

# **A BRIEF GUIDE TO EFFECTIVE MEDIATION REPRESENTATION**

## ***Business Law Institute Pennsylvania Bar Institute***

*Philadelphia PA  
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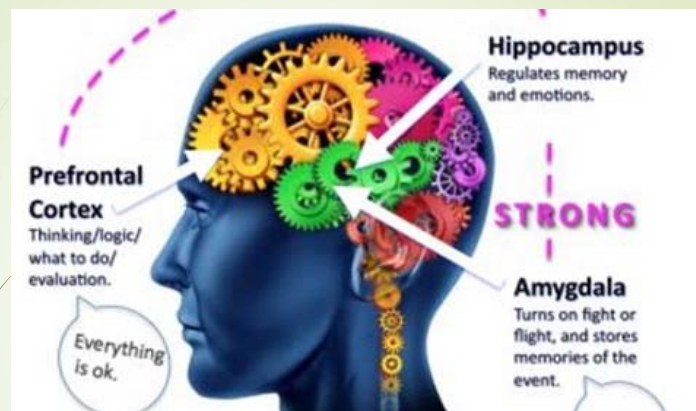
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## ***First; some neuro science... Learning As Neuroplasty***

- Neuroplasticity...everything we learn brings about changes in our brains
- Synaptic "firing" across the Synaptic Cleft
- Physically and literally we can have the brain we want [Chemical; Structural; Functional]


## Learning Styles

- Auditory: Hearing
- Kinesthetic: Feel
- Visual: Depict
- Verbal: Combining auditory and visual



NEUROLOGY MAPS THE BRAIN

Ever been so mad you can't think straight?  
Seeing Red?



## New Processes and Skills take time to develop

### Examples of learning:

- Sport
- Music
- Academics
- Case law
- Why does law school take so long?



## WHAT IS MEDIATION?

- Mediation is a process in which a neutral *[impartial third person]* Acts to encourage and facilitate the resolution of a dispute *without prescribing* what it should be.
- An informal process intended to help disputing parties reach a *mutually acceptable agreement*.
- Mediator's role is to *reduce obstacles to communication, assist in identification of issues and explore alternatives, facilitate a voluntary agreement* with ultimate *decision-making*, resting *solely with the parties*




## *When is mediation appropriate?*

- ❖ *"...when the time is right".*
- ❖ *Throughout the process that is mediation, "timing" is a core consideration for participants and mediator*
- ❖ *As lawyers, parties and mediators have become more experienced with the flexibility of party driven self-determination...*
- ❖ *...opportunities for exploring mediation arise earlier in disputes, particularly when the parties and their representatives share an evolved experience and trust in mediation*




## MODEL STANDARDS OF CONDUCT FOR MEDIATORS

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005. Both the original 1994 version and the 2005 revision have been approved by each participating organization.




## Unique Challenges for mediation in Pennsylvania

- History...process over regulation
- Progressive Ideas take time
- Resistance in Bench/Bar?
- Oversell [Koolaide]
- In more experienced jurisdictions it's "in the water"
- Not always done right/well




## STANDARD I. SELF- DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.




## STANDARD I. SELF- DETERMINATION

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- Parties may exercise self-determination at any stage of a mediation, including **mediator selection, process design, participation in or withdrawal from the process, and outcomes**



## “Self-determination”, but to a point?

- 1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.
- 2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.



## “Keeping Score?”

- B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.





## STANDARD IV. COMPETENCE

- A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties
- A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.



## STANDARD IV. COMPETENCE

- A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation
- If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance





## STANDARD VI. QUALITY OF THE PROCESS

- A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants
- The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions



## STANDARD VI. QUALITY OF THE PROCESS

- A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation
- A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation



## STANDARD VI. QUALITY OF THE PROCESS

- A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.
- If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination



## STANDARD VI. QUALITY OF THE PROCESS

- If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation
- If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation



## STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

- A mediator should act in a manner that advances the practice of mediation.
- Fostering diversity within the field of mediation
- Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate



## STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

- Participating in research when given the opportunity, including obtaining participant feedback when appropriate
- Assisting newer mediators through training, mentoring and networking
- A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict



