

COMMENTARY

Mediator Orientations, Strategies and Techniques

By Leonard L. Riskin

Almost every conversation about "mediation" suffers from ambiguity. People have disparate visions of what mediation is or should be. Yet we lack a comprehensive system for describing these visions. This causes confusion when people try to choose between mediation and another process or grapple with how to train, evaluate, regulate, or select mediators.

I propose a system for classifying mediator orientations. Such a system can help parties select a mediator and deal with the thorny issue of whether the mediator should have subject-matter expertise. The classification system starts with two principal questions: 1. Does the mediator tend to define problems narrowly or broadly? 2. Does the mediator think she should evaluate—make assessments or predictions or proposals for agreements—or facilitate the parties' negotiation without evaluating?

The answers reflect the mediator's beliefs about the nature and scope of mediation and her assumptions about the parties' expectations.

Problem Definition

Mediators with a narrow focus assume that the parties have come to them for help in solving a technical problem. The parties have defined this problem in advance through the positions they have asserted in negotiations or pleadings. Often it involves a question such as, "Who pays how much to whom?" or "Who can use such-and-such property?" As framed, these questions rest on "win-lose" (or "distributive") assumptions. In other words, the participants must divide a limited resource; whatever one

gains, the other must lose.

The likely court outcome—along with uncertainty, delay and expense—drives much of the mediation process. Parties, seeking a compromise, will bargain adversarially, emphasizing positions over interests.

A mediator who starts with a broad orientation, on the other hand, assumes that the parties can benefit if the mediation goes beyond the narrow issues that normally define legal disputes. Important interests often lie beneath the positions that the participants assert. Accordingly, the mediator should help the participants understand and fulfill those interests—at least if they wish to do so.

The Mediator's Role

The evaluative mediator assumes that the participants want and need the mediator to provide some direction as to the appropriate grounds for settlement—based on law, industry practice or technology. She also assumes that the mediator is qualified to give such direction by virtue of her experience, training and objectivity.

The facilitative mediator assumes the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than either their lawyers or the mediator. So the parties may develop better solutions than any that the

mediator might create. For these reasons, the facilitative mediator assumes that his principal mission is to enhance and clarify communications between the parties in order to help them decide what to do.

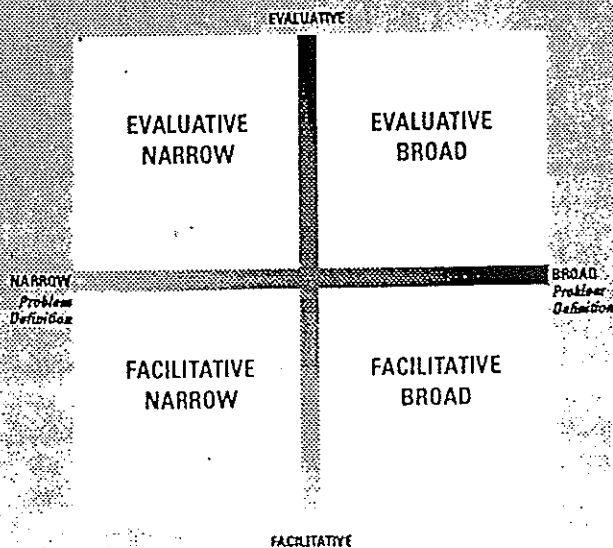
The facilitative mediator believes it is inappropriate for the mediator to give his opinion, for at least two reasons. First, such opinions might impair the appearance of impartiality and thereby interfere with the mediator's ability to function. Second, the mediator might not know enough—about the details of the case or the relevant law, practices or technology—to give an informed opinion.

Each of the two principal questions—Does the mediator tend toward a narrow or broad focus? and Does the mediator favor an evaluative or facilitative role?—yield responses that fall

(continued on following page)

ROLE OF MEDIATOR

Leonard L. Riskin, Professor of Law and Director of the Center for the Study of Dispute Resolution at the University of Missouri-Columbia, proposes a system for classifying mediators' orientations. It begins by posing two questions: "Does the mediator tend to define problems narrowly or broadly?" and "Does the mediator favor an evaluative or facilitative role?"



