



Practical Advice for Selecting Mediators in Business Litigation

By Tyler Meade

Frustration with mediation is common in business litigation. The roots of this sentiment are varied, but one cause stands out: There is a frequent mismatch between the broad range of mediation styles and the approach preferred by counsel in a particular business dispute. Fortunately, there is the “Riskin Grid,” developed in the 1990s by a mediation scholar named Leonid Riskin. An operational understanding of this framework can help business litigators make sense of the various mediation styles, and identify neutrals who will mediate their dispute in line with their expectations.

The Underlying Problem

Disputes are too varied to permit a one-size-fits-all approach to mediation. For example, some of the techniques that are most effective in a family law dispute infused with emotion on deeply personal issues may fall flat in a purely financial dispute between sophisticated parties with extensive litigation experience. The resulting variation in mediation styles is significant. Some mediators spend significant time allowing the parties to tell their stories before any offers or demands are made, while others launch immediately into positional bargaining. Some will take an active role in formulating offers and demands. Others view that level of involvement is inappropriate. Some insist that all or most proceedings take place in joint session, while others place the parties in separate caucus rooms for the entirety of the mediation. There are many more such examples.

Yet most business litigators have a set, more narrow view of how their mediations should be conducted, setting the stage for a mismatch of styles.

The Riskin Grid

In his seminal work, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, Professor Riskin set out to “categorize the various approaches to mediation so that [counsel] can better understand and choose among them.”¹ He posits that “mediation orientations” can be graphically plotted on four quadrants separated by vertical and horizontal axes intersecting in a cross-shaped formation.

Of particular relevance to business litigators is the center-line vertical axis, labeled “evaluative” at the top and “facilitative” at the bottom. Conceptually, this axis is a continuum representing the range of strategies and techniques employed by mediators. Somewhat less relevant is the horizontal axis, labeled “narrow” on the left and “broad” on the right. This continuum represents the scope of the problem to be addressed in mediation.²

The Differences Between Narrow and Broad Definitions of the Dispute

In “narrow” mode on the left-hand side of the Riskin Grid, the mediator focuses on the particular issues pending in the litigation. In “broad” mode on the right-hand side, the mediator will go beyond the narrow issues in dispute in the litigation and explore whether there are any underlying interests of the parties that bear on the negotiation. A broader focus may reveal motivations to settle that are collateral to the precise issues being litigated, or even a win-win scenario that is not otherwise apparent.

The following parable is illustrative: Two sisters are fighting over an orange that each needs for baking. A narrow defini-

tion of the dispute would focus on who gets the orange. This may turn on who decided to bake first, or who first took the orange from the fruit basket – a zero-sum tussle that would leave one of the sisters happy and one disappointed. Cutting the orange in half will satisfy neither, as both recipes call for an entire orange.

Broadening the focus to consider the underlying interests might reveal that one sister's recipe requires only zest from the peel and the other sister's recipe requires only orange juice. In this example, exploration of the underlying interests reveals an obvious path forward: One sister gets the peel, and the other gets the juice.