## *How to select a mediator*

- *Does she understand the process?*
- *How can we tell?*
- *What should we ask?*
- *Any good or bad experiences as guidance?*



## *Mediation Models or "Styles"* *Facilitative Mediators*

- Facilitative Mediation is an "Asking Process"
- Assistance from the mediator in communications and identifying underlying interests
- Mediator helps parties identify their own resolutions of issues and/or interests
- Joint Sessions often a default in both opening [convening] mediation and in mediation process agenda setting and prioritization of issues



## Mediation Models or "Styles"

### Facilitative Mediators [contd.]

- Mediator seeks to facilitate open communication amongst parties and if present, their representatives (this can often shift to caucus forum at initiative of mediator, party or party representatives)
- Mediator seeks to facilitate negotiation (this can often shift to caucus forum at initiative of mediator, party or party representatives, particularly when mediator wishes to engage in reality testing)
- Mediator encourages building resolution, reaching agreement. Closing often in joint session, but not always, depending on the degree of advancement parties have made in moving towards final resolution



## Mediation Models or "Styles"

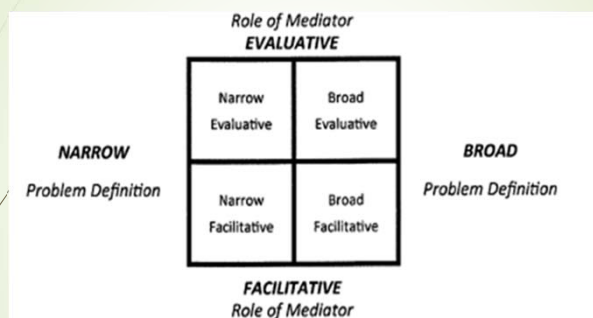
### Evaluative Mediators

- Evaluative Mediation is a "Telling Process"
- Direction on Process
- Narrow focus on issues; but if focus is shifted or broadened, such moves are often initiated by the mediator ["If something you try does not work...try something different" -Bernard Mayer]
- Evaluative mediator gives parties direction on appropriate settlement options/values based upon law, local "cultural" practices and related standards, [often including the mediators own demonstrated and party acknowledged substantive "expertise" and other relevant standards].
- CAVEAT: Pennsylvania Rule of Professional Conduct 2.4 *Lawyer Serving as Third Party Neutral* in particular RPC2.4 (b) and *Comment [3]*.
- Evaluative Mediators' often default position is to keep parties separated during much of the process [Caucus] to exchange settlement positions, offers, reality testing, explore potential interests beyond the obvious position based conflicts

## Mediation Models or "Styles" Evaluative Mediators [contd.]

- Negotiation is often controlled, along with communication of party concerns through the mediator, at the mediator's initiative
- Outcomes/solutions tend to be specific issue based rather than (broader?) interest focused
- Currently, in our region/District the preferred model utilized by attorneys and Third Party client representatives seeking mediation services in "litigated mediation cases"?

## Rislin Grid



## Riskin Grid

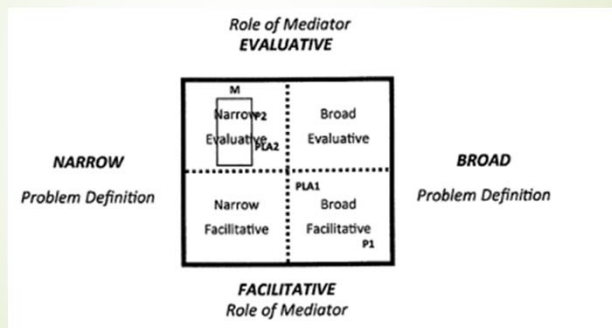
- Adapted from *Dispute Resolution and Lawyers Cases and materials Fifth Edition*; Riskin, Westbrook, Guthrie, Reuben, Robbennolt & Welsh *West Academic* [2014] pp 311-314
- What we have here is the **Riskin Grid** which was developed by Professor Leonard L. Riskin [first in the mid 1990's] to explain to lawyers potential mediator orientation, as related to evaluative and/or facilitative models in the mediation process. Over the past 20 years, Professor Riskin has revised and updated this grid to address both amateurish attempts to teach the process and also to add to the utility of the tool.

