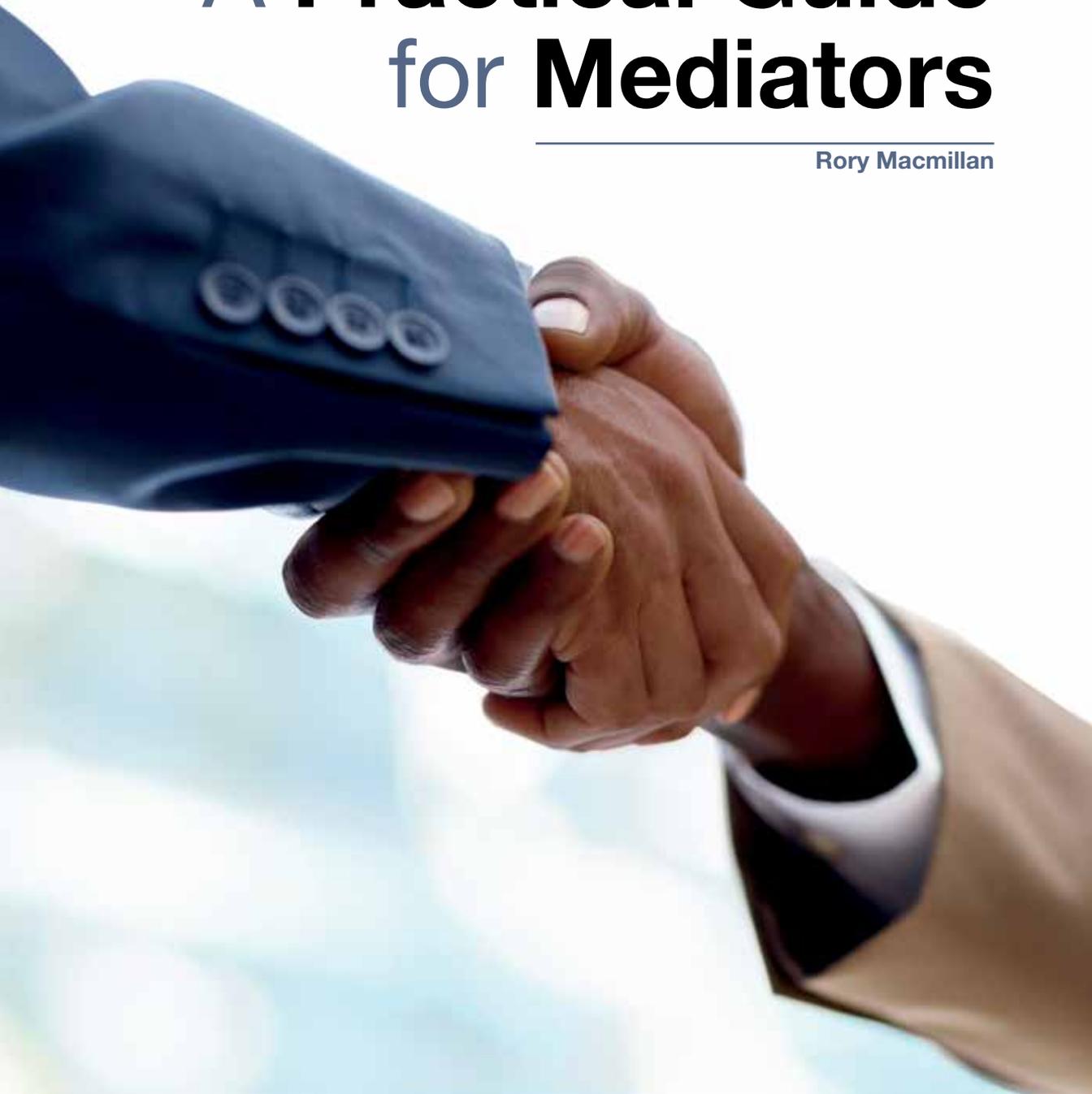


MACMILLAN KECK

ATTORNEYS & SOLICITORS

A Practical Guide for Mediators

Rory Macmillan



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This book first arose out of a passage in Borges, out of the laughter that shattered, as I read the passage, all the familiar landmarks of my thought - our thought, the thought that bears the stamp of our age and our geography - breaking up all the ordered surfaces and all the planes with which we are accustomed to tame the wild profusion of existing things, and continuing long afterwards to disturb and threaten with collapse our age-old distinction between the Same and the Other. This passage quotes a 'certain Chinese encyclopaedia' in which it is written that 'animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) et cetera, (m) having just broken the water pitcher, (n) that from a long way off look like flies.' In the wonderment of this taxonomy, the thing we apprehend in one great leap, the thing that, by means of the fable, is demonstrated as the exotic charm of another system of thought, is the limitation of our own, the stark impossibility of thinking that.

Michel Foucault, quoting Jorge Luis Borges in *The Order of Things (Les Mots et les Choses)*, posted in a niche in The Box, a meeting space in Central London designed to inspire creative thinking and dispute resolution.

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1. Introduction

Mediation involves one or more structured meetings between disputing parties, chaired by a neutral third person whose purpose is to help them negotiate and hopefully resolve a contentious problem.

In an ideal (indeed, somewhat idealised) mediation, the meeting or meetings will be organised and transpire along the following lines:

- the parties will agree to **meet** together with an impartial mediator in order to try to settle the dispute through negotiation with the mediator's help;
- the mediator will **establish a positive and constructive atmosphere**, setting ground rules and guidance for respectful and productive interaction between the parties;
- each of the parties will **explain** to the other party and the mediator its account of the facts, its goals and its perspectives on the matter;
- the mirror of the previous point, each of the parties will **listen** to the other with a view to understanding where it is coming from;
- the mediator will help the parties **explore** their underlying interests and choices, sometimes together, and sometimes separately;
- the parties, enlightened by a deepened understanding of their needs and the options before them, will **negotiate** with each other with the assistance of the mediator; and
- where possible (as it often is), the parties will reach and sign an agreement and thereby **settle** their dispute.

This sounds simple, but a lot more is going on beneath the surface than one might think.

Parties usually turn to mediation when they have run out of better ways to resolve a dispute. They may have concluded that litigating may produce a disappointing result, consuming a disproportionate amount of time, energy and money. They have likely reached a point where negotiating without help is not taking them forward. Communication has become blocked or even broken down entirely.

Into the stuck, untrusting tension of a dispute, mediation introduces a fresh outsider's open-minded attitude of inquiry, creativity and new energy. It brings a drive and generosity of spirit that helps the parties to search and find a way to close a stagnant and irritating piece of their history together. When the mediator is good, it provides a stabilising wisdom – not a wisdom that provides the answer to the dispute, but a wisdom about how the parties can work together to reach their own answer.

Commencing with the parties' agreement to try to work out their issues through mediation and typically closing when the parties decide (or decide not) to bind themselves in a settlement, mediation is a process with well established protocols yet flexibility to adapt to the needs and personalities of the parties, their relationships and histories.

Typically scheduled on a single day, but sometimes continuing over several months, mediation is designed to bring the parties carefully to a moment of informed decision about their problem. With the support of the mediator, the parties examine their interests, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes.

Mediation makes a safe place for the parties to consider their situation together and hopefully embrace a shift in expectations and behaviours, enabling them to leave the unproductive rut into which their relationship has run. It is at its best when the time, effort and money that the parties have been wasting in the dispute are released and redirected into profitable economic activity.

In a successful mediation, the process reaches fruition when the parties simultaneously understand their own choices and interests and communicate with each other, seeking a zone where these choices and interests coincide enough to fix an agreed future with which they can both live.

That future may be an end to the historical relationship between the parties with them never needing to meet again, or it may be one of continued, conditional dealing and shared value generation. In either case, the future opens up as the parties fix the terms on which they will put the antagonisms of the past behind them.

Mediation often involves crystallising the situation to a moment of decision for the parties, setting the pathway forward once and for all. This makes it an exciting activity for a mediator, parties and their advisers. But as many disputes are multi-layered, involving diverging economic interests, uncertain legal issues, different personal histories and varying personalities, mediation is often difficult, and particularly delicate. Mediating successfully requires a range of personal and business skills and attitudes – some of which we are born with and some of which mediators can learn, develop and hone with training and experience.

Much of this manual is about these personal and business skills, and the elements to remember, learn and integrate in mediating successfully. It is a guide for the less experienced mediators who are still learning their trade. It is most interested in how a successful mediator needs to think, what to focus on before and during a mediation. Some of these are "soft skills" (e.g., active listening) and some are mundane but important "to-do items" that can be listed (e.g., ensuring that the chairs are comfortable and coffee is available).

Typically, mediators do not advise upon, evaluate or determine disputes. They manage the mediation process where ultimately the parties determine the outcome. A mediator may be called to play several roles in the process, such as to:

- assist the parties to **overcome miscommunication**, misunderstanding and confusion by helping them clarify what is agreed and disputed, and identifying the underlying issues;
- **develop awareness of the real needs** of those who are involved by drawing out information and probing each party for their underlying interests;
- **help the parties to generate and evaluate options** to resolve the dispute;
- **be a sounding board and reality check** for parties to reflect on the reasonableness of their positions and demands and alternative approaches; and
- **facilitate communication** and **motivate the parties** to find a way to work co-operatively towards finding a mutually acceptable solution; and
- **build on areas of agreement** and assist parties to craft a satisfactory and effective settlement.

