

**EIGHTH ANNUAL
SOUTHERN SURETY AND FIDELITY CLAIMS
CONFERENCE
APRIL 3 - 4, 1997**

**“RISK ASSESSED MEDIATED SOLUTIONS: TOOLS FOR
THE CLAIMS NEGOTIATOR AND/OR MEDIATOR”**

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November 1996**

SUMMARY

Federal judges are often requiring parties in civil suits to attempt to find a mediated solution using a mediator appointed by the court. Since the mediator will report to the judge on the success or failure of the mediation efforts, and the judge may retain some bias from this report if the matter proceeds to trial, it may be in the best interest of the surety to make a favorable impression on the mediator. Using the approaches outlined in this paper for the preparation of a mediation position will likely achieve either a reasonable mediated solution or, at least, an impression on the mediator that the surety attempted to be flexible and reasonable in seeking a solution. You may be surprised that you as the claims' adjuster are already using these techniques.

INTRODUCTION

The mediator must be able to quickly develop some means of understanding the positions of the parties involved in a mediated solution in order to be successful. The differences between the parties may involve legal, technical, material, managerial, informational, personal positions or other issues. The common denominator of these differences however, is dollars.

If both parties can be brought to the table with a clear understanding of their own position, not just in an absolute sense of black and white, but also in a more realistic sense of the “gray” areas which represent the *risks* which they face in representing their position, then progress can be achieved more quickly in a negotiated or mediation effort.

Where there may be a great deal of emotion present in a case on both sides, if the parties can present their expectations in a “Risk Assessed” format some of the emotion may be eliminated. If this type of objectivity is not possible by either of the parties, then the chance of a successful mediation is reduced. It may be the role of the mediator initially to bring the parties to such a realization using the mediator's experience and knowledge with regard to the facts of the case.

Representing the positions of the parties in a “Risk Assessed” format involves a major assessment of the factors involved in the case, the positions taken with regard to these factors and the confidence levels of each side. Requesting that the information be presented on a “confidence scale” allows the mediator to determine if there is room for movement in positions, i.e. if one party states that there is only one number, -theirs-, and that is the settlement figure then mediation will not be able to proceed. The very action of preparing a “Risk Assessed” position involves an admission by each that its position is not absolute. The positions of the parties could be prepared in advance of the mediation session in a “Risk Assessed” format as outlined in this paper.

If both parties have, in good faith, described their positions with regard to the settlement in the “Risk Assessed” format and present it to the mediator in numeric format, the mediator can then combine this information privately, and assess the course of action the mediator should follow.

It should also be noted that this technique is very useful in assessing the relative positions of the parties in any negotiation by claims personnel.

FORMAT

Information is provided in confidence to the mediator by each party in the following format which provides the necessary data to be plotted on a graph. Four scenarios are asked to be considered by the parties including (1) their best case with all points being viewed as favorable in their case, (2) the same basic assumptions but with what they know to be their most vulnerable contentions removed, (3) an assumption that they prevail in only the half of their contentions which are strongest from their own analysis, (4) an assumption that they prevail only on the absolute strongest contentions of their case. The values developed should result in a list in descending order which can be plotted by the mediator on a graph. Chart 1 illustrates the method used to organize this information.

Each data point will be reviewed by the mediator with the party to assure that there was sound reason used to produce it. Good preparation by the parties for the mediation will result in defensible and explainable positions for each of the values provided. If it appears to the mediator that adjustments need to be made in one or more of the values provided by a party then the mediator can work on the adjustment of that value with the party. It may be helpful in this adjustment process to have specific assistance available to the mediator if the issues being reviewed are outside of the mediator's area of expertise. A technical specialist may be part of a "mediation team" approach in some cases. A technical consultant may also be a part of each sides analysis to produce the necessary data for the chart.

When each party's position has been examined and discussed in detail with adjustments and refinements made then a composite model or graph can be constructed by the mediator in understanding each position and searching for the means to bring the parties together. The area in which a possible solution can be found can be seen easily on the graphical representation as the "overlap" of the two positions, referred to as the "Expectation Overlap Area" (EOA). Working in this area of possible solutions the mediator may be able to bring the parties together.

