



Risk-oriented mediation

This process provides a reality test and a business focus, helping to move clients away from emotional positions

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Recent discovery has demonstrated that the case you signed up for is, well, a dog. Your client, however, cannot see it that way. The client thinks you are giving up.

The costs associated with continuing the fight will generally be borne by the attorney. As the case progresses, as counsel you see the costs looming higher and higher – well beyond the point of rational business judgment.

How do you get the client under control and get the case settled? How do you address the client's legitimate emotional needs?

The answer

The answer is: Mediation. Not just any mediation, mind you. A reality-testing walk down the path of a risk-based facilitation is the key to getting this problem under control.

Risk-based facilitative mediation is a tool that inserts a business judgment "reality check" into the emotional experience of settling a difficult case. *Risk-based facilitative mediation* inserts an analyses of the risks by analyzing four factors:

- **Adverse Verdict Potential (AVP)** – assume that the trier of fact accepts 100 percent of the other side case. If this happens, what is the likely outcome?

- **Compromise Verdict Potential (CVP)** – Assume the trier of fact accepts part and rejects part of each side's case. What are the likely result ranges?

- **Cost (C)** – How much will it cost to go from the day of the mediation until the conclusion of the trial? This includes all

real dollar costs such as: changes in the attorney fee structure, loss of interest, expert fees, etc. These are *above the line* costs.

Below the line costs include "personal interest" costs. These costs relate to the personal interests of the parties. These include: the negative energy of the litigation becoming a reminder of the incident; preserving an ongoing business relationship; allowing the children minimal mental scarring from the divorce process; desire for confidentiality; obtaining an apology; or an agreement to remediate a dangerous condition. In a sexual harassment case where there is a fear of future contact, this interest issue may be addressed by creating an escrow where the penalty for contact is the forfeiture of funds that were set aside to ensure no contact – a mediator's restraining order.

- **Present Settlement Value (PSV)** – The risk of losing measured by the potential for compromise and balanced with full consideration for the costs produces a *risk-adjusted* present settlement value. It is the business judgment applied to the emotional situation. The ranges will flow from the facilitation process, and the client will not feel forced into compromise – the client will embrace compromise because the analysis is neutrally managed and honest.

Select the mediator with care

When working with the emotional client, it is important to select the mediator with care. A purely evaluative process that focuses only on money will often isolate the client and exacerbate the tension. A purely facilitative process, where

the mediator expresses few opinions and takes few positions will not provide the control strength that is necessary to manage the emotions. Thus, skilled counsel will work to find a mediator who has a high track record for success and the ability to move seamlessly between the two techniques.

Communicate with the mediator before the case is heard

- **Conference call** – Participate in a conference call with opposing counsel and the mediator either prior to setting the case, or shortly thereafter. Discuss the time estimates, accommodation needs, unique hostilities or emotions, and identify the parties to be present. Obtain agreement that the decision makers will be personally present!

- **Ex parte communication** – Mediation is not arbitration. Ex parte communication, pertaining to unusual issues or unusual aspects of the client psychology, are encouraged. It is important that the fact of a private conference be disclosed to the other parties.

Preparation and presentation – the keys to success

Consider the structure and format of the mediation. Determine the amount of time really necessary for a full airing of views. Reserve enough time to permit your clients to fully vent to the mediator.

- **Exchange briefs** – a well-written, informative and non-argumentative brief communicates sensitivity and preparation to the other side of the case. It communicates that the attorney is committed



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to the client and committed to the case. If there is "secret information," submit an unattached supplement that will only go to the mediator.

• **Open caucus presentations are important.** It is counsel's chance to ensure that the decision maker on the other side hears your client's position, and vice versa. Provide a verbal overview of the case from your point of view. This should not be adversarial treatise but rather a conservative review of the case as you see it, including an analysis of the challenges that you must overcome, and why you feel you will overcome them. Do not skirt the latter issue. It is just as important that your client hears you acknowledge the difficult issues, as it is for the other side's decision maker to appreciate that you have considered them.

• **Prepare your client to talk** – The client will either talk privately to the mediator or will participate in an open caucus depending upon the nature of

the case, client, and issues. Prepare the client in advance. Nothing is more harmful to a case than permitting the other side the opportunity to view an out of control client. Nothing is more helpful than permitting the other side to view and hear from a sincere client, describing the incident, or articulating the manner in which the incident has impacted him/her.

Provide your client with an outline of what to expect so that any aspect of the process will not surprise your client. Enhance the mediator's reputation in the eyes of your client to ensure that the client understands that the mediator is neutral and that you respect the mediator's opinions.

Risk-based facilitative mediation provides a reality test, and a business focus analysis that readily and rapidly moves that client away from emotional positioning. Mediators who employ this technique and combine it with sensitivity and

good listening skills ensure that the client has been part of the process, has been given an opportunity to vent, and has participated in the decision making process leading up to resolution and settlement of what may have been the most important issue in the clients lifetime.



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Polsky is AV-rated and recognized by The Daily Journal as one of the Top ADR professionals in California. He has been designated as a Superlawyer in ADR and teaches Negotiation and ADR at USC. He may be reached at www.adr-mediate.com and apolsky@jam-sadr.com.