The mediator will guide the mediation process, providing a sense of direction and progress and overcoming inertia. He or she will also often have to face and deal with parties' emotions and absorb or deflect counter-productive hostility.

This manual explores these various roles, following the key elements of a mediation process, including preparing for the mediation, commencing the mediation, exploring issues and interests with the parties, helping the parties to negotiate, and (hopefully) helping the parties capture their resolution in a settlement agreement.

Preparing and Running a Mediation

2. Overview of the Mediation Process

Mediation is flexible. It can be tailored to accommodate the needs of the parties. A diversity in mediation practice means that there are considerable differences in how parties enter into mediation. Nevertheless, there are various elements that are common to almost any mediation, including:

- preparing for the mediation;
- focusing from the outset on relationship building, impartiality, confidentiality, party ownership and respect;
- commencing the mediation;
- probing beneath the positions to identify issues and interests, what we have called here ploughing the ground;
- searching for agreement through negotiation; and
- concluding and recording the deal.

Preparing for the mediation starts with the parties agreeing to mediate. This involves agreeing the terms and procedures for the mediation (e.g., confidentiality, authority, representation, duration, procedure, costs, etc.) and appointing a mediator. It typically requires signing a formal mediation agreement. The parties will often then brief the mediator on the dispute and provide summaries and supporting documents. The mediator will often request that any fees be paid upfront. And the mediator will fix venue and timetable arrangements. The mediator may also need to explain the mediation process to the parties and help them prepare.

From the start to the end, the mediator must behave in a manner that reflects the **core principles of mediation**. That is about building a trusting relationship with the parties, being truly impartial, ensuring confidential treatment of the process and each party's information, ensuring the parties have a sense of "ownership" over the process, and maintaining a respectful attitude throughout.

Commencing the mediation involves preparing the venue and receiving the parties. The mediator will get the parties to introduce themselves, and the mediator will typically make an opening statement. Following that, the mediator will typically ask each of the parties to make their opening statement, and the mediator may find it useful to summarize their opening statements. The mediator will then seek to establish an agenda to address what appear to be the key issues in the dispute during the rest of the mediation.

Early in a mediation, and before trying to engage in full-on negotiation, **probing beneath the positions** to unearth the parties' key interests is the essential core of what makes mediation an effective means of dispute resolution. The issues are clarified, the parties' needs and interests are identified and explored. Common ground is established where it

exists, including any concessions and agreements in principle. But most importantly, the parties begin to understand what they need from the mediation and what is realistic for them to expect to get under the circumstances. This understanding of "need" and "reality" short-circuits the previous belief about what they can get based on unrealistic (which is not to say unjustified) expectations. It sets up the essential platform for an interest-based negotiation that can occur between properly informed parties. The probing may occur in separate meetings with parties (often called "caucuses") and in meetings where both parties are present.

The more the platform of understanding of a party's own interests and those of the other party is built through probing, the more that **searching for agreement** can proceed. Although some mediation schools like to distinguish between "exploration" and "negotiation," probing and searching for agreement typically intermesh. A key skill of the mediator is to know when to pause the discussion over possible resolution and return to underlying needs and reasons of the parties for their thinking – and similarly to know when to stop the introverted focus on needs and move to work towards defining a deal. In searching for what is often referred to in negotiating parlance as the zone of possible agreement (the "ZOPA"), the parties and sometimes the mediator will suggest options, the parties will make offers to each other and respond to such offers. They will negotiate and the mediator will seek to assist the parties in finding a deal with which they can live.

As the parties converge on agreement, **recording the deal** is essential in order to put it behind them. It may be complete, or partial or interim, or there may be no deal at all. If there is one, the goal is to record it in writing so that it is legally binding.

The next chapters explore these elements of the mediation process in more detail with a particular view to the attitude and disposition of the mediator and practical things to bear in mind.

3. Getting Ready: Preparing the Parties and Yourself

The mediator has a lot of work to do before the mediation. Never underestimate the value of preparation. Once the mediation begins, it will consume all of your mental and physical abilities and there will be no time to do the preparation that you needed to do beforehand.

Agreement to engage in mediation

Before a mediator is appointed and a mediation process begins, he or she will need to ensure that the parties have already met agreed certain preliminary issues. The parties will need to decide in the first place whether they wish to engage in mediation. If so, they have to find a protocol for identifying a mediator, which may be a person they both know and respect, or someone proposed by a third party, such as a mediation institution, President of a local chamber of commerce or Governmental body.

The commitment to engage in mediation is typically best recorded in an agreement setting out the terms under which the mediation will take place, including:

- confidentiality;
- authority to settle;
- selection and appointment of the mediator;
- immunity of the mediator from suit;
- a date and timetable for the mediation;
- a venue for the mediation; and
- the apportionment of costs and fees.

They may also agree (but they may not) to stay legal proceedings that may be underway, although this is not always necessary for a successful mediation. A sample agreement is included in Appendix A.

Sometimes the impetus to enter into mediation comes from an official body such as a court or a regulatory authority. The parties are pushed into the mediation, being told that they will face adverse consequences if they do not enter into mediation. Such consequences might be a possible costs award against it, having the refusal to enter into mediation be taken into account in any later official ruling, or even being found in contempt of court.

However, in most cases, the parties reach the decision to enter into mediation through their own enlightened self-interest. This is only possible where they or their advisers already recognise mediation as an established method of resolving disputes, and where

the mediator is someone trusted by both parties whether due to reputation, relationships or institutional accreditations.

Where a country's mediation institutions are immature and the practice of mediation remains under-developed, and where official sanctions are absent to pressurise parties into mediation, it will fall to the mediator to "drum up business" and convince parties to engage his or her services.

Most successful mediators have spent a lot of time giving talks and presentations promoting mediation as a dispute resolution process and, of course their own services as mediators. This is a professional service business like any other. In some cases, the mediator himself or herself will actually have to persuade the parties that mediation is the best approach to resolve their dispute. Occasionally, it is necessary to mediate between the parties to get them to enter into an agreement to enter into mediation – quite apart from mediating settlement of the dispute.

Once the parties have agreed to mediation, a practical question arises as to who will attend, in particular:

- how senior the participants representing the parties should be (e.g., CEO and Minister level or the day-to-day operational staff); and
- whether lawyers and experts should also attend (usually it is better if they do because most parties will wish to consult them before settling anyway).

Mediating the mediation agreement

The author was once engaged as a mediator in a dispute in the South Pacific – on the other side of the world from where he lives. The parties signalled that they were interested in mediation, and some funding was provided before they formally agreed to enter into a mediation process. The author travelled to meet the parties to explain to them what mediation is, how it would work in this case, that it was confidential and that they had no substantive obligations in relation to the dispute itself until and unless they reached a settlement agreement. It took a lot of face time with each party to ensure they understood what they were getting into. He crafted the mediation agreement and explored with each party the benefits and risks of the process, and the distrust each had of the other party. In effect, he mediated the conclusion of the mediation agreement. Unusually, he also circulated some notes on potential directions for the negotiation in order to stimulate the parties' thinking. By the time the parties met for the actual mediation, they had a full understanding of the process and, more importantly, they had an idea of how they could resolve it. Several months of pre-mediation preparation resulted in a rapid negotiation and settlement.

It can be difficult to get senior people to commit the time for mediation. A mediation typically requires committing an entire, uninterrupted day, and possibly involves travel. They will often send junior staff with defined authority to settle or instructions to call the decision-maker. But if the matter is important enough, the decision-makers will come. Typically it depends on whether the other party is sending people of similar level. The author recalls a mediation where three senior Government Ministers met with the CEOs of the country's telecoms companies for 4 days without interruption. If the mediation is pitched as the occasion for the final resolution of an important issue, the decision-makers will often want to attend in person.

Assistants and co-mediators

Assistant mediators

It can be very useful to have an assistant mediator, and acting as an assistant can also give you excellent early career experience in mediation. The usefulness of an assistant depends of course upon his or her experience and skill level. At the least, an assistant provides an extra pair of eyes and ears – someone who can watch, listen and perceive the behaviour of the parties. A more experienced assistant may play more of a co-mediator role.

Professional development

One of the author's early experiences was as an assistant mediator in a dispute between a travel agency and its client. A large group tour from India to England had been arranged by the travel agency but had been botched. He recalls being left with the representative of the travel agency while the lead mediator went off to caucus with the clients. The author asked the party he was left with to consider the reputation and financial consequences of losing a case against them, and the costs of fighting it in court. He helped them map out the possibilities and probabilities, which led to a clearer understanding of their options and alternatives to a negotiated agreement. Even an inexperienced mediator can be of tremendous assistance simply by engaging in disinterested, curious questioning. The key was to ask genuine questions about the situation and the consequences of settling, and the barriers to negotiation.

