



*DRBs and the
Skills of the Mediator:
Key Questions*

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Questions

- Have you served as a mediator?
- Have you been trained in:
 - Mediation skills?
 - Interest-based negotiation?
 - Communication?
- Has mediation ever been used in connection with a project for which you were a DRB panelist?
- Have you ever acted as a mediator in connection with a project for which you were also a DRB panelist?



Potential benefits of mediation

- 1. Continuing control by the parties over dispute resolution process and product, as contrasted with the risks and uncertainties of litigation or arbitration
- 2. Customization of the process for managing and resolving the dispute
- 3. Confidentiality
- 4. Communications enhanced
- 5. Cultural, cross-border bridge6.



Potential benefits of mediation

- 6. Commercial realities considered
- 7. Cost savings, cycle time reduction
- 8. Creative, durable solutions
- 9. Cost and risk low as compared to potential benefits
- 10. Continuing relationships maintained or enhanced



Elements of relationships

“Above the line”:

Respective rights and obligations
of the parties, which may require adjustment



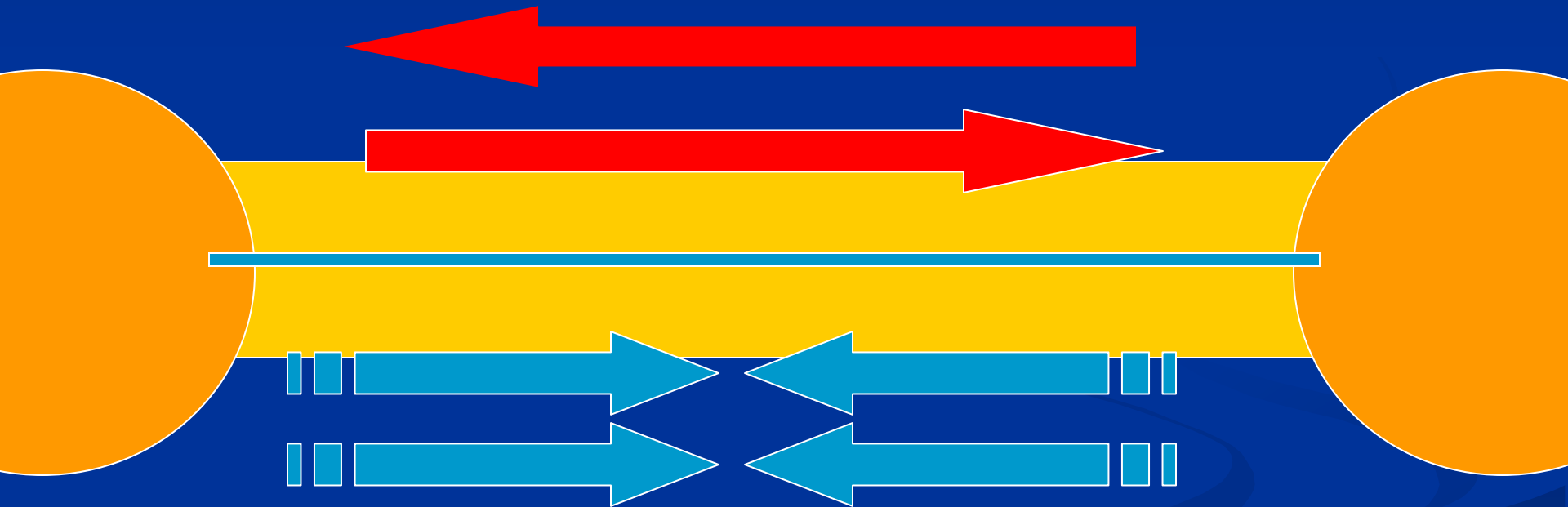
“Below the line”:

Business and personal interests,
feelings; mutual understanding,
communication



Potential impact of mediation

Defining rights and obligations with relationship



"Below the line" reinforcement of relationship:
Interests & feelings; empathy & empowerment



Mediation applications

- Personal injury
- Medical malpractice
- Commercial disputes
- Design and construction disputes
- Labor and employment
- Family business disputes
- Health care disputes