I.	II.	III.	IV.
<b>Litigation</b>	<b>Business</b>	<b>Personal/Professional/</b>	<b>Community</b>
<b>Issues</b>	<b>Interests</b>	<b>Relational Interests</b>	<b>Interests</b>



# Bringing the Parties to the Table

[With apology to Professor Riskin]

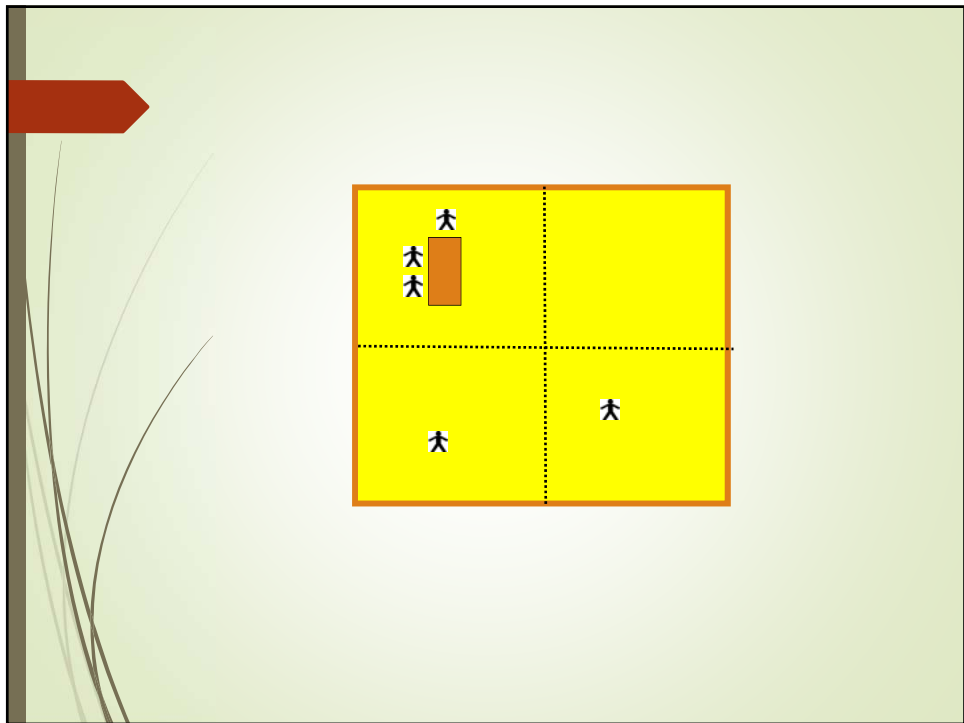
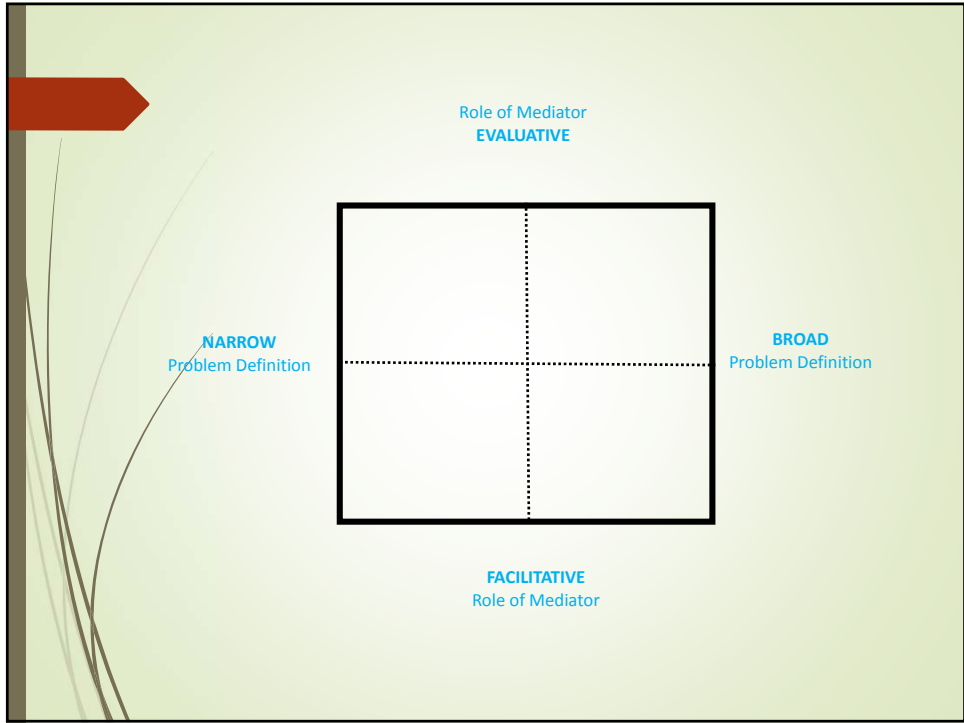


