation costs associated with the litigation itself and a possible adverse outcome. Craven offers an interesting variant on this approach, whereby he encourages the parties to visualize life without the emotional anguish of the pending dispute. Anyone familiar with the trials and tribulations of litigation will immediately appreciate the power of this approach.

### Restructuring the Mediation

The dynamics at work in a caucus room during a protracted mediation session vary based on the differing personalities comprising the negotiating team. Having spent a good deal of time locked away in caucus rooms as a party advocate, I can attest to one constant — emotional strain. The mediation process forces parties to uncomfortably relive their dispute. The rigors of distributive bargaining can further fracture already broken relationships. Moreover, the anxiety and emotion expended in the bargaining effort exhausts many participants.

A skilled mediator is a student of interactions throughout the mediation process. The mediator will be studying both the exchanges between the parties and the interaction among the members of the separate negotiating teams. As the process unfolds, the mediator develops impressions as to which participants are advancing the possibility of reaching an agreement and which individuals are detrimental to the process. At the point of impasse, the mediator can restructure the mediation to refresh and reinvigorate a process that has ground to a halt.

There are many options a mediator has when restructuring the process to mine fresh perspectives and create new opportunities for a breakthrough. *Ibid.* Options for restructuring the process include: (1) adding participants to, or subtracting participants from, the process; (2) having the key decision-makers from each side meet together without their respective negotiating teams; (3) inviting the opposing lawyers and/or experts to meet apart from their clients; and (4) convening a new joint session to address a narrow impasse issue. *Ibid.*

### A Mediator Proposal Or Case Assessment

A powerful tool in the mediator's arsenal is the mediator's proposal or case assessment. As with many of the techniques discussed herein, there are numerous ways this approach can be implemented. A mediator utilizing this technique can go as far as proposing final settlement terms for the party's consideration. Other related options include a mediator's assessment of a particular impasse issue or a mediator's overall assessment of the likely outcome of the dispute if litigation is pursued. Dwight Golann, *Nearing the Finish Line: Dealing with Impasse in Commercial Mediation*, Dispute Resolution Magazine, Winter 2009 at 4.

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Use of this impasse breaker warrants particular consideration. An essential feature of the mediation process is party self determination. A mediator, imbued with authority by virtue of his or her selection and role in the process, exerts substantial influence over the outcome of the negotiations when making a proposal. Accordingly, the parties' desire to have the mediator provide a proposal or case evaluation in the event of an impasse should be considered during the convening or opening stages of the mediation. Understanding whether or not a mediator's proposal or case assessment may be forthcoming can influence a party's decisions throughout the process, including the disclosure of confidential information.

Mediation will not always result in a global resolution of the parties' disputes. When an overarching agreement is not reached, effort can be directed at reaching smaller agreements. Even if parties are not ready to resolve the entire matter, they may agree to a streamlined dispute resolution process or an agreement to exchange information and resume negotiations at a later time. When an agreement cannot be reached, deciding whether the process was worthwhile is informed by the party's own mediation philosophy. Was the process just about achieving a settlement or was it about making informed decisions in the handling of a dispute?