Mediation applications

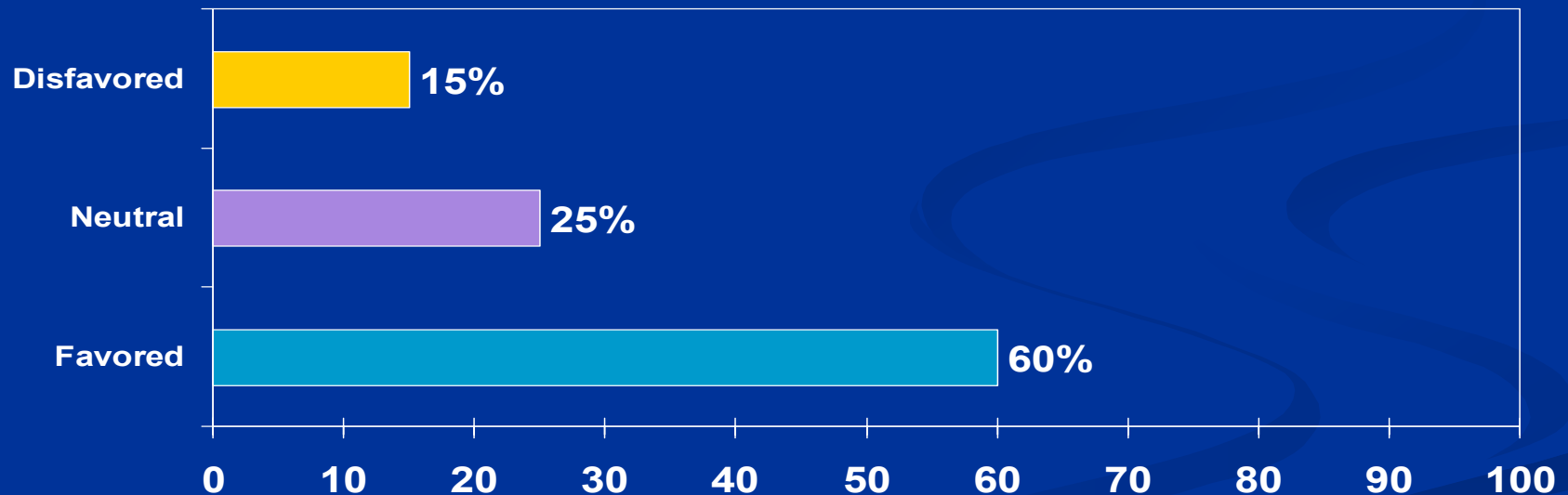
- Intellectual property disputes
- Educational disputes
- Governmental disputes
- Corporate governance issues
- Maritime (ship charterage) disputes
- International or cross-cultural disputes