Roles that assistant mediators can play include:

- taking notes, allowing the mediator to focus on the communication between the parties;
- observing the non-verbal communications of the parties;
- drafting a settlement if the parties do not have lawyers present;
- co-mediating, e.g., leading a caucus with one party whilst the mediator is with another party;
- running messages to avoid the need to break off a meeting to make contact with the other party; and
- being a sounding board for the mediator to voice his ideas and thoughts.

Working with a co-mediator

Co-mediation is the process of using two or more mediators as facilitators in a neutral role. If the co-mediators work well together, it more than doubles their effectiveness. Their collaboration can lead to great creativity, and the extra resources can bring a disproportionately larger impact. But they need to be able to work well together as a team. They need to trust each other. If they are competing with each other, it will go wrong.

An extremely useful element of co-mediation is the opportunity to share perceptions and ideas during, and to debrief at the end of, a mediation session. Most mediation institutions make debriefing an essential part of co-mediation. This also gives mediators the chance of receiving honest feedback on their performance.

Provided that a suitable co-mediator is available, co-mediation is almost always more effective than solo-mediation. Co-mediation is particularly useful where:

- a dispute is particularly complex or too demanding for one individual to manage effectively;
- the mediation would be more effective if different skills were represented in the mediator team; or
- there are so many parties, or the geographical separation is such, that one mediator could not caucus with all parties.

Choose your co-mediator carefully!

Mediation is a competitive business. The number of disputes is often less than the number of mediators seeking to mediate them. Mediators are often therefore in sales mode, talking about their own brilliance as mediators. Occasionally, their egos get the better of them. As a result, it is not always easy to find collaborative mediators. The author once co-mediated a dispute with a leading mediator in his community who had strong ideas about his own pre-eminence and importance. The co-mediator liked to take the lead, and talked only about himself rather than working as a mediation team. But he didn't know much about the industry they were dealing with, and so he couldn't grasp the meaning of the offers and counter offers, or the reasons behind them. The parties soon lost faith in him as an effective mediator despite his initial confidence. Choose your co-mediator very carefully!

Co-mediation offers substantial advantages by:

- combining the skills, insights and talents of two or more mediators;
- providing mediators with back-up and support when they need it most, such as when the parties become blocked;
- reducing the risk of the mediator feeling isolated or becoming exhausted;
- providing an objective check by one mediator on the other;
- giving a party who doesn't like one mediator the opportunity to deal more with the other; and
- employing different communication and negotiation styles.

The presence of a co-mediator can result in a significant boost to a mediation. In order to do so, however, the mediators need to devote ample time to preparation and planning in order to ensure a co-ordinated approach. In particular, before a mediation commences, aim to reach agreement on:

- a division of tasks in the preparation stage of the mediation and a sharing of tasks for the remainder of the mediation; and
- the method of communication between mediators (e.g., when dealing with the strategies to be applied during the mediation, when to break into caucus sessions, etc.) especially in front of the parties.

The participants and their roles

Most mediations include a number of individuals in addition to the leads from each party and the mediator. Parties often bring an entourage of supporters. The size of such a group is left mostly at the discretion of the party, but as a mediator you must ensure that you and the other parties are informed in advance of who is to attend. Large teams can be challenging, from seating to maintaining effective involvement. But it is often crucial to have lawyers and experts present. And knowing who is not in the room can be as important as who is.

Lawyers

Lawyers are present at most large commercial mediations. In fact, many cases may be referred for mediation by lawyers, so there may be a significant investment in time and reputation that needs to be recognised by the mediator.

Lawyers can play a positive and constructive role in mediation. They often stimulate movement and flexibility, and so you should ensure that they are involved and engaged throughout the mediation. It helps greatly if the lawyers are well versed in how mediation works and how they can best help their client's interests (ref, Hal Abramson, *Mediation Representation*).

Nevertheless, be aware of some difficulties that may emerge from their involvement. Some mediators have found that power struggles may occur between them and the legal representatives of the parties as to the manner in which a mediation session is to be conducted. Some lawyers may have a tendency to regard mediation as a pre-hearing conference. This can be avoided by the mediator being clear about the mediation process during the preliminary conference and the mediator's opening statement. Mediators can also be faced by potential power imbalances where one party has legal representation while the other does not.

Ideally, before the mediation, the lawyer will:

- advise the party on the process;
- assist in the selection of mediator;
- brief the party in presenting the case;
- prepare the case summaries and supporting documents to be sent to the mediator and the other parties before the mediation, and identify any documents that should be confidential and for the mediator only; and
- carry out a realistic appraisal of the strengths and weaknesses of the party's case.

The mediator might communicate initially with the lawyer in setting up the mediation, and it is a good idea to probe the lawyer to ensure that he or she is indeed doing these things.

At the mediation the lawyer will typically:

- either present the case or support the party in his or her presentation;
- advise the party throughout the mediation, possibly even lead in settlement negotiations;
- identify legal issues that need to be addressed by the emerging settlement; and
- draft, or assist in drafting, the settlement agreement.

Use the lawyers well in your mediation. Like the mediator, they usually want to come out of the mediation with a success story, and this often means helping their client to an acceptable solution.

Often the best use of the lawyer is to ensure that their client fully understands the risks associated with not settling. You might ask the lawyer to give a percentage estimate of success of an arbitration or court case, the number of months or years it would take to complete, the likely legal fees, the prospects of enforcement, and the commitment of time and effort by the client.

No lawyer likes to admit that the other party has a strong case, but ensuring that the lawyer has objectively laid out his or her client's legal options is a crucial context for working out how best to advance its interests. In fact, a short and direct path to settlement is often paved with good legal advice.

Experts

As in an arbitration, there are generally two possible roles for experts in mediations:

- as specialist adviser to a party; and
- as specialist adviser to the mediator.

In the former, the expert is part of the party's team and may play quite a limited role. Settlements are rarely based upon the detailed knowledge of an expert. It is unlikely that they will change their position to an extent that will materially affect the mediation. They have typically been paid for having taken a specific position and given a specific opinion. Their technical knowledge has been put to its use, and changing their mind would suggest a malleability that greatly undermines their credibility. As a result, they may be a barrier to flexibility and eventual settlement. If possible, it is desirable to have an expert available by telephone rather than present at the mediation.

However, an expert on the mediator's team provides a different dimension. It is rare to find individuals who combine subject matter expertise with the skills and experience of mediating. In a complex dispute, having an acknowledged expert available to advise the mediator may allow the mediator to focus more on facilitating the progress of the parties towards settlement. Often, such a process takes little account of the legal or technical complexities but is achieved because it is the best solution for the parties, all factors considered. An expert's presence may also be a comfort to the parties. Highly specialised and complex cases need to be understood if the mediator is to help to achieve settlement.

Who is not in the room?

It is also important to know who is not present – who is not in the room but whose authority strongly influences those who are. A given party's team will often need to face their bosses (which may be a CEO, a board of directors or shareholders) and peers when they return to the office. Helping them find ways to satisfy the needs of those that are not in the room, including explanations for reaching the settlement they did, can be an extremely important hurdle to cross in reaching a deal with the other party. In some cases, the participants will want to be able to allude to the mediator's influential role, indeed the mediator's assent to the deal, as a way of legitimising their decision to accept it. It is very important to understand what pressure or constraints those outside the room exert to enable the final settlement to be accepted.

Pre-mediation meeting or conference call

Once the parties have agreed on the preliminaries and signed the mediation agreement, the mediator selected may wish to conduct a pre-mediation meeting or conference call, whether with representatives of the parties together or separately. Often it will be enough to meet with the lawyers simply to ensure that the basic process and principles are clear to both parties. However, if the parties are not familiar already with mediation, it may be useful to meet with the parties themselves. The key goal is to ensure that the parties are clear about the process. Allaying misconceptions and fears at this time can be particularly important.

Ideally, the mediation agreement – or other form of confidentiality agreement – will have been signed at the outset, so that the preliminary meeting (if there is one) takes place under the same conditions as the mediation itself. However, if the parties have not reached formal agreement to mediate, the mediator may need to use the preliminary conference as the occasion to get such an agreement signed.

Finding a classy venue

The author's favourite mediation venue was an elegant modern hotel in Monaco where, after flying in by helicopter, the author (as mediator) and a large British company, a large French company, a Monaco company and a European Government met monthly over a period of two years and hashed out settlements over the amounts of and liability for claims exceeding \$100 million in aggregate value. A long boardroom table allowed 12 people to exchange views over croissants and excellent coffee. A large balcony allowed parties to exchange their perspectives informally with the backdrop of the Côte d'Azur and luxury yachts. The prospect of a splendid lunch typically accelerated the morning negotiations towards resolution on each occasion.

This will involve discussing the process and clarifying the parties' intentions and understanding, and preparing the actual mediation agreement. This may involve a risk of the mediator incurring time without remuneration if after such meeting the parties decide not to pursue the mediation, but sometimes it is the only realistic pathway to get the parties to agree. The person who is proposing to act as mediator has to be careful as he or she may have an interest in the parties reaching agreement to hire him or her, and the parties will quickly smell when a mediator's self-interest is at work.