Leonard L. Riskin is C. A. Leedy Professor of Law and Director, Center for the Study of Dispute Resolution, University of Missouri-Columbia School of Law. This is an excerpt from an extensive work in process dealing with mediator orientation and behavior.
©1994 Leonard L. Riskin

(continued from previous page)

along a continuum. Thus, a mediator's orientation will be more or less broad and more or less evaluative (see sidebar on page 111).

Strategies and Techniques Of Each Orientation

Each orientation derives from assumptions or beliefs about the mediator's role and about the appropriate focus of a mediation. A mediator employs strategies—plans—to conduct the mediation. And he uses techniques—particular moves or behaviors—to effectuate those strategies. Here are selected strategies and techniques that typify each mediation orientation.

Evaluative-Narrow

The principal strategy of the evaluative-narrow mediator is to help the parties understand the strengths and weaknesses of their positions and the likely outcome at trial. To accomplish this, the evaluative-narrow mediator typically will first carefully study relevant documents, such as pleadings, depositions, reports and mediation briefs. Then, in the mediation, she employs evaluative techniques, such as the following, which are listed from most to least evaluative:

- Urge parties to settle or to accept a particular settlement proposal or range.
- Propose position-based compromise agreements.

- Predict court (or administrative agency) dispositions.
- Try to persuade parties to accept mediator's assessments.
- Directly assess the strengths and weaknesses of each side's case (usually in private caucuses) and perhaps try to persuade the parties to accept the mediator's analysis.

Facilitative-Narrow

Like the evaluative-narrow, the facilitative-narrow mediator plans to help the participants become "realistic" about their litigation situations. But he employs different techniques. He does not use his own assessments, predictions or proposals. Nor does he apply pressure. Moreover, he probably will not request or study relevant documents, such as pleadings, depositions, reports, or mediation briefs. Instead, because he believes that the burden of decision should rest with the parties, the facilitative-narrow mediator might ask questions—generally in private caucuses—to help the participants understand both sides' legal positions and the consequences of non-settlement. Also in private caucuses, he helps each side assess proposals in light of the alternatives.

Here are examples of the types of questions the facilitative-narrow mediator might ask:

- What are the strengths and weakness of your case? Of the other side's case?
- What are the best, worst, and most

likely outcomes of litigation? How did you make these assessments? Have you thought about [other issues]?

- How long will it take to get to trial? How long will the trial last?
- What will be the associated costs—in money, emotions, or reputation?

Evaluative-Broad

The evaluative-broad mediator also helps the parties understand their circumstances and options. However, she has a different notion of what this requires. So she emphasizes the parties' interests over their positions and proposes solutions designed to accommodate these interests. In addition, because the evaluative-broad mediator constructs the agreement, she emphasizes her own understanding of the circumstances at least as much as the parties'.

Like the evaluative-narrow mediator, the evaluative-broad mediator is likely to request and study relevant documents, such as pleadings, depositions, and mediation briefs. In addition, she tries to uncover the parties' underlying interests by such methods as:

- Explaining that the goal of mediation can include addressing underlying interests.
- Encouraging the real parties, or knowledgeable representatives (with settlement authority) of corporations or other organizations to attend and participate in the mediation. For instance, the mediator might invite such

ABOUT THE CPR INSTITUTE FOR DISPUTE RESOLUTION

ORGANIZED BY PROMINENT CORPORATE COUNSEL, THE CPR INSTITUTE FOR DISPUTE RESOLUTION has become a leader in developing uses of private alternatives to the costly litigation confronting major corporations and public entities. The membership of CPR, a nonprofit organization, consists of more than 500 large companies, leading U.S. law firms, academics and judges.

TO ITS MEMBERS, CPR OFFERS EXTENSIVE BENEFITS AND SERVICES, including research access to CPR's unique ADR database; training and counseling; a complete library of ADR practice tools and model procedures; and semi-annual conferences for CPR Sustaining Members.

Would you like further information about CPR membership? If so, please complete the following form:

Name: _____

Organization: _____

Title: _____

Address: _____

Telephone: _____

Return to: Elizabeth McGahan, Vice President—Membership and Administration, CPR Institute for Dispute Resolution, 366 Madison Avenue, New York, NY 10017. Telephone: (212) 949-6490. Fax: (212) 949-8859.

individuals to make remarks after the lawyers present their opening statements, and she might include them in most settlement discussions.

