

Multi-Stage Mediation Simulation with Lawyers and Parties

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1. Stage 1—Introduction to Process: The mediator introduces the role play with a brief generic description of the dispute and then passes out the documentation that the participants will use. Each participant, including the mediator, will be given the general information (1-2 pages) and each party (excluding the mediator) and party lawyer will be given a sheet of “confidential information” relating to that specific party’s situation (embarrassing information, perhaps, which the party would prefer to bury; or, in a commercial case, information relating to the company’s financial strength). The participants will then be given time to digest the information, get comfortable with their roles (as party or attorney) and, in the case of the individual party-lawyer team, discuss mediation strategy and the impact of the confidential information on the outcome of the dispute should it be disclosed. [Note: the participants will have had a lecture on the framework of the mediation process and will have watched a video].
2. Stage 2—Mediator’s Opening: The mediator explains the process, i.e., that this is an informal, confidential and voluntary proceeding where the participants have complete control of the outcome of their case; they can come to agreement on all or part of the dispute or walk away at any time. The mediator then explains the mechanics of the process, including (importantly), the caucus (separate meeting) and the concept of confidentiality in mediation. The mediator will then ask the parties if they have any questions and, after having dealt with the questions, if any, will review the “Agreement to Mediate” with the parties and then ask the parties to sign the agreement.

Take Away: This is the high point of mediator “activity” where the mediator occupies the stage, demonstrates competence and control of the process and begins the task of giving the parties that they are dealing with a competent professional who is sufficiently skilled to get help them resolve their dispute.

3. Stage 3—Parties Opening: The mediator then invites the parties to each give his or her side of the case, explaining that the person who brought the claim (usually the plaintiff) will go first. When attorneys are present and there are legal issues, the mediator may (particularly in a commercial case) ask the attorneys to open emphasizing the legal perspective before turning to the parties to present their respective factual perspectives.

Take Away: Gives parties the opportunity to be heard, which may not have happened previously, and vent if needed.

4. Stage 4—Dialogue with the Parties: The mediator will move back forth between the parties requesting each side to comment on contested facts and legal issues. This may be the first time that each party has internalized the other side’s legal and factual position. The mediator

must carefully moderate the discussion to keep the process going and preclude the emergence of acrimonious ad hominem and/or inappropriate characterizations.

Take Away: Helps mediator understand that he or she is facilitating a negotiation, provides mediator with the opportunity to practice facilitation skills and promotes power-equality by putting parties on an equal footing and helps each party stand in the shoes of the other which is a giant first step towards understanding and resolution.

5. Stage 5—The Caucus (separate meeting): When it appears that further dialogue has outlived its usefulness or could ignite ill feelings/emotional outbursts, the mediator can call a “time-out”, so to speak, by inviting each party and party lawyer to meet with him or her in a separate session called a “caucus.” Before going into a caucus, the mediator takes pains to explain the process to each party and emphasizes that discussions in caucus are protected by confidentiality and cannot be disclosed by the mediator to the other party (or anyone else) without the caucusing party’s permission. In the caucus, the mediator can more straightforwardly test each party’s factual assumptions and legal positions with the mediator techniques of moving parties from positions and interests and “reality testing”, that is asking the party/lawyer how they think a judge or arbitrator will view their legal and factual positions or by querying the financial and lost-opportunity costs of continued litigation. The mediator can also use the caucus for “shuttle diplomacy” by taking offers and counter-offers back and forth to the caucusing parties. The mediator searches for party movement in the proffering of offers and counter-offers so that she or he can take each new offer to the other party with an expression of optimism.

Take Away: The participants and, especially the mediator, can understand and experience the usefulness of separating the parties, especially when they have come to impasse or acrimony, and moving the parties towards a recognition of their interests in a settlement and recognizing the downside of continued non-settlement.

6. Stage 6—Closure: There comes a time when the mediator can sense that there has been a shift in consciousness and intent to such an extent that the parties are moving almost inexorably towards settlement. Often this “shift happens” towards the end of the day. It is at this point that the mediator begins actively using such mediation techniques as “BATNA-WATNA” and “bracketing” to move the parties closer and closer to the point where differences can be split or “swallowed.” Here the mediator takes charge by strongly urging the parties to put their points of agreement down in writing and, ideally, keeps the parties caucusing until they have each agreed in caucus on all the salient points, and the dotting of the “I”s and crossing of the “T”s. Note. I recommend that the mediator keep the parties in caucus by shuttling back and forth with the settlement until the parties have signed off in caucus.

Take Away: helps the participants understand that “shift happens,” that the caucus is an extremely useful tool for moving the parties away from positions and towards interests and that the mediator has a plethora of tools in the mediator quiver (reality testing, BATNA and bracketing to name a few) to get the parties to closure.

7. Stage 7—The Agreement: This is largely a formality, if the mediator has been careful to secure the agreement of each party in caucus to the settlement terms. Remember, the last thing that the mediator wants is to have a settlement unravel because the parties have failed to agree on a non-de minimis term. If all has gone well, the mediator thanks the parties for their courtesy and cooperation (whether or not they have been courteous and cooperative), says a few kind words about the process, and bids them adieu.