



GENERAL

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**MEDIATION UNCOMPROMISED:  
MASTERING THE ART OF CHANGING MINDS & INFLUENCING OPINIONS**

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"If the only tool you have is a hammer, it is tempting to treat everything as if it were a nail."

- Abraham Maslow

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, in our busy practices tempting to hammer away at the same old problems in the same old way. We hope this paper and our presentation can provide some new techniques and approaches to assist you in successfully resolving your mediations. Why settle for compromise when excellence is at hand.

## **I. Negotiation Paradigms and Styles**

A central consideration when shaping your mediation is selecting the mediator that best suits your position in the controversy to be resolved. After considering subject matter expertise, the approach to the negotiation becomes an essential element in your selection process. The risk when considering mediator styles is to oversimplify because an effective mediator will undoubtedly employ numerous approaches when attempting to facilitate a settlement among the parties. Nonetheless, understanding the paradigmatic approaches to interacting with the parties and framing problems will be instructive when identifying the best mediator 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 in Figure 1.<sup>1</sup> The

## **Orientations**

Role of Mediator  
**EVALUATIVE**

Problem  
Definition  
**NARROW**

An often-  
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

When weighing these differing tendencies, consideration should include how the parties involved in your mediation (including your own negotiating team) are likely to respond to pressure to compromise or having greater autonomy in the process.

## **B. Narrow Problem Orientation v. Broad Problem Orientation**

An

from narrow to broad.<sup>6</sup>

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.

Dispute resolution theory contrasts two bargaining models problem orientation. 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 an outcome that reflects a favorable number along a continuum of competing demands. The opposing model is integrative or cooperative bargaining in which the possibility of a negotiated solution is sought beyond the

differences. As most negotiations will involve elements of each of these bargaining methods, it is important to appreciate the subtleties of each.

### **1. 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

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 competing monetary demands. Inherent in the distributive bargaining process is a tension

reaching a consensual 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 disposition of the participants in the negotiation.

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<sup>6</sup> Id.







**A.**

**- Revisiting the Litigation Risks**

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

There are many options a mediator has when restructuring the process to mine fresh perspectives and create new opportunities for a breakthrough.<sup>11</sup> 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 point of contention.<sup>12</sup>

#### **IV. Conclusion**

prepare you to maximize the value of any negotiated settlement or to assess the value of your cause so you know when it's time to walk away.

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<sup>11</sup> Id.

<sup>12</sup> Id.