The Differences Between Facilitative and Evaluative Techniques

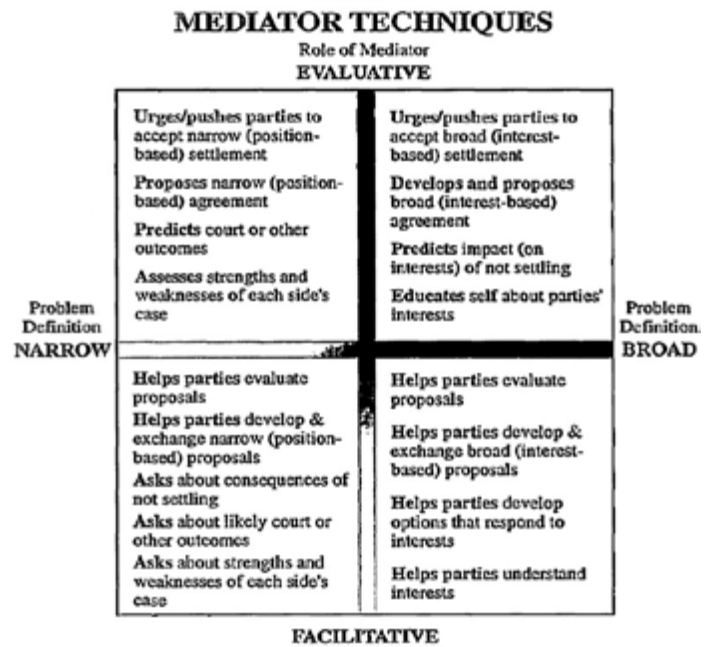
The upper half of the Riskin Grid represents strategies and techniques in which the mediator evaluates, and shares their view on, matters important to the parties. If the mediator is operating in the upper left quadrant of the Riskin Grid – i.e., is narrowly focusing on the claims and defenses in litigation – they will share their view on the merits of the parties' respective legal positions. If the mediator is operating in the upper right quadrant – i.e., is taking a broader view and exploring underlying interests – the mediator may opine on any number of related interests, such as the downstream consequences of not settling.

A mediator operating in the lower half of the Riskin Grid takes a more subtle approach. Their tack is to moderate and guide the dialogue. In Riskin's words, "the facilitative mediator assumes that [their] principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do."³ Thus, a purely facilitative mediator would not opine on the merits of the dispute, suggest offers or demands, or take any action that could be seen as overtly directing the negotiation.

Questions are the primary tool when the mediator is in facilitative mode. A mediator in evaluative mode might say, "I think you're going to lose on issue X," whereas a mediator in facilitative mode will try to raise the same point with a question: "Tell me why you're not worried about issue X?" A mediator in evaluative mode might declare, "The costs of litigation are going to be twice what you're likely to recovery," whereas a mediator in facilitative mode would ask, "How much do you think the jury is going to award, and how much do you think you're going to spend through trial?"

The Philosophical Divide Underlying the Evaluative-Facilitative Continuum

The evaluative-facilitative continuum reflects a philosophical debate in some quarters over the proper role of a mediator.



© 1995 Leonard L. Riskin

At least in the formative days of mediation, many mediators operated in one mode or the other, but not both. Gerald S. Clay, a veteran mediator, summarized one camp's view as follows in a 1994 article co-written with Professor James Alfini, "Effective mediation almost always requires some analysis of the strengths and weaknesses of each party's position." Professor Alfini, on the other hand, claimed that "lawyer-mediators should be prohibited from offering ... evaluations."⁴

A more nuanced consensus has emerged in the decades since then. Most practitioners now agree that there is room for both facilitative and evaluative techniques. However, some criticize highly evaluative techniques as contrary to the principle of self-determination, the concept that the parties, rather than the mediator or some other third party, should decide the outcome of their dispute. Those in this camp may view it as improper for a mediator to suggest offers and demands, or to make a mediator's proposal without the consent of the parties, or to make a mediator's proposal at all.

Using the Riskin Grid To Help Find the Right Mediator in a Business Dispute

The process for selecting a mediator should begin with an assessment of the particular dynamics of the case at hand, continue with identification of the mediation techniques deemed most likely to be effective given those dynamics, and conclude with a selection of the mediator most proficient in the preferred techniques.

Sometimes, this boils down to a choice between a mostly evaluative mediator, or a mostly facilitative one. In other cases, the parties do not know which mode is best, or they want the mediator to use the full range of skills. In the lat-

ter case, counsel should screen for a versatile mediator. The most skilled mediators move freely around the Riskin Grid, and have a keen eye for knowing when to alternate from one mode to the other.

If there are such great all-around athletes, why would one ever choose a mediator who tends to operate in one particular mode? Like many things in litigation, the answer boils down to strategy. Choosing a mediator who tends to operate in the desired mode helps ensure the mediation is conducted in that mode. There are any number of reasons why the parties may prefer a mostly evaluative mediator, or a mostly facilitative one.