Role of Mediator  
**EVALUATIVE**

**NARROW**  
Problem Definition

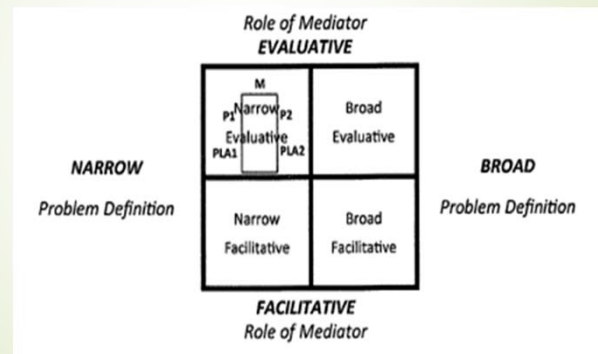
**BROAD**  
Problem Definition

**FACILITATIVE**  
Role of Mediator




## The "End Game"

[Which does not always play out "In the Room"]




## How to prepare for the mediation

- ❖ *effective mediation preparation is much like trial preparation in scope and depth, although from a more varied perspective*
- ❖ *parties and counsel sometimes arrive at mediation in a state of "surrender" [mutual frustration]*
- ❖ *Mediation provides the tools to have the neutral work with the parties and rebuild the confidence to move forward*
- ❖ *Understanding and taking full advantage of pre-mediation processes [if any] is a vital component of successful outcomes*



## *How to prepare your client for the mediation*

- *Discuss monetary and non-monetary issues*
- *How inflexible or "linear" should our negotiation plan be?*
- *How much do I let my client talk [participate]?*
- *How frank should I be with my client about the strengths and weaknesses of the case?*
- *Balancing the advocate role, with counsellor, advisor, even 'Teammate?'*



## *Practical tips for representing clients in the mediation*

- ❖ *Get familiar with the process; do you recall your first deposition, oral argument, trial?*
- ❖ *...you have the right to EXPECT the mediator to help in every way she can, remember, she's neutral*



## *Considerations for preparing a settlement agreement*

- ❑ *If you have a settlement, do not leave the mediation without at least a written memo of understanding regarding the core terms of agreement.*
- ❑ *It's a settlement.*
- ❑ *Don't play games. Test for regrets...rather than "passive aggressive retrenchment"*



## *What are the biggest mistakes made by mediation advocates?*

- *Calling it "mediation" but describing and doing "arbitration" or "case evaluation" Don't assume you and the neutral are on the same process page*
- *It's fine to advocate your clients position, and expected...consider the value of a more "balanced" approach...but let your client know you are doing so, and obtain consent*
- *Don't spend any time and thought on selecting a mediator...*
- *Not understanding or exploring the non-legal dynamics of your case..*



## *What are the biggest mistakes made by mediation advocates?*

[contd]

- Giving up too early...emotions cloud judgement*
- Per the previous bullet, sometimes people do indeed need "to sleep on it"*
- Beware of mediators who "keep score"...parties settle cases...and the best lasting settlements are those that the parties "own". Not what the mediator pushed them towards...[Does the mediator have a number from the outset?]*
- Failed to ask questions.**