A pre-mediation meeting or conference call can have a number of useful functions:

- **confirming the parties understand** what mediation involves, and that they have gone through and understand the mediation agreement (and getting it signed if it is not already signed);
- **assisting the parties to prepare** for the mediation (e.g., preparation of a case summary, negotiating strategy, etc.) to ensure that the parties are well prepared, have received relevant advice and so are in the best position to make informed decisions about offers, counter-offers and a settlement agreement during the mediation.
- **identifying who will participate** in the mediation, and ensuring that the parties understand the roles of lawyers, experts and others in supporting the effort to probe interests, come up with options and search for an agreement;
- **agreeing on common documents** and checking whether any information needs to be exchanged, how this can be done and what information, documents or things need to be available during the mediation process; and
- **identifying any practical requirements** that need to be addressed in the mediation (e.g., mutually convenient time and location, need for a co-mediator, need for interpreters, other commitments, etc.).

Exchange of case summaries

The mediator may find it useful to have each party prepare a case summary and send it to the mediator and to the other party at an agreed date before the first mediation session. A concise case summary can be valuable in focusing parties on the real issues in dispute and help the mediator understand the main issues of contention – at least as viewed by the parties at that time.

Preparing on the substance

The amount and nature of the mediator's preparation depends on his or her level of experience, the complexity of the dispute and the volume of materials supplied by the parties. The goal of preparation is to ensure that the mediator has attained a sufficient

degree of familiarity with the subject matter of the mediation and a good sense of the parties' personalities and perspectives to serve the parties usefully. It is rare that complete ignorance of the dispute and the parties will enable the mediator to serve the parties well in probing their interests and facilitating their negotiations.

Preparing will therefore involve reading the parties' pre-mediation briefs, and reflecting on what the mediator knows about the parties' interests, though without prejudging the unknown possibilities that may unfold during the mediation. It may require the mediator to ask some questions of the parties in advance of the mediation to ensure that basic information is on the table from the outset, although it is usually desirable to leave this for the commencement of the mediation.

Preparing mentally

Personal mental preparation is also valuable, and sometimes very important. Mediations are often intense and stressful. The parties have each their positions and their own needs to guide them, but the mediator often has to handle two parties (with multiple roles and personalities) at once and without time to reflect deeply.

The mediator needs to feel confident in his or her abilities. That requires knowing enough about the case and the parties. It also means ensuring that possible internal insecurities and lapses of confidence are addressed. The mediator may benefit from various grounding exercises commonly used in conflict resolution and techniques from psychology and psychotherapy. These differ for everyone, but can include going for a walk, breathing exercises, stretching and yoga, going for a run, or even loosening up by watching a funny movie. Mediation can be very stressful for the mediator and knowing how to deal with one's own anxieties is a central capability for any good mediator.

Grounding and relaxing exercises

The author once acted as the third party neutral in a week-long dispute resolution process between two viciously disputing parties. They were among the largest companies in the country, they were represented by two of the most senior lawyers of the local bar, and they had millions of dollars at stake. The author was in his early 30s and clearly young for the role. To keep himself grounded and ensure that he wasn't distracted by the tensions in the dispute and undermined by the aggression of the parties' exchanges, he woke early every morning and did an hour's yoga and breathing exercises before sessions. They helped!

Preparing the venue and logistics

Preparing for a mediation includes ensuring that the venue is appropriate and set up optimally. The choice of venue for the mediation is important. The parties may have an idea, but the mediator's experience in mediation is what he or she is hired for, and so it will often be appropriate for the mediator to suggest (and if necessary insist on) a location that is suitable for a successful mediation.

The venue is best if it is a neutral location that has comfortable seating, comfortable temperature, and is well lit and large enough to contain the representatives of the parties, but not so vast as to feel empty. Parties need to be able to hear one another easily. They need to be close enough to one another to communicate well, but not pressed on top of each other. These things can be extraordinarily important. Ideally, the venue should also be flexible enough to accommodate mediation sessions that run late into the night or over weekends. Balconies can be useful to allow parties to go out to make important phone calls, or to discuss an issue privately with each other, or just to get a break.

Meeting spaces that stimulate creativity

The most impressive venue the author has seen is The Box. Part of the London School of Economics, it was designed by architects to facilitate openness and creativity. It comprises a smart board room, with all of the necessary formalities for meeting around a table, that can be transformed into a conference room with the possibility of using a projector and varied seating, a kitchen space and two areas with inviting sofas and bookshelves. Curiously shaped mobiles hang from the ceiling. Posters of the adventures of space and supersonic inventions align the walls. Light pours in from the windows with views over Central London. One wall contains ten or so niches, in each of which is found an innovative trick. In one, moving your hand inside the niche produces different sounds. In another, hand movement produces different colours. Another niche includes a mechanical toy in which, when you turn the handle, a skeleton beats a dead horse, a reference to the worthlessness of expending energy on things that have no life left in them. Another box contains the quotation by Michel Foucault from Jorge Luis Borges quoted at the beginning of this Guide (ref, *The Order of Things*). The Box offers space for imagining the possible beyond assumptions, exploring issues, negotiating solutions and making decisions.

The availability of food and drinks at the venue needs to be checked and requested in advance. A common food and drink station for all parties can also act as a useful catalyst to further discussion between disputing parties. Mealtime is often more relaxed, enabling creativity and compromise.

The mediation will work better if, in addition to a principal room for joint sessions, each party has access to its own dedicated room. That gives them privacy to discuss the issues internally among themselves, take a break from the intensity of meeting with the other party, and can be used for "caucus" meetings with the mediator if those are to occur.

Privacy of the venue is important. If journalists may be interested, ensuring that the parties will keep it confidential can be crucial. But it is also important to know that rooms can be locked to ensure that any materials on tables or flip charts exploring options will be secure, and that there are not related parties using the neighbouring rooms.

Privacy above all

The author once mediated a dispute over information and communications technology (ICT) licensing between a licensor and a licensee. The licensee claimed that the licensor had granted it an exclusive licence, and that the licensor had no right to grant a licence to a third party. Yet the licensor wanted to grant a licence to the third party, believing this would lead to greater exploitation of the rights. This led to a bitter dispute between the licensor and the licensee, including court litigation and injunctions. Litigation with the third party was also threatened. To resolve the matter, the licensor and licensee agreed to a mediation process. The author visited several hotels to find the best venue and made his selection. The day before the mediation, the staff of the chosen venue mentioned by chance that the third party was having its annual general meeting in one of the hotel conference rooms. The prospect of holding the confidential mediation in the conference rooms adjacent to where the third party was meeting, with the increased tensions of personal encounters in the corridor and the risk that the third party might try to meet with and influence the licensor or the mediator, was exceedingly awkward. The mediator quickly switched hotels to an alternative location and the mediation went smoothly and settled successfully.

Seating arrangements need to be carefully prepared so that seats are appropriately grouped, everyone has enough space at the table if there is one, parties can hear each other, and no party appears to be physically aligned with the mediator more than the other.

Typically it is immensely useful to have flip charts in each room. Indeed, it may be useful to have three or four in the main meeting room to enable different dimensions of the dispute (e.g., facts, interests, options and offers/counteroffers) to be left visible. It will also often be useful to have flip charts in the parties' separate meeting rooms. Basic things like ensuring that there will be enough sheets of flip chart paper, pens and tape or sticky gum to stick the sheets to the wall as the day proceeds are as important as mental preparation and preparation on the substance of the dispute. There is nothing more frustrating in a mediation than getting stuck on a minor but necessary logistical issue.

Ensuring practical facilities are available

In one experience of the author, the mediation took four and a half days with Government Ministers and local company CEOs assembled in a hotel in the Radisson chain. Meals had to be served when needed in different rooms and cool drinks delivered upon request. Air conditioning had to be working. Flipcharts, marker pens and whiteboards, as well as projectors and screens were required in every room, and notebooks, pens and post-its at every table. The mediation had to cope with intense media interest. The hotel had to ensure staff maintained inscrutable discretion and confidentiality, and journalists were kept off the premises. On the last day, the deal was signed at 2am. Television cameras and journalists were ushered in to record what amounted to a landmark reform of the country's telecoms industry. The deal became known in the industry as *The Radisson Accord*.

Key points:

- If possible, bring an assistant mediator on board.
- If there are suitably experienced fellow mediators with whom you have a good rapport, consider working with them as co-mediators.
- Prepare the parties; hold a pre-mediation meeting or conference call if appropriate.
- Confirm the parties understand the mediation process and mediation agreement.
- Prepare the venue and logistics carefully.
- Read the summary of facts and any supporting documents.
- Prepare mentally for the mediation.
- Ultimately, don't forget that you owe it to the parties to do the best job you can for them, so deploy the best possible resources you can and, like a Boy Scout, Be Prepared!

4. Connect, Trust and Entrust: the Relationship with the Parties

Some parties look for a soft mediator who will go gently from party to party as a messenger. Others look for a bully to “sort out the other side.” Some look for creativity to cut through complexity to a solution, and others simply want a mediator to legitimise the result.

