

MATA

Mediation and Training Alternatives

MEDIATION PROCESS

GENERALLY

Commercial mediation is a flexible process and therefore not one to be constrained by rules or by a rigid framework. What is outlined here is a framework and a theoretical concept of mediation which has been shown, over its first decade or so of existence, as being both typical and effective. Most mediators will develop their own techniques and style within this framework.

TYPICAL FRAMEWORK

The mediation **venue** will have one room where everyone can meet and also a separate room for each party (plus the mediator and assistant if one is present) to use as their home base. Normally the mediator will welcome the parties and settle them into their rooms and ensure that any queries are answered before the mediation commences.

Most mediations start with an **open (joint) meeting** where everyone meets in the same room. The mediator sets the ground rules for the day and the parties briefly present their position on what they see as the key issues that need to be addressed if settlement is to be achieved. This session sets the scene for the rest of the day(s) and gives the parties a chance to hear the other's position and to respond. It is the opening of communication between them and the mediator's first chance to encourage the parties to be flexible and to try to understand why the others feel strongly about their case.

When the mediator feels that it is appropriate, the parties will return to their rooms and the mediator will hold **private meetings** (often called caucuses) shuttling between the parties and gathering information in confidence. In this way the mediator builds a unique picture of the dispute, and of each party's needs, and so can help the parties to move towards a solution.

Often the mediator will arrange **working groups** during the day, possibly putting lawyers together to discuss particular legal points, or experts to debate a technical point, or the decision-makers to negotiate on an issue and then on the final deal. The mediator has to ensure that everyone knows what is going on and that they stay committed to the mediation, even when the mediator is spending long periods with the other party. The overall aim – that of giving the parties the best chance of achieving a settlement – must never be lost, and the mediator manages the mediation process to ensure that the parties are kept focused on this outcome

The final settlement will be drawn up by the lawyers (who are normally present in a commercial mediation), and the mediator will encourage the

parties to pass that time (which can be a couple of hours) together in a more social atmosphere. This puts the litigation and arbitration experience in stark contrast, where it is highly unlikely that the parties will want to speak to each other, let alone be sociable together, if they have been fighting to win in front of a judge or arbitrator.

Throughout the day the mediator will be setting tasks for the parties whilst s/he is away from them, or even encouraging them to get some fresh air and exercise. Mediation days can be long and everyone needs to remain clear-headed.

After the mediation, the mediator will normally make **follow-up** calls to the parties, or their lawyers, during the period after the mediation to ensure that the agreement has been fulfilled and that there are no unexpected problems. Then shred the papers and move on to the next dispute!

THEORY OF MEDIATION

A pattern of five phases of mediation has been identified. However, it is essential that these phases are not seen as distinct parts of a mediation with a recognisable transition from one phase to another. It may well be that, looking back over the day, the move from one phase to another can be identified, but at the time the phases will merge and there will often be a need to revisit a phase. However, most mediations go through the following phases:

- Preparing**
- Opening**
- Exploring**
- Negotiating**
- Concluding**

The **Preparing Phase** is what happens before the mediation day. There are the 'domestic' arrangements of date, venue, who attends, timetable for document exchange and, of course, the mediator's fee. There is also the pre-mediation contact by the mediator, usually with the lawyers but sometimes with the parties direct. This contact is essential as it enables the mediator to get a feel of the personalities, the real needs of the parties and puts colour on the documents provided to the mediator. The mediator will find out what settlement discussions have taken place before the mediation, and the reasons for them not succeeding. It will also be an opportunity for the mediator to answer any queries or uncertainties that the lawyers or parties may have about the mediation process.

The document exchange usually occurs around one week before the mediation day. Parties will provide a summary of their case for mediation purposes, which will be exchanged with the other party. There may also be a confidential briefing paper for the mediator which will not be shared with the other parties. Most likely there will also be several lever-arch files of supporting documents which the lawyers feel to be relevant and which the mediator may only skim

The **Opening Phase** will cover the welcoming of the parties and settling into their rooms, dealing with last-minute queries and ensuring that everyone is prepared for the open session. Everyone will then meet in the main room and

the mediator will set the ground rules for the day, emphasising that everything is confidential and without prejudice to any proceedings, that the day is flexible and has the sole purpose of giving the parties their best chance of achieving a settlement. The parties will then present their summary of the key issues and the mediator may well ask questions and encourage the parties to talk.

This phase may include some private meetings but usually the **Exploring Phase** starts when parties retire to their rooms and the mediator shuttles between them. This phase is crucial to building a foundation for achieving a settlement and if it is missed the negotiations invariably deadlock. The mediator needs patiently to build an understanding of what underlies the cases and to identify the parties' real needs. Needs can be very different to the presented claims. It is also a time to make space for the venting of emotion and helping parties to avoid, or move out of, positions where they could lose face. Probably more than anything it is a time to help the parties really understand what the other is saying and why they are saying it. Such understanding will not only help the party adjust their position but also start to construct a settlement that meets the other's needs.

When the foundations have been firmly laid, the **Negotiating Phase** may begin. Initially the mediator may well be the carrier of offers, but the eventual aim must be for the parties to negotiate the settlement directly. This is rarely easy and the mediator may well be asking some challenging questions, particularly testing the reality of each parties position. The mediator will use techniques for avoiding, or overcoming, deadlock and may even feel the need to remind the parties of what lies ahead if settlement is not achieved. It is probably in this phase that the mediator needs to be most creative, persistent and optimistic!

The **Concluding Phase** is where the deal is written down, the terms clarified and issues such as tax implications checked. This can be a tedious process as, even though it is intended to be a simple Heads of Agreement, the lawyers need to ensure that their party is not disadvantaged in any way, so the import of every word becomes significant. This is usually a good time to locate the wine cellar and allow everyone else to relax!

A few mediations do not settle on the day, although most of those do settle soon afterwards. When settlement is not achieved on the day it is important to conclude on a positive note, possibly reminding parties of the progress that they have made in the mediation and agreeing a timetable for further action. It may well be that the Concluding Phase will, in these circumstances, continue for several weeks until a settlement is achieved or the parties opt for an alternative process.

Repeating the earlier comment, Phases of Mediation is a theory, albeit a useful one. The phases do not run concurrently and usually overlap. The mediator may well return to explore an issue further in the Negotiating or even Concluding Phase. The criterion is always 'what will give the parties their best chance of getting a settlement?'. The theory may help understanding of what

happens where, and why, but it is the effective practice of a flexible process that gets the results.

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