2004 Fulbright & Jaworski Survey

300 Corporate Counsel

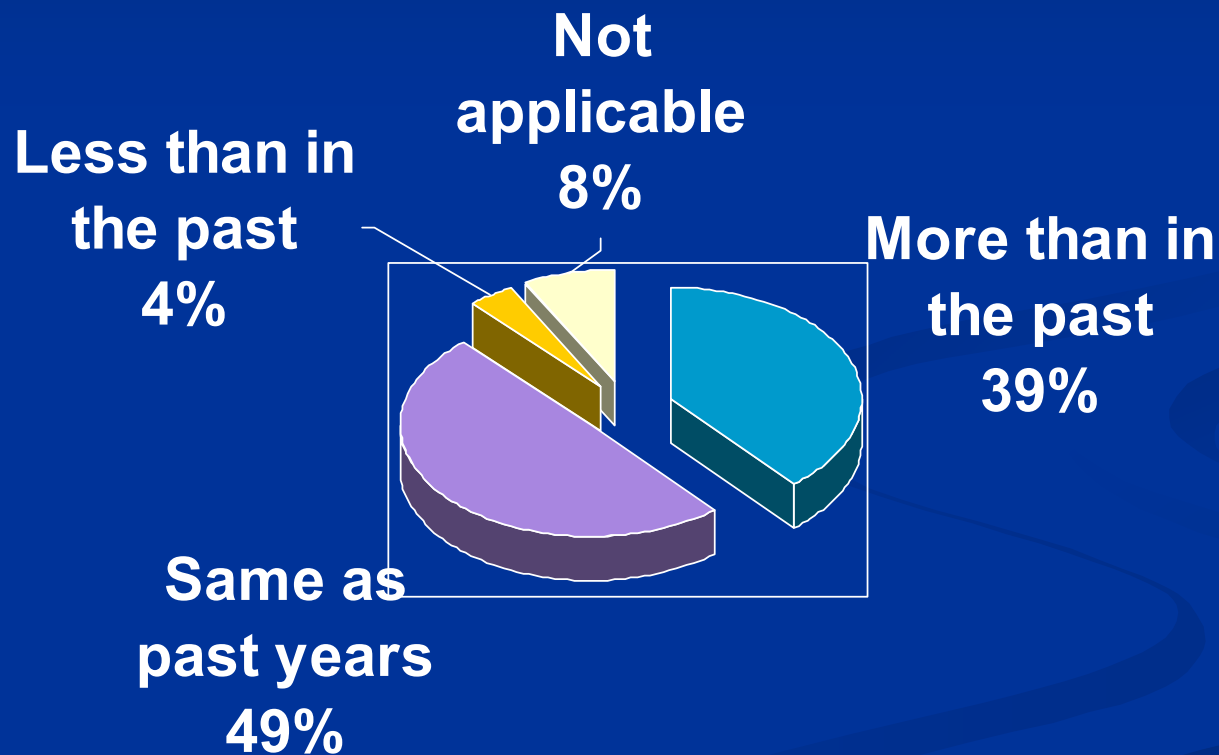
Attitudes Regarding Mediation





Extent of mediation last 12 Mo.:

Corp. Legal Times Survey (2004)





Use of pre-suit mediation

- More likely in jurisdictions with strong “culture” of mediation (Florida, California, etc.).
- More likely in the context of certain relationships (e.g. construction, business relationships, some real estate deals, employment) where there are incentives to resolve disputes early.
- Impact of growing use of stepped dispute resolution processes in contracts.



Pre-suit mediation: Potential benefits

- Greater likelihood of party focus on the real issues, problems, interests as opposed to litigation.
- Less likelihood that parties are hardened in their positions; less commitment of time and money.
- Greater likelihood of preserving business and personal relationships.



Pre-suit mediation: Potential benefits

- Joint agreement to mediate, on selection of mediation and rules for mediation is a key indicator of potential success. (Construction industry survey)



Pre-suit mediation: Challenges

- Defense counsel, insurers may not see the rationale for pre-suit settlement discussions.
- Getting critical information on the table is key (substantive info, interests, barriers to resolution).
 - Lawyer desire for “perfect information”
 - Damage issues are often overlooked in early discussions.



Pre-suit mediation: Challenges

- If already in deep conflict, parties may be in highly reactive mode.
- There has been insufficient “pain.”
- Who should be at the table?
- Special challenges of multi-party disputes.
- Absence of lawyers in some cases.



Mediator as case manager

- One of the best uses of pre-suit mediation is to move toward mediated case management of the lawsuit.
- Opportunity to help parties set up a process to get necessary information, narrow and refine the issues.
- Focus on constructive joint efforts: take statements, bring in an expert, conduct a joint inspection.