A party may want to steer the mediation away from a known weakness in their position, in which case a facilitative mediator is likely more desirable. Litigants in an unusually complex case may fear that an evaluative mediator, operating with limited time and knowledge, will not be able to weigh in on the merits in a constructive manner. Others may fear that an evaluative mediator will alienate one of the participants and thereby make a settlement more difficult to obtain. Evaluative techniques are less helpful in cases where the parties are clear-eyed about, and openly acknowledge, the strengths and weaknesses of their case.

Conversely, it is not unusual for highly sophisticated parties in a business dispute to view facilitative techniques as time consuming and largely unhelpful. For example, parties with intense demands on their time and a dispassionate view of the dispute may find it frustrating to field open-ended questions designed to allow the parties to “feel heard.” That technique is very effective in quieting strong emotions that stand in the way of productive bargaining, but can feel misplaced in cases not infused with strong emotion.

A relatively common scenario is that one side has identified what they believe to be a fundamental flaw in their opponent’s position, and wants the mediator to persuade their opponent that there is a defect in their case. An evaluative mediator – assuming they agree there is a defect – is likely to deliver the desired message, at least in some manner. A mostly facilitative mediator either won’t deliver the message, or won’t do so in a manner that is sufficiently forceful to have a meaningful impact.

Mediators who describe themselves as “evaluative” tend to be more assertive during the negotiation process in ways that extend beyond sharing their views on the merits. The extent of their assertiveness is another thing to consider. Is it okay for the mediator to express frustration and yell at the parties, as some well-known and very effective mediators have been known to do on occasion? There is no universally applicable answer. Forcefulness can help bring about a settlement, and is therefore welcomed by some parties. Some,

however, may lose faith in the impartiality of a mediator that is too forceful.

If one side or the other in a business dispute sees value in maintaining an ongoing relationship, they will want a mediator who takes the time to explore underlying interests, and avoid mediators who focus only on the issues being litigated. One underlying interest that many mediators focus on is the cost of litigating a case to verdict. While it can be effective to highlight that cost in some cases, a party representative who has handled dozens of cases on behalf of their employer and mediated multiple times doesn’t need to be educated on the cost of litigation.

How To Discern a Given Mediator’s Preferred Approach

Most counsel consult their peers when looking for a new mediator. In some cases, it may be fine to ask, “who is your go-to mediator.” But an excellent mediator in one context may not be the preferred choice in another context, so it pays to be more specific when soliciting recommendations. A better question might be, “Who is your go-to mediator *when it is important for the mediator to be assertive and weigh in on the merits?*” The mediator’s website may contain indicators of their preferred approach. Finally, do not hesitate to reach out to the mediator to discuss whether they might be appropriate for your case.

Conclusion

The Riskin Grid is neither a perfect framework nor a panacea for the selection process. That said, a deeper understanding of the myriad mediation styles is undoubtedly helpful when selecting a mediator.



Tyler Meade is a mediator with the New York and San Francisco offices of Signature Resolution, focusing on high-value business disputes, class actions, technology disputes, and crypto-related cases. The founder of a litigation boutique, he spent two decades representing plaintiffs and defendants in complex commercial litigation around the country, then served as chief legal officer of Gemini, the New York-based crypto exchange and prediction market (NASDAQ:GEMI).

Endnotes

1. Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7, 13 (1996).
2. *Id.* at 17, 25, 35.
3. *Id.* at 24.
4. *Id.* at 9, citing J. Alfani & G. Clay, *Should Lawyers-Mediators Be Prohibited from Providing Legal Advice or Evaluations*, Disp. Resol. Mag., Sprint 1994 at 8.



2026 | VOL. 31 | NO. 2

NYLitigator

A publication of the Commercial and Federal Litigation Section
of the New York State Bar Association

**Expert Witnesses in New York
State and Federal Courts**

**A Primer For Attorneys Who Are
Retained To Represent Clients in
an Arbitration**

**No Privilege for the
Prompt: Attorney-Client
Confidentiality, Work
Product, and Generative AI**