- Asking about the participants' situations, plans, needs and interests.
- Speculating about underlying interests and asking for confirmation.

The evaluative-broad mediator also provides predictions, assessments and recommendations. But she emphasizes options that address underlying interests, rather than those that propose only compromise on narrow issues. In the mediation of a contract dispute between two corporations, for instance, while the facilitative-narrow mediator might propose a strictly monetary settlement, the evaluative-broad mediator might suggest

new ways for the firms to collaborate (perhaps in addition to a monetary settlement).

Facilitative-Broad

The facilitative-broad mediator seeks to help the parties define, understand and resolve the problems they wish to address. She encourages them to consider underlying interests rather than positions and helps them generate and assess proposals designed to accommodate those interests. Specifically, she might:

- Encourage the parties to discuss underlying interests in joint sessions. To bring out such interests, she might use techniques such as those employed by the evaluative-broad mediator.
- Encourage and help the parties to develop their own proposals (jointly or

alone) that would respond to underlying interests of both sides.

The facilitative-broad mediator does not provide assessments, predictions or proposals. However, to help the participants better understand their legal situations, she will likely allow the parties to present and discuss their legal arguments. In addition, she might ask questions such as those listed for the facilitative-narrow mediator and focus discussion on underlying interests.

In a broad mediation, however, legal argument generally occupies a lesser position than it does in a narrow one. And because he emphasizes the participants' role in defining the problems and in developing and evaluating proposals, the facilitative-broad mediator does not need to fully under-

stand the legal posture of the case. Accordingly, he is less likely to request or study litigation documents, technical reports or mediation briefs.

However, the facilitative-broad mediator must be able to quickly grasp the legal and substantive issues and to respond to the dynamics of the situation. He needs to help the parties realistically evaluate proposals to determine whether they address the parties' underlying interests.

Mediator Techniques

Mediators usually have a predominant orientation, whether they know it or not, that is based on a combination of their personalities, experiences, education, and training. Thus, many retired

(continued on following page)

MEDIATOR TECHNIQUES

The following grid shows the principal techniques associated with each mediator orientation, arranged vertically with the most evaluative at the top and the most facilitative at the bottom. The horizontal axis shows the scope of problems to be addressed, from the narrowest issues to the broadest interests.

| | | EVALUATIVE | | | | | |
|---------------------------|---|---|--|-------------------------------|--|---|---------------------------|
| | | Litigation Issues | Other Disputable Issues | Business (Substantive) Issues | Business Interests | Personal Interests | Societal Interests |
| NARROW Problem Definition | Urges/pushes parties to accept narrow (position-based) settlement | | | | | | |
| | Urges/pushes parties to accept broad (interest-based) settlement | | | | | | |
| BROAD Problem Definition | Develops and proposes narrow (position-based) settlement | | | | | | |
| | Develops and proposes broad (interest-based) settlement | | | | | | |
| | | FACILITATIVE | | | | | |
| | | Urges/pushes parties to accept narrow (position-based) settlement | Urges/pushes parties to accept broad (interest-based) settlement | Predicts court outcomes | Predicts impact (on interests) of not settling | Assesses strengths and weaknesses of legal claims | Probes parties' interests |
| NARROW Problem Definition | Helps parties evaluate proposals | | | | | | |
| | Helps parties develop narrow (position-based) proposals | | | | | | |
| BROAD Problem Definition | Asks parties about consequences of not settling | | | | | | |
| | Asks about likely court outcomes | | | | | | |
| BROAD Problem Definition | Asks about strengths and weaknesses of legal claims | | | | | | |
| | Helps parties evaluate proposals | | | | | | |
| BROAD Problem Definition | Helps parties develop broad (interest-based) proposals | | | | | | |
| | Helps parties develop options | | | | | | |
| BROAD Problem Definition | Helps parties understand issues and interests | | | | | | |
| | Focuses discussion on underlying interests (business, personal, societal) | | | | | | |

©1994 Leonard L. Riskin

(continued from previous page)

judges, when they mediate, tend toward an evaluative-narrow orientation.