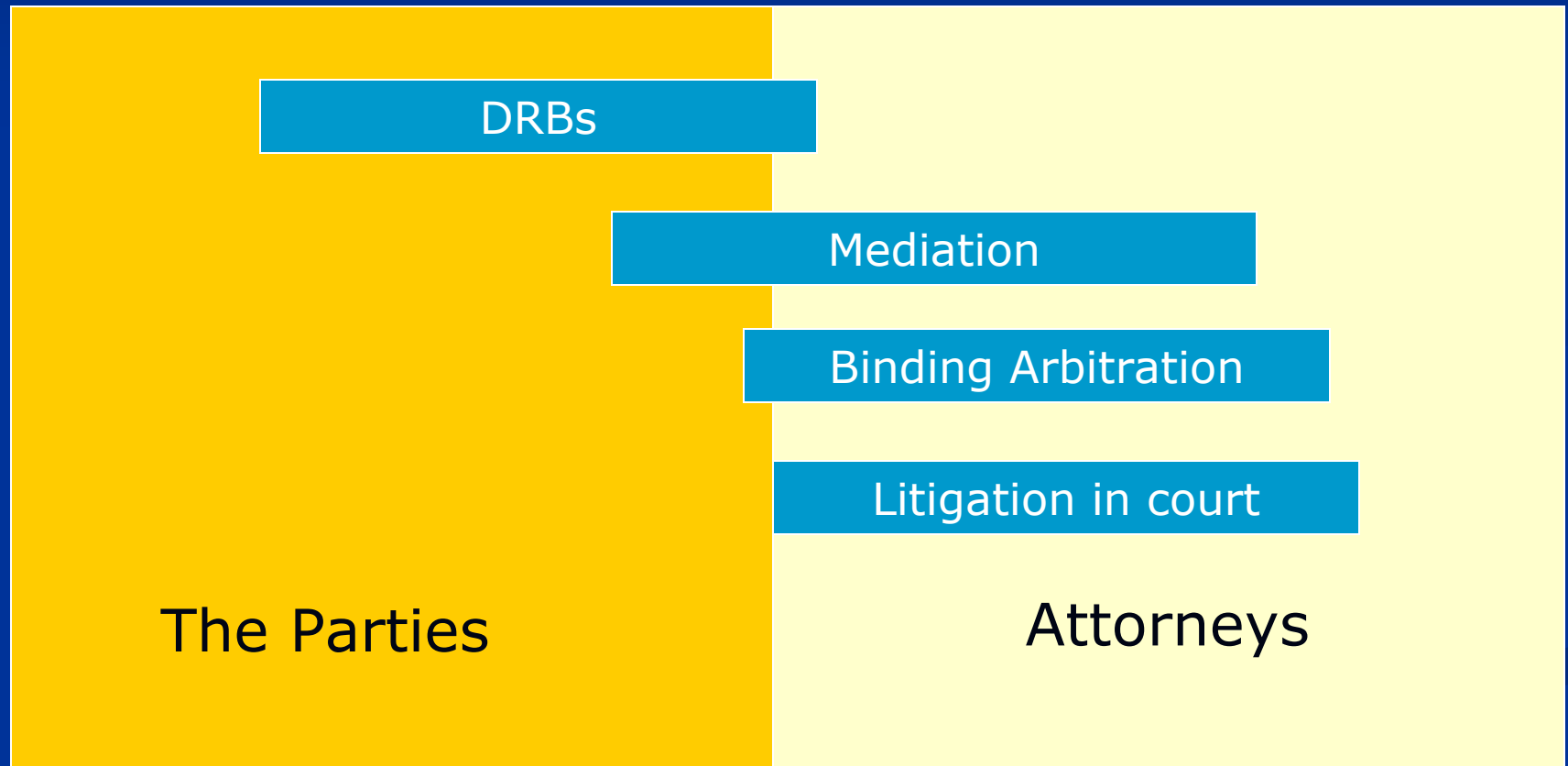


Benefits, drawbacks of mediative and conciliative approaches

- Greater potential for addressing not only distributive issues, but those “below the line” relational issues
- But may not resolve issues
- Sometimes not employed early enough, most effectively; many lawyers are resistant to early mediation.



Who is the main process “driver”?





Mediators...

- Directly facilitate negotiations
- Work directly with the parties, often separately and in confidence (ex parte)
- Serve as “agent of reality”
- May promote broad focus on business and personal goals
- May make evaluations, sometimes offer proposals

DRBs...

- Adjudicate disputes presented
- Receive information in open hearings from both parties and render a report
- Render advisory opinions if agreed by both parties in the hope of “expediting the settlement process”



Practice Guidelines for DRB Members

- Canon 1 [Disclosure of Conflicts]
 - Comment: Board members: (4) [m]ust not, while serving on a DRB, have any employment relationship in any capacity, including . . . mediator. [Although focus is on relationship with one party.]



Practice Guidelines for DRB Members

- Canon 2 . . . There shall be no ex parte communications with the parties except as provided for in the DRB's Operating Procedures.
 - Comment: Examples of impropriety include:
 - Private meetings or other private communications with one of the contracting parties.
 - Giving advice on construction means or methods or contract administration.
 - Offering legal advice or opinion.



Big Dig: As-planned

- Multi-step Issue Resolution Program (negotiation)
 - Number of issues/disputes resolved: over 19,000
 - Aggregate amount claimed: over \$4 billion
- Dispute Review Board (DRB)
 - Established for each major contract (over \$20 million and 1 year in duration).
 - Viewed as a backstop...not an activist DRB approach.
 - Designated to review all claims arising out of contract; some assigned to multiple contracts for the sake of efficiency.



Big Dig: As it developed

- Significant backlog of unresolved claims;
- Issues arose over several years of aggressive roadway and tunnel openings and submission of several “end of the contract” delay and impact claims
- Fall, 2002: Turnpike Authority Chair directs Project’s Claims and Changes Department to establish a “close-out” plan to resolve the pending backlog of nearly 5,000 outstanding contractor claims on the Project (pending for more than 300 days on average);
- Jan. 2003: National Academy of Engineering and National Research Council issued a report to MTA recommending resolution of outstanding CA/T contractor claims being “major priority”



Expedited Claim Resolution Plan

- Targeted 18 complete or nearly complete contracts that had a large number and magnitude of claims;
- Called for negotiation team for each contract comprised of a Team Leader, with technical support from other CA/T personnel (estimators, schedulers, auditors, etc.);
- Called for structured negotiation agreements providing for scheduled claim submissions, negotiations, and a mediation program WITH TEMPORARY SUSPENSION OF ORIGINAL ADR PROGRAM (based on change order that developed a loop-out; could eventually go back to DRB if necessary)



Results of mediated negotiations on the Big Dig

- Number of disputes resolved through mediation: 840
- Dollar value of amounts claimed: \$570 million



Questions