

Traditional vs. Risk-Based Mediation

Traditional and risk-based mediation follow a familiar format. The mediator must identify the conflict, and create the atmosphere to permit resolution. The processes differ **markedly** in the approach taken by the mediator.

The key to success is the mediator's ability to earn the trust of the parties. Often the mediator will begin in a very friendly and detached manner, to assure a relaxing and hospitable session. Problem solving will be the key, in words, gestures and conduct of the mediator.

The mediator must learn the nature of the dispute, and identify any *below the line* issues. These are issues that transcend traditional remedies. They may be as simple as a handshake or apology, or as complex as a structured retirement plan. Typical ranges of issues include:

1. issues of fact;
2. substantive legal issues;
3. relationships between the parties, business and personal;
4. monetary thoughts;
5. non-monetary issues;
 - anger
 - conciliation
 - need for acknowledgment
 - need to vent
6. local jury pool and verdict ranges.

Introduce the Process

It is an important and often overlooked requirement for the mediator to *introduce the process* before the parties exchange views. In so doing, the mediator defines the goals, and sets the tone. Otherwise, the session can quickly resemble the original dispute.

The mediator will take the time to discuss the process of *risk focusing*. Each side should understand that there will be a time when the mediator focuses them privately on the sole issue

of the risks and costs attendant to proceeding forward. This is the essence of risk-based mediation. It is very effective, particularly in cases where the risks for both sides are extreme.

Plenary Session

Following the introduction, the traditional mediation begins with a *plenary session* where the mediator asks each side to present its views on the situation in an *open forum*.

The mediator should set the rules, and explain the goal of the plenary session. The parties should be asked to agree with the goals, and confirm that they understand the rules. Critical is the rule of *uninterrupted presentation* with the acknowledgment that each side will hear things they disagree with.

The mediator may, and often should, encourage facilitated dialogue by asking questions of the parties themselves (as opposed to their legal representatives) in the plenary session.

This can pose some risk. The mediator should take care to include in the introduction that this may occur, and encourage all parties to speak freely, honestly and, hopefully, calmly in response to questions. Mediators use this technique to flush out *below the line* issues and underlying emotions when the mediator believes it is in the best interest of resolution for these to be heard firsthand. The *open-ended question* is the favored technique.

In an effort to assure communication, rather than reaction, the mediator often follows the answer to the open-ended question by summarizing what the mediator has heard, and seeks corroboration.

Private Caucus

Following the plenary session begins the *private caucus*. It is here that the difference between *traditional* and *risk-based* mediation takes place.

When shifting to private caucus, the mediator should provide the side left alone with some type of *resolution-oriented private activity*. This will vary depending upon the circumstances of the case.

A good initial approach, immediately after the plenary, is to ask the waiting parties to write down every reason to settle and every reason to continue the dispute. The mediator will discuss the results of the exercise upon return.

After the initial private caucus, an effective exercise is to ask the parties to work with their legal representative (as an adviser, not as an advocate) to answer four questions:

1. What is the likely outcome if the other side's version is accepted 100% by the fact finder?
2. What is the likely outcome if the fact finder accepts some, but not all of the case as presented? Why might these parts be accepted?
3. What is the total dollar cost of proceeding from this point through trial?
4. Balancing the answers to the first two questions and considering costs, what is the present settlement range from your point of view?

This *risk-managed* approach is often quite useful in that it focuses the party on business considerations, rather than on the dispute.

In *risk-based facilitation* the mediator aggressively focuses each side privately on its risks and costs of proceeding forward with the litigation. This exercise presents many harsh realities and is designed to ensure that the party understands that, whatever the situation, the litigation has down sides.

When this is practiced, it is essential that the process be defined in the introduction. After the risks and costs are outlined, the mediator should leave the party with counsel to discuss these issues, and repeat the process with the other parties to the case.

Traditional private caucus provides the party with an opportunity to vent, and tell their story. The trained mediator will generally listen attentively and ask few questions. When asked, they will be open-ended, “how did it feel” type of questions. Ideally, the party is talking, and their attorney (when applicable) is encouraged to listen and not advocate.

The purpose of the *traditional* initial caucus is to identify each party’s interests, and make an effort to determine how far apart the parties really are. The caucus process can last a few hours, or proceed over many sessions, depending on the complexity of the case. Some fairly consistent patterns are:

- Continuous effort to elicit and define the real needs and expectations of the party;
- Proposal of solutions by the mediator, or taking of solutions to the other side for discussion:
 - Mediator might propose clearly unacceptable solutions and ask for criticism and suggestions. This often clarifies the parties’ real needs and expectations.
 - Mediator proposes alternatives in an effort to reach consensus.
- Solicitation of solutions from a party with explanation why the solution might be acceptable to the other party.

As the process proceeds, the mediator moves from needs and expectations to the *solution creation process*.

Solution Creation Process

The mediator’s goal is to avoid impasse. In complex cases, there are often multiple issues to be resolved en route to global resolution. The mediator will focus the process on the smaller issues, and use them as the building blocks for global resolution.

In *facilitated negotiation*, the mediator often will avoid a solution coming from one side of the dispute. Rather, the solutions may be presented as neutral proposals, through private analysis. The mediator will not carry offers across for negotiation. Instead, the discussions will be concept-oriented. Once both sides agree to the concept, the mediator closes the settlement. In this way there is no winner.

This differs from *distributive negotiation*, the tedious and emotional process often associated with buying a car — demand/counter offer/counter demand, etc. The more emotional the dispute, the less appropriate is distributive negotiation.

Distributive negotiation is the standard for many types of disputes, such as construction defect, where the issue is purely monetary, and/or the negotiating entities (or cultures) favor that approach.

Mediations Morph

The personality of a mediation changes throughout the session. A successful mediator realizes when it is appropriate to move into risk-based mediation, and when a traditional model is appropriate. In highly sensitive situations, such as labor/sexual harassment and injury cases, the mediator should generally begin with the traditional model, and shift to risk focusing after some trust has been established. In other situations, and with certain personalities, a purely confrontational approach is more appropriate.

Sometimes the mediator will sense that unrealistic client expectations block resolution. The mediator might speak with counsel privately to ascertain the basis for the expectations. The mediator may seek permission to become very aggressive with the client. Permission is important to ensure that the attorney does not step in to advocate, or protect the client.

Why Mediation?

Transfer of power and control of risk. That, quite simply, is the answer. In arbitration, 100% of the power is given to a third party — the arbitrator. In trial, it is given to the jury. In mediation, the risk is managed and the outcome controlled. The key to success is the selection of the appropriate mediator.

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