But successful mediation involves helping parties to understand their own interests, the realistic choices they face, and the best options available – and to find a deal if one may be had. And this depends on the mediator pitching the right relationship with the parties. This is about relationship building, confidentiality and ownership. It depends on impartiality and respect for each party.

Relationship building

The effectiveness of the mediator depends importantly on his or her ability to establish a positive connection with the parties. A good relationship makes the parties feel understood and increases their openness towards the mediator. This also leads parties also to be more open to different solutions arising in working with the mediator.

Developing relationships is of course part of being human, but in mediation, it is an important conscious element of the mediator’s work. And although it may come more naturally so some than to others, a mediator’s ability to develop relationships quickly can be refined by devoting attention to it as a skill, and even some training.

The mediator’s openness and honesty with a party are central to this. Parties quickly recognise when they are being manipulated or when a mediator is employing tricks to get them to concede or compromise. There is no substitute for true curiosity and an appreciation of human nature – with all its foibles.

Empathy for the challenges parties face in carrying out their business and handling disputes is also central to building a fruitful relationship with them. In the stress of handling the mediation, mediators sometimes forget that the dispute has probably been, and the mediation itself probably is, much more stressful for the parties. A combination of firmness and respect will go a long way to dispose the parties well to share their concerns and ideas with the mediator.

But simple, obvious things also make a big difference. For example, people notice if the mediator manages to learn and remember everybody’s names. It gives them a sense that they are being seen for what they are, not just another party in yet another mediation – and perhaps their concerns will truly be heard.

Remembering names – I and Thou

In addition to mediation, the author regularly facilitates senior executive retreats for parts of the United Nations. Sometimes 30-40 people participate. They sometimes ask how he manages to learn everyone’s name so quickly. Part of the solution to this is partly to get names and pictures in advance, but more than anything it is easier to remember names if you truly listen to what a person is saying. Taking each participant seriously as a person, seeking truly to hear them (see the discussion of “active listening” below), transforms them from yet another voice which has to be managed in a meeting into a real human with real interests, ideas and opinions. At the centre of any mediation are individuals with real needs who are stumbling and struggling to meet them in the process. Looking for each person not only makes it easier to remember their name – it also helps you get a closer understanding of what they really need out of the process, and so help to find a deal that meets their needs. As Martin Buber put it (ref, *I and Thou (Ich und Du)*), it is the difference between seeing the other person as an object (an “it”) as opposed to someone with whom we can have a genuine relationship (a “thou”).

Confidentiality

A key part of developing a good relationship in mediation is a clear commitment to specific rules of confidentiality. It is an integral aspect of the mediation process.

The mediator will want to ensure the parties understand that the overall mediation itself – information exchanged and what transpires in it – must be kept confidential by the parties. Their mediation agreement will typically stipulate this, but it is important to remind them.

In addition, if the mediator separates the parties and has “caucus” meetings with each of them, then the mediator will typically commit to keep the contents of each meeting confidential unless the relevant party authorises him or her to divulge any information or offer to the other side.

These aspects of confidentiality are the basis of the parties’ confidence in the mediation process itself. They may have a good relationship with the mediator, but without clear specific rules on confidentiality they may rest unsure how free they can really be.

It is thus important both to respect confidentiality and to remind the parties of it at various moments during a mediation session. It is good practice for the mediator to be very careful in assuming that everything said is in confidence, and to request permission to pass any information from one party to the other party. This care in itself strengthens parties’ trust in the mediator’s commitment to respect the confidential aspect of mediation.

Confidentiality can be tricky in mediations that are mandated by law, and particularly where the mediation is carried out by an authority that may later have responsibility for deciding the dispute if it is not resolved by mediation. An authority that has been involved in a mediation will have been privy to exchanges between the parties that one may not want to surface as evidence in a dispute which falls to that regulator to decide. Because of this, mediation in regulatory contexts is much harder to conduct than mediation that is separate from any regulatory or judicial process. Countries often split the mediation role from the regulatory and judicial roles for this reason.

Mediating in an adjudicatory context

The author once chaired an arbitration panel in a dispute between two companies. The parties were entrenched in their positions. Instead of ploughing ahead straight into the arbitration, the author asked the parties first whether they were willing to try to resolve it through mediation in case this would avoid the necessity of the arbitration. They indicated that they were. However, such pre-arbitration mediation is particularly tricky for an arbitrator to do. Each party knows that the arbitrator will ultimately hear and decide the case if the mediation is unsuccessful, and so will be cautious not to reveal too much. Furthermore, a panel needs to be scrupulous in ensuring that it will not be influenced in any later decisions by information disclosed to it in private by one party if the other is not to have an opportunity to respond. For these reasons, the author cautioned the parties to disclose to the panel only things that they would be willing to see disclosed to the other party in due course if the panel thought this necessary. The mediation was as a result relatively constrained. The arbitration panel met separately with each party and listened to its explanation of the situation, probed its need for and alternatives to settlement, and asked it to suggest terms for a settlement. The larger company made an offer and the smaller company refused, declaring that it preferred to go ahead with the full arbitration. The larger company then won on the key issue in arbitration and the smaller company may well have regretted not taking the settlement offer.

Ensuring the parties have “ownership”

The mediator needs to set a good balance between his or her control of the procedure of the day on the one hand, and the parties’ ownership of the process and result on the other.

As mediation is typically voluntary (the exception being mediation mandated by a court or regulatory authority), parties may stop participating when they conclude it is no longer worth continuing. This is sometimes perceived as a weakness in the mediation process, particularly by parties that are not experienced in mediation. But the voluntary nature of mediation is also its core strength: the parties are there to resolve the matter and only their own will to get

there will do it, with or without the help of the mediator. They are freer to speak and explore ideas to which they only commit if they agree at the end. If achieved, a resolution will be all the more durable as a result. It is usually valuable for the mediator to ensure that this is clear from the outset, and to establish it in the commencing phase of the mediation.

Even when participation is not voluntary and mediation is required by court, by law or by contract, parties retain control of the process and can render the mediation meaningless if they feel it is not productive. In mandated mediation situations, a party can be required to submit to mediation, but he cannot be required to agree to a settlement. The parties also set the terms and conditions on which they will settle. It is the parties’ solution to the parties’ problem, and the mediator is ultimately no more than a helper in accelerating their communication process – and ensuring that the parties understand that they are responsible for whether they achieve anything or not.

Being impartial

As a neutral third party with no vested interests, no position to protect and no emotions to vent (other than relating to his or her own personal ambitions as a mediator!), the mediator is in the best position to get parties to reveal their real weaknesses and needs. Before this happens, however, the mediator will often be tested by the parties to check impartiality, confidentiality and trustworthiness. As the mediation progresses and relationships are formed, the parties will become more relaxed, less defensive and so more open to understanding. If the mediator is perceived as being partial, this process will be impeded. It is therefore important for the mediator to:

- be open and even handed with the parties;
- ensure that questions are phrased so as not to appear critical or judgmental; and
- ensure that verbal and non-verbal reactions to parties’ comments do not suggest a particular view.

The mediator’s impartiality is often challenged, directly or indirectly, by parties asking the mediator for a view on an issue, or even to suggest a solution. There may be scope in some instances where a mediator can comment on a particular issue whilst still retaining a neutral role. But the general rule is to avoid giving a view. You may soon find yourself being quoted by one party to the other in support of its position.

Associated with the mediator’s impartiality is the need to avoid assumptions. We are all conditioned by environment, relationships and experience and so it is very difficult to come to any situation without preconceptions affecting both our attitudes and actions. Stereotyping, in relation to gender, race, profession, economic status, age, religion, and other groupings, is a common basis for making what may be false assumptions. As mediators, we need to recognise where our own prejudices lie and work hard to treat each person as a unique individual.

This is an area where mediation institutions, which provide confidential debriefing with and supervision of mediators, are particularly useful. One can become acquainted with one's own foibles and learn how to recognise when one is falling short of the ideals of a respectful, impartial mediator.

While the mediator will have read some background papers on the dispute beforehand, it is important to enter the mediation with an open mind. At all times:

- watch out for your own **preconceived ideas** on the merits, or otherwise, of the case and of perceived weaknesses or strengths;
- be aware of the **persuasiveness and influence** of a party's presentation or argument; and
- be prepared to think and **act flexibly** and not adhere to a fixed format for the mediation or a particular structure for a settlement.

In mandatory mediations, such as those imposed by law, the mediator may have been appointed by a third party, such as a statutory regulatory authority or a court. In such cases, you may have to make further efforts to demonstrate impartiality and neutrality to the parties.

Parties to a mediation need to trust the mediator. His or her honesty is basic to their willingness to share with the mediator confidential information and to explore avenues of compromise. That depends in particular on the parties knowing that what they tell the mediator will not be passed on to the other side unless they authorise him or her to do so.