ANALYSIS

Graphically the information on the position of the parties is represented as illustrated in Chart 1 by the negotiator or the mediator. This graph can be developed manually using simple techniques. If more than two parties are involved it will be useful to enhance the graphics to allow all positions to be represented clearly. The surety's position is represented using one color or line type with the opposing party distinguished by a different color or line type. If additional parties are involved they must be uniquely distinguished through use of additional colors or line types. The bottom of the range of values represents the estimated cost to that party to achieve the benefit noted. This type of presentation of the information allows for a clear and comparative examination of the relative positions of the parties at the start of the mediation process. It further allows progress in the mediation effort to be tracked and documented which is especially useful when several mediation sessions are required.

Looking at the typical initial positions as presented in Chart 1, certain information on the relative positions is clear including: (1) a large overlay area does exist indicating that a wide variety of solutions are possible in the range of \$175 to \$500 so that a solution via mediation is likely, (2) there is a significant slope or gradient to both parties lines on the graph indicating that both parties

feel that there are weaknesses as well as strengths to their positions, (3) the shape of each party's graph tends to mirror the oppositions indicating that they may recognize each other strengths as well as their own, (4) at the 50% confidence level the Expectation Overlay Area is at its widest band so that compromise may be possible in a "win win" situation, and (5) a line can be drawn horizontally at a value of approximately \$275, which would be totally in the EOA. The information provided by this graph would tend to allow the mediator to move the parties initially toward a settlement value of \$275 if the mediator deemed all other factors were reasonable.

If the mediator does not have an obvious solution upon first analysis of the charted data, the mediator can proceed with the negotiation process at that point or suggest that each party re-analyze its position with respect to specific aspects of its case and attempt to refine and modify its values at one or more points. To be realistic the graphs from each side must show some "give". If the mediator feels that one or more parties are not showing good faith in the process the mediator can try and instill some flexibility into the process in specific areas. The results can be reflected in revisions to the chart.

SOLUTIONS

The mediator is responsible for guiding the parties to a mutually acceptable solution. The mediator can proceed in one of several ways as dictated by the information on this "Risk Assessed" solution chart. A very simple solution would be to propose consideration of a settlement value which "splits the difference" between the values at the 50% confidence level (middle of the chart) in the EOA {this is clearly not the case in our example}. If the difference between these values is significantly less than the expected litigation costs this may provide a solution which can quickly bring the mediation to a successful conclusion. More likely, however, a more complex approach and several iterations in the process will be necessary before a solution will be found.

More complex approaches using the graphical technique can be employed by the mediator to explain the relative positions of the parties and what the mediator is attempting to do with each side. By presenting a "typical" chart to the parties (not compromising the confidentiality the mediator shares with each) illustrating the problem the mediator is facing in attempting to find a mediated solution. With one party the problem may be that there is a seeming inflexibility over one value they have provided and considerable effort may be required to change the position using all the mediation skills possible. In each case in the process there is a specific objective on the part of the mediator which is explained to the party in achieving some adjusted value on the chart. When all room for further adjustments appears to have been exhausted then a graphically developed "compromise" may be appropriate.

One graphically developed compromise which can be used is the "Area Equalization" approach. In this scenario both parties can feel that they are being given consideration for the strengths of their positions. This solution is "two dimensional" in that it takes into account the shape of each party's graph as well as the individual values. Thus if they have a particularly strong position up to a certain point but beyond that point their case weakens this is accounted for in the mediation process. The "Area Equalization" approach provides greater assurance that anomalies in positions will be accounted for in achieving a mediated solution. The "Area Equalization" approach can be used in either a vertical or horizontal direction depending upon what the mediator deems to be most appropriate and fair. A vertical cut through the EOA with equal area on either side of the line will produce a range of possible values for a settlement. Each side should be convinced by this approach that their strengths have been fully recognized. A

horizontal cut into areas of the EOA will produce a single settlement value which may be agreeable to both parties.

Other graphical solutions are also possible to develop for special or unusual circumstances. These may be used to overcome problems in special cases.

CONCLUSIONS

A "Risk Assessed" approach to achieving a mediated solution should be considered. In some situations it can help structure the process and define a reasonable range of solutions from which an agreement can be extracted. In other situations it can assist the mediator in guiding the parties to a common ground. It is a new tool to be used in helping bring parties together. It further has application in situations prior to any litigation or mediation being considered to clearly develop alternative courses of action and anticipate responses by potentially adversarial parties.

This is a technique that may help you before mediation ever occurs, by showing your principal and the obligee the strengths and weakness' of their positions. Face it - The gathering of information at the initial level of investigation is used in the mediation process anyway. Why not use some graphics in negotiations to settle the case early?