Yet mediators do not always behave consistently with the predominant orientations they express. Some mediators lack a clear grasp of the essence of their own expressed orientation. It is also common for mediators to employ a strategy generally associated with an orientation other than their own. This might help them carry out a strategy associated with their predominant orientation. For example, a prominent facilitative-broad mediator who often conducts sessions with parties only—not their lawyers—routinely predicts judicial outcomes. But he also emphasizes the principles underlying the relevant rules of law. He then encourages the parties to develop a resolution that makes sense for them and meets their own sense of fairness; in essence, he evaluates in order to free the parties from the potentially narrowing effects of law.

In addition, many mediators will depart from their orientations to respond to the dynamics of the situation. A prominent evaluative-broad mediator, for instance, typically learns as much as he can about the case and the parties' circumstances and then develops a proposal, which he tries to persuade the parties to accept. If they do not accept the proposal, he becomes more facilitative.

Another example: an evaluative-narrow mediator may explore underlying interests (a technique normally associated with the broad orientations) after her accustomed narrow focus results in a deadlock. And a facilitative-broad mediator might use a mildly evaluative tactic as a last resort. For instance, he might toss out a figure that he thinks the parties might be willing to agree upon, while stating that the figure does not represent his prediction of what would happen in court.

Speaking generally, broad mediators, especially facilitative ones, are more willing and able to narrow the focus of a dispute than are narrow mediators willing and able to broaden their focus. Again speaking generally, evaluative mediators are more willing to facilitate than facilitative mediators

are to evaluate. However, many evaluative mediators lack facilitation skills.

Many effective mediators are versatile and can move from quadrant to quadrant (and within a quadrant), as the dynamics of the situation dictate, to help parties settle disputes.

Using the Grid to Select a Mediator

The grid should help disputants determine what kind of mediation they wish to undertake and what sort of mediator to seek. Here are some general points to keep in mind.

The parties' informed expectations about the problems to be addressed and what they need from a mediation should govern their mediator-selection process.

It is difficult, though, to develop informed expectations before the mediation starts. A party's strong belief that he wishes and needs only to address a distributive (win-lose) issue, for example, would incline him toward selecting a narrow mediator. An additional belief that he will need direction or some pressure, would suggest that he should lean toward an evaluative-narrow mediator.

Still, I would caution parties against feeling very confident in their initial assessments. Often the litigation process encourages a narrow perspective on the dispute. If litigation-oriented lawyers are selecting the mediator, they may be inclined toward a litigation-like outcome, which is best provided by an evaluative-narrow mediator (a category in which retired-judge mediators are heavily represented). Unless the lawyers are sophisticated about mediation, however, they might see only the virtues of this approach—its simplicity and efficiency—and not its potential drawbacks.

Such drawbacks include the risk that the evaluative-narrow approach could foreclose a creative, interest-based agreement. Similarly, a party originally inclined toward dealing collaboratively with underlying interests may learn during the mediation that the other side insists on a narrow approach and needs guidance from the mediator in order to reach resolution. For all these reasons, it may be wise to select a me-

diator whose background and experience make her versatile.

Subject-Matter Expertise

In selecting a mediator, what is the relevance of "subject-matter expertise?" The term could mean substantial understanding of either the law, customary practices, or technology associated with the dispute. In a patent infringement lawsuit, for instance, a mediator with subject-matter expertise could be familiar with the patent law or litigation, practices in the industry, or the relevant technology—or with all three of these areas.

The need for subject-matter expertise typically increases to the extent that the parties seek evaluations—assessments, predictions or proposals—from the mediator. The kind of subject-matter expertise needed depends on the kind of evaluation or direction the parties seek. If they want a prediction about what would happen in court, they need a mediator with a strong background in related litigation. If they want suggestions about how to structure future business relations, perhaps the mediator should understand the relevant industries. If they want to propose new government regulations (as in a regulatory negotiation), they might wish to retain a mediator who understands administrative law and procedure.

In contrast, to the extent that the parties feel capable of understanding their circumstances and developing potential solutions—singly, jointly or with assistance from outside experts—they might prefer a mediator with great skill in the mediation process, even if she lacks subject-matter expertise. In such circumstances, the mediator need only have a rough understanding of the relevant law, customs and technology. In fact, too much subject-matter expertise could incline some mediators toward a more evaluative role, and could thereby interfere with developing creative solutions. ■

The author invites written comments about his work concerning mediator orientation and behavior. Fax them to him at: 314/882-3343. To submit comments for publication in Alternatives, fax a duplicate to the editor at: 212/949-8859.