Respect

Often the mediator will be frustrated with parties which get stuck on stupid points, blinded even to their own interests. A mediator often has to work on his or her own attitudes to ensure that he or she maintains respect for the parties. Parties are very sensitive to the respect of the mediator. He or she may be the first "outsider" to hear their case, and they will quickly pick up if he or she thinks they are exaggerating or being irrational. A party may secretly regard being involved in a mediation as an admission of weakness or failure on their part, so if the mediator is able to convey respect and acceptance it becomes easier for that person to be open and honest.

You will find that you behave respectfully if you make an effort to care genuinely about the parties' wellbeing during and after the mediation. Each person is a unique human being, not merely a party in a mediation process. Recognise that they are responsible for determining their own fate. Assume their goodwill unless they prove this wrong. Do your best to suspend your critical judgments, and put aside your irritations.

A party will sense these things. Genuinely listening to a person, making sure you are really hearing what they are saying and asking for clarification when you are not (what is often called "active listening"), using non-judgmental language and conveying warmth and encouragement – these are transformative in the mediation context.

Respect is difficult to maintain when a person is behaving in ways which are aggressive, manipulative, overbearing, self-deprecating or just plain irritating. However, respect and acceptance are not the same as liking or approving. The mediator does not have to agree with values, opinions or behaviour, but must simply accept each person as an equal human being and have a genuine interest in communicating with that person. Maintaining respect for parties helps to build up trust and create an environment in which they are more likely to explore sensitive issues and disclose hidden agendas.

Key points:

- Let the parties own the mediation and the outcome.
- Be impartial; treat all parties equally.
- Avoid giving a particular view.
- Be aware of preconceptions or prejudices.
- Assume everything said in private is said in confidence.
- Check confidentiality before revealing any information.
- Show respect and accept each person as an equal.

5. Starting Off: Opening the Mediation

Preparing for the first session

As mentioned above, take some time to prepare mentally before the mediation. The parties are bringing a problem that they have been unable to solve themselves. They hope that the mediator will find a way to help achieve a solution. The commencement of the mediation is the time when the mediator's demeanour and words will provide reassurance to the parties that the process is worth pursuing, and lead them to invest their energies to pursue a settlement. First impressions are very important and conveying calm and confidence supports the process from the outset.

It is usually helpful for the mediator to meet the parties at the reception area of the venue and lead them to their private rooms. During this time, you can inform the parties of the amenities available at the venue. Give the parties time to get settled before hurrying them into the first session.

It is worth taking the time to plan carefully where the parties will sit in the first session. The room and table may dictate much of the seating but the mediator needs to decide on what layout will best encourage communication and so assist the building of relationships – and in some cases cause the least damaging friction. Communication could be impaired if parties are seated too far away from each other or resentment could arise if one party feels that they have been given a disadvantageous seating position (e.g., facing the glare from the sun, under a noisy air-conditioning unit, or further from the mediator than the other party). The ideal seating arrangement may not be found for the first session but as familiarity with the venue and the interactions between the parties grows, it will be possible to vary the seating during subsequent sessions.

Once seated, the most natural thing is for the mediator to introduce himself or herself, briefly summarise the reason for the meeting – to seek resolution of the dispute between the parties present – and then ask everyone to introduce themselves. This allows the mediator to get a quick insight into how the parties relate to each other and what tensions (and even just nervousness) may be present.

Basic and somewhat obvious conventions are worth pursuing, e.g., checking whether the parties would like to be addressed by their first or last names. Where a lot of people are present who do not know each other, place cards can be useful to remember names. They can be put aside during subsequent sessions as familiarity grows.

The mediator should be aware of parties' particular needs throughout the mediation, for example breaks needed for important calls, consideration of a person's disability or limitations, or any commitments that might affect the time they can devote to the mediation.

Framing the mediation

After introductions, it is almost invariably important and appropriate for the mediator to start the mediation by saying some words about the process that the mediation will follow. This can help to increase trust, manage anxieties, put parties at ease and generally create a more positive atmosphere. Parties sometimes still need reassurance that mediation is an appropriate way to resolve their dispute. If parties feel uncertain, confused or uncomfortable about the process at the outset, communication and trust will suffer for the rest of the day.

The mediator's opening statement enables you to introduce yourself, set the tone, explain the process and your role, and provide practical information (e.g., Internet access, toilets, breaks and other things the parties may need to know).

Introduction

Unless already done in a pre-mediation meeting, the mediator's opening should begin with a short introduction. The parties have probably seen the mediator's CV, but briefly highlighting relevant personal and professional experience in dealing with the context or subject matter of the dispute can build the parties' confidence.

Set the tone of the mediation

The mediator has an important role in setting a tone which encourages participation, respect and productive interaction. Ideally, the mediator's behaviour will become a model for how parties and others communicate and treat each other during the mediation. For example, inclusive behaviours, such as making eye contact round the table, being responsive to non-verbal cues and making sure that everyone has a chance to check their understanding of the process, as well as using a touch of humour, will help generate a positive atmosphere of cooperation.

Explain the process to the parties

Although the parties may be familiar with mediation, it is almost always worth recounting the basic features of mediation at the outset so as to ensure their expectations are aligned with the way it will be conducted:

Mediation is voluntary. Except for the few cases where a law, a court or a regulatory authority has required the parties to mediate, the process is entirely voluntary, and parties can terminate the mediation at any time. In some countries, if a party unreasonably refuses to engage in mediation, a court may, when deciding the dispute, make an order against that party for some of the legal costs – even if that party wins the actual litigation on the merits (ref, e.g., *Dunnet v Railtrack* in England & Wales). But otherwise, parties are free to walk out of the door – or not even enter it.

Setting the tone

Sometimes a party takes the initiative to set a positive tone. In one mediation in Fiji in which the author was mediator, at the centre of the table sat a traditional wooden bowl used for drinking kava, a customary social ritual in that society. Pink and white magnolia leaves floated on water in the bowl, a classic image of peace and reconciliation. In his opening statement, the Chairman of the Board of one of the parties gestured towards the bowl and said it represented “one village” in their shared culture and that he hoped that the mediation would result in unity and an accord among the parties. It did.

Mediation is confidential. The parties and mediator will usually have signed an agreement committing to keep confidential all information and offers exchanged in the mediation. It is helpful to remind the parties of two dimensions of confidentiality:

- all that happens, is said and is written during the mediation is confidential to those taking part unless otherwise agreed; and
- the mediator will keep confidential information shared with him or her in private sessions with each party.

A mediator should always keep confidential any notes that are made during caucus sessions. Confidentiality is crucial. Once trust is broken in a mediation, it is very difficult to regain.

Parties’ should have authority to settle. It is highly desirable to ensure and confirm at the outset that both parties come with authority to settle – otherwise one may be negotiating on a false premise, looking for a settlement while the other is really using it as a “fishing expedition” to gather information about the other’s readiness to compromise. Often, and preferably, parties will sign a mediation agreement which states that they come with authority to settle. However, few come with absolute authority – there is usually a limit, which may not be revealed until late in the mediation if at all.

Parties should act courteously and respectfully. Remind the parties that throughout the mediation process, they must treat each other with respect. Each person should be allowed to speak uninterrupted.

Explain the mediator’s role

The mediator is a facilitator of communication, negotiation and decision making between the parties. It should be made clear that your role is not to impose a solution. It is the parties’ problem and it will be their solution.

The mediator should check that the parties understand this point fully. The notion that you are not a decision maker may be new to some parties and inconsistent with their expectations. They may be expecting you at least to come up with the result and to exert some authority to impose it. This is not impossible, and sometimes happens, but it changes the dynamic of mediation completely. It is usually important that the mediator establishes at the outset that he or she is not there to decide things but to enable them to happen.

The mediator should also explain that he or she is the manager of the mediation process. Parties should expect you to maintain firm – but polite – management over the proceedings as the mediator is a process facilitator charged with creating an environment conducive to participation and communication.

Throughout the mediation process, the mediator aims to be impartial and neutral. To start off on a firm footing, it can be helpful to remind the parties that you have not been engaged by either party in the past. If you have been engaged by one of them, it is important to explain this in detail before the mediation and to obtain each party’s confirmation that there is no perceived conflict of interest. (A waiver of a conflict of interest is unlikely to suffice, as even if legal liability is avoided, the perception of a conflict of interest will impede the development of a trustful relationship.)

If during any part of the process the mediator begins to suspect a conflict, it is vital that it be brought to the attention of the parties for it to be addressed. Concealing or ignoring such suspicions places the mediator’s credibility in serious jeopardy as well as the parties’ faith in the process.

Inform the parties about the mediation process

Explain that the mediation will involve:

- joint sessions where the mediator facilitates the parties’ discussions and negotiations;
- possibly private and confidential meetings (or “caucus” sessions) between each party and the mediator if this appears useful and fits the mediator’s style; and
- a concluding settlement session at the end to document and sign any agreement.

It may be helpful for the mediator to emphasise that no-one at the mediation is committed to anything until it is set down in a written agreement and signed, so everyone has freedom to try anything during the course of the mediation “without prejudice.” Only when it is recorded in writing and signed does it become a binding settlement agreement.

Parties' opening statements

After the mediator's opening, the parties should be asked to make opening statements. It is often best for the mediator to decide in advance who should make the first opening statement. Leaving the decision as to who goes first to the parties may in itself lead to dispute. The natural course would be to invite the party demanding something of the other (the claimant) to go first, but this can be changed if there is a good reason to do so. Much depends on where the parties are in their dispute process and negotiations. If one party is burning to start the mediation with a statement, it may be helpful to let it do so and see where it leads.

Before turning the floor over to the parties, the mediator should briefly explain the purpose of the opening statements:

- the purpose is to inform the other party of their case in the presence of the neutral mediator;
- the mediator may wish to set a time limit on both parties' opening statements to ensure that it is a brief summary;
- the mediator may wish to give the other party an opportunity to ask questions after the statement (though it is usually wise to restrict these to clarifications and not allow anything approaching a rebuttal); and
- it is important that parties respect each other and allow the statement to be made without interruption.

If the listening party interrupts or is aggressive, the mediator needs to reinforce the ground rules. Each party must allow the other side a reasonable opportunity to be heard and must listen to what the other side has to say even if they strongly disagree. The whole purpose is to enable safe communication between the parties. They will have an opportunity to give their version in due course.

The mediator might invite members of a team in addition to the leader or lawyer to add to the opening statement if they so wish. Including everyone helps to keep them engaged and committed to the mediation. This depends on the business culture as in some countries, it would be inappropriate for anyone other than the boss to speak – at least at the outset.

Usually the opening statements are predictable examples of “positional” (rather than “principled”) negotiation: extreme, entrenched, with no indication of flexibility or even of willingness to settle. Often parties need to be reassured that this is a familiar part of the process and that they should let the mediation process go forward to explore what is behind the positions – and in particular their underlying interests.

Summarising the statements and setting the agenda

At the end of the parties' opening statements, it is often helpful for a mediator to summarise what has been said, for at least two reasons:

- it **assures the parties** that the mediator has heard their individual issues and concerns (and will continue to do so throughout the mediation); and
- the summary and any discussion that comes out of it may help **develop an agenda** for moving into an exploration of the underlying issues which the parties have raised.

After hearing the parties and summarising their statements, it may be worthwhile for the mediator to then propose an agenda to ensure that the mediation progresses in a constructive manner and is concluded in a reasonable time. This is usually essential in mediations involving complex disputes. The agenda would list the issues and concerns which the parties agree need to be discussed (whether or not all need to be resolved) before any final settlement is possible.

Setting an agenda can serve several purposes. It may:

- **recognise the issues** that the parties put on the table, and assure them that these will be addressed;
- encourage a co-operative attitude by **converting individual issues into mutual problems** to solve as far as possible;
- break the dispute into **manageable segments** for the benefit of the parties and mediator;
- bring **structure** to the discussions and provide a **focus**; and
- give a **framework for progress**.

Be sure to emphasise that the agenda is flexible in that more issues can be added if they emerge from subsequent discussions. As far as possible, try to avoid having too long an agenda. More often than not, most items can be usefully condensed and discussed under a single heading.

As mediators become experienced, it is common to prolong the first open session. There is nothing better than the parties communicating with each other and this should be encouraged so long as it is useful.

Key points:

- Arrive at the venue early to check arrangements (i.e., seating, meals, refreshments, etc.).
- Make introductions.
- Set the tone of the mediation and set out its features (i.e., voluntary, confidential, authority to settle, etc.).
- Invite parties to make their opening statements.
- Summarize the opening statements.
- Set an agenda for the mediation with the parties.

6. Ploughing the Ground: Exploring Issues and Interests

The opening of the mediation described above is quite structured, and is best kept so. It frames much of the rest of the day and it is valuable to set a solid base. However, what happens next is very much open to the mediator – and the parties.

The strongest temptation is often to try to get the parties to start exchanging offers and counter offers – basically to negotiate. This is almost always a big mistake. They have likely come to mediation because they are locked into positions – neither able to open its own or the other’s positions. Their assumptions, their thinking, their attitudes have probably hardened and it is crucial to take time to loosen them up to look at them through a different lens.

That lens will be their underlying interests as they relate to the issues in the dispute. But learning what their underlying interests are depends hugely upon developing a trustful relationship in which you the mediator can take the time to explore the situation and the issues more broadly with them.

Only when the ground has been ploughed and the earth turned, showing up whatever pebbles and worms (and sometimes golden sovereigns) lie beneath, will it be really possible to sow the seeds that will grow and blossom into a settlement.

And even more simply than this, the parties and the mediator need to have a clear idea what it is they are negotiating about. They have to take the time to think through the dispute so that what the parties care most about leads the process.

For these reasons, exploring the dispute and its origins, but particularly what the parties need now, is crucial.

The value of thorough exploration

There are several benefits to taking time after the opening to focus on the underlying issues and interests. Exploring is primarily driven by the mediator’s honest curiosity – a non-judgmental seeking of understanding. The mediator wants to see what is going on – what has happened, how each party perceives it, the disappointments and frustrations and perhaps anger, as well as the “shoulds” and “shouldn’ts” (what the parties think should and shouldn’t have happened and what should happen now to resolve it). There are lots of things that are helpful in taking time to explore the dispute thoroughly before looking for settlement solutions and offers and counter offers:

Building a listening oriented process

It is in the nature of conflict that one side often stops listening to what the other is saying. Taking time to explore the issues also enables the mediator to build upon the opening

session to establish the principle of listening. Most marriage therapy techniques are centred on the therapist assisting the spouses to listen properly to the other. Some schools of mediation, for example Gary Friedman and Roger Mnookin of Harvard Negotiation Project and Jack Himmelstein believe it is so much more important than anything else to get the parties to understand each other that they avoid separating them into caucus sessions out of principle (ref, *Challenging Conflict: Mediation Through Understanding*).

Establishing the main points of dispute

Over time, and in the midst of the emotions that lead to and arise from disputes, the parties may have lost sight of the real issues at stake. As a mediator, you can bring a clear mind and vision to a confused situation by encouraging parties to ask clarifying questions that may lead to a better understanding of the underlying issues. This does not mean trying to establish a common understanding of everything at the outset. Rather, it is about establishing a common understanding of what is actually in dispute. One party may think it is about one thing and the other may be focused on a different issue. Clarifying each party's perspectives enables the parties and the mediator to see the terrain that has to be worked if an agreement is to be reached.

Uncovering useful information

Most parties know things – have information – that they would prefer not to reveal but which may be relevant, and this may need to be brought out if a settlement is to be reached. The mediator's role at this stage is to observe. What parties say may have inconsistencies or other hints that may be worthwhile to pursue.

At this early stage of the mediation, it is often better to note, rather than elicit, any options, common ground or agreements in principle that have been incidentally raised by any of the parties. These may serve as a good source of ideas for the next stage of the mediation – when they move into negotiating.

Helping a party understand its needs and interests

As the parties' stories unfold, the mediator can probe more deeply to understand their underlying interests and needs, and ensure that they also gain a fuller understanding of their own. These are what will enable the resolution later, and it is crucial to unpack them as much as possible. More often during caucus sessions than joint meetings, the parties can open up to the mediator about their real needs and interests without fear of weakening any negotiating position or exposing vulnerabilities. Such confidential sessions can give the mediator an opportunity to move beyond the posturing and encourage the parties to focus on their real needs and interests.

Understanding underlying issues

The author recalls a dispute where one party, a Government, was convinced that the second party, a communications company, was simply resisting and fighting settlement out of bad faith. It appeared to be objecting to every little detail and not working towards a productive outcome. The company was very anxious that the Government was enacting new laws that would lead to the decimation of its business and, more than anything, wanted to be sure that the legislation was introduced in an orderly fashion with proper consultation taking into account good international practice. It feared for its business while the Government saw it as obstructionist, preventing it from moving forward with certain changes to the legal system. Taking the time to explore with each party what it was trying to achieve and what its needs were laid the foundations for the agreement that followed. It turned out that, more than anything, the dispute was over the process that was to be followed. So long as the company was confident that the Government was taking into account its business in changing the legislation, the parties were able to work together.

Understanding the other party's needs and interests better

It is not only important for a party to understand its own needs better, but it is crucial that it also be thinking about the needs of the other party. The more it understands the constraints and demands the other faces, the easier it will be to find a realistic solution. Indeed, getting a party to think about the way the other party views the dispute and its likely response to aggressive behaviour or settlement offers is often called "reality testing," which is discussed further below.

A key purpose of mediation, and indeed what some view as its primary goal, is to foster fuller understanding between the parties so that, knowing where each one is coming from, they are capable of, and responsible for, finding the solution.

Spending time with one party considering the way the other party views the dispute also helps introduce a dimension of what Scottish philosopher Adam Smith called the "impartial spectator" (ref, *Theory of Moral Sentiments*). It is not the mediator's role to judge either party, but a party explaining the situation to a third party and then also taking time to consider the needs of the other may become more objective.

Shifting the normative to the pragmatic

Parties' thinking is often clouded by their views on what "shouldn't" have happened and what "should" be done now to resolve the problem. It is often because they have not agreed on what "should" happen that they are in the mediation in the first place. This disagreement on underlying views of the norms of morality, fairness and justice will often also have led to the downward spiral from a disagreement to a breakdown of trust and the outbreak

of hostility between the parties. So much of what enables us to work together in society depends upon shared norms of morality, fairness and justice. When another party simply doesn't accept one's view of the way things should be, the relationship breaks down.

A key aspect of mediating is to enable the parties to shift, and it is often a subtle process, away from the "shoulds" and "shouldn'ts" towards an understanding of the interests – what the parties really need out of the situation. The ultimate goal of taking time after opening the mediation to explore the dispute is to work out the parties' real needs and what as a matter of fact can be agreed under the circumstances. To paraphrase and invert another Scottish philosopher, David Hume, you can't assume that what you think "ought" to be the case "is" (or can be made to be) the case (ref, *Treatise on Human Nature*). Once these opinions are unearthed and replaced with a realistic view of what the other party might actually be persuaded to do to settle, finding a zone of possible agreement that can resolve the dispute is infinitely easier – and faster too.

Understanding previous settlement offers

By exploring the history of previous settlement discussions, the offers made and the reasons for their rejection, the mediator can better assist in identifying possible areas for future negotiation. At least initially, the benefit of asking about previous offers is not so much to find a compromise between them as to get information about what was driving the parties then, what assumptions they held at that time, what their perceptions of their options were, and examine how these might be viewed differently now.

Using different combinations of participants

Once the parties have given their opening statements, the immediate questions are what communications (between whom and about what) you want to happen next, and how can you structure sessions to enable them.

There is an old debate in the mediation community about how best to design mediation sessions, and in particular whether to keep the parties together throughout or whether to separate into "caucus" meetings involving private sessions with the mediator. There are different schools of thought and different styles, and they partly depend on your theory of what mediation is all about (the Friedman-Mnookin view is mentioned above; other schools such as Europe's CEDR rely extensively on caucusing).

The pro-caucus and anti-caucus debate is a somewhat stale way of looking at things. In the author's experience, it is wiser to acknowledge that many different kinds of meetings may be useful at different times for different activities and purposes. The skill of the mediator, and one of his or her most important roles, is to design each session in light of where the parties are in the process and what needs to happen next. This may involve keeping everyone together, splitting the participants into the separate parties, breaking the participants into working groups focused on different issues, or other structures.

It is important to think through your views on, and personal approach to, the design of sessions. What are you trying to achieve as a mediator? Is it the same every time? Will it help communication to flow if the parties remain together? Are you separating them because the tension of keeping them together, including recriminations or long silences, is just too much for you as mediator to handle?

These things are really a matter of judgment and sometimes also a question of where the mediator's skills are strongest. If you can get the parties to explain their interests to each other, then that's great. If you find that with all the help in the world they are not communicating, and so even you the mediator can't work out what's beneath the dispute, you may want to take each party aside for a while to get to the root of it. You may even want to take them apart in order to give them a break from the intensity of being with one another for prolonged sessions. Joint and caucus sessions should be used flexibly as needed.

The fact is, the process of exploring the issues in the dispute can take up a large part of the mediation. In a one-day mediation, it may be worth spending several hours on it. There is plenty of time in that for bring the parties together and meeting them separately in caucus sessions if you think fit.

The key is to be ever vigilant about what is working in a given meeting, thoughtful about what needs to be addressed between whom, and to redesign the next meeting structure accordingly. One party may need to explain something to the other, but it may as easily be a need for just the lawyer or an expert of one party to discuss something with his counterpart at the other. Or it may be that an individual within one party needs to express something to another person within the same team. Perhaps the project manager needs to tell his boss some essential fact in the story that is untold thus far. Maybe the lawyer needs to help her client understand the probabilities of winning or losing in court and the costs involved. It could be that the client needs to tell the lawyer to be a bit less argumentative and help find solutions.

Particularly where a party has become internally locked into a fixed view of the situation and hasn't the openness, confidence and imagination within its own group to explore alternative perspectives and solutions, it can be helpful for the mediator to spend time with them. The mediator can help loosen up the party with probing questions that shift underlying assumptions, challenge positions and generate creativity. In many cases, it may involve a party revealing vulnerability – of its position or its resolve – which is very difficult to do in front of the other party, so it can be helpful to meet separately.

Mediation is dynamic. This doesn't just mean that it's busy; it means that it's always changing, and each change leads to another change. As Heraclitus is quoted as saying, "everything flows, nothing stands still." There is no single fixed structure that works for all situations, and following the dynamic shifts, capitalising on them and nudging the parties into new directions is where the mediator adds real value.

This boils down to being flexible and ready to change the combinations of those participating in meetings. The mediator needs to look for the moment when it appears that the current meeting is not generating an exchange to its full potential and think of another meeting combination in which participants would have a better chance of exploring and resolving issues.

Varying the participants is also useful for the simple reason that people get bored and frustrated in long meetings. Changing the parties around merely for the sake of it will appear to be just a game of musical chairs. But it is the mediator's job to monitor energy levels and focus. Watch for when energy is lagging. It may be time to focus on a different aspect of the case, whether by creating working groups or separating the parties – or perhaps just taking a 15 minute break.

Handling the parties together

The most valuable dimension of keeping the parties together is to maximise useful, direct communication between them. Particularly if the opening session has triggered an exchange of questions, it can be very useful to capitalise on this. The more they can explain to each other directly, the better.

Still, mediating between two disputing parties in the same room who want apparently irreconcilable things is often very difficult. There should be no surprise about that. Nobody said mediation is easy (ref, *Coldplay*).

Adapting session structures

In a multiparty mediation involving a regulatory authority and several companies, the author and his co-mediator began the mediation with a joint session. After the parties made their opening statements, they tried to continue to explore the underlying interests in joint session but the parties soon got stuck in repetitious positioning. It was apparent that the regulatory authority was central to all of the issues in play and that its disputes with the companies were all similar. However, the companies also had disagreements with one another, even if the biggest problems were with the regulatory authority. The mediators organised the mediation by adopting a “hub and spokes” approach. They arranged sequential meetings of each company separately with the regulatory authority. However, because the disputes with the regulator could not be resolved without resolving certain key commercial pricing issues between the companies, simultaneous bilateral meetings between those companies were also arranged. Meanwhile, the other companies were not left with nothing to do – they were tasked with mapping out the alternative paths that resolution could take and writing down their underlying interests on flip charts. This structure served well to ensure that all of the matters in dispute moved towards resolution until a joint session at the end when all of the parties came together to sign the deal.

With the two parties together, the mediator not only has to listen to a party that is speaking, you have to be sure the other party isn't interrupting all the time to argue, you have to follow the flow of the dialogue, you have to detect underlying issues, you have to ask questions to redirect the discussion towards deeper understanding between the parties, and you have to think about what happens next – whether the joint session is worth continuing or best interrupted for a caucus session. And you have to deal with your own nerves if the parties get heated or turn to you for an answer. It's a lot!

This isn't for the faint hearted. Mediation requires the mediator to be firmly grounded in himself or herself and with a good grip of the process to be able to go through all of that.

But even if you don't have the experience and stature of a seasoned arbitrator, judge or mediator with in-born gravitas, it is entirely possible for a novice to be an excellent facilitator in the fire of a joint session. More than anything, the key is to take a real interest in the problem at hand for its own sake, and not to become concerned that resolving it is the be all and end all of your career and reputation. This dispute isn't about you, it's about the parties, their problem, and the search for a solution for them. Keep your eye on that and you'll add real value to them in the process, which is what mediation is all about.

Using caucus sessions

The value of the caucus session is that parties can talk frankly and freely about the dispute compared with a likely more guarded expression with the other party. They can be put at ease by the private and confidential nature of the meeting to share their weaknesses and strengths and their view of their opponent's case. This can deepen their own understanding of their choices and needs.

It would be naive of a mediator to expect the parties to open up in the first caucus session. Even though the mediator is impartial and the meeting is confidential, the parties will typically test the mediator to be sure that they can trust this person. The first caucus with each party often serves just to reinforce what was said in the first joint session, with parties reaffirming the battle lines and emphasising to the mediator that they are serious and that they have a strong case.

A few things to bear in mind if caucusing:

Timing and duration

Time is a major consideration in managing caucus sessions, particularly in the early stages of the mediation. Try to manage the sessions so that the other party is not left alone for too long. The party that is not in caucus may be left feeling restless, worried or stranded after the momentum generated from the first joint session in particular.

Before breaking into caucus sessions, it may help to reassure the parties that the length of time in caucus may be different with each party. Again, in the heat of dispute resolution,

there is little that creates more anxiety than the lengthening absence of the neutral spending time with the other party. Different lengths of time do not indicate preference or sympathy at all – it is only an indication of the mediator’s honest attempts to help the parties achieve a solution.

Follow-up

A useful thing to do to reduce a party’s worries at being left alone while the mediator is with the other party is to give it a task to do when he caucuses with the other party. This needs to be a genuine task and as specific as possible. For example, it could be to draw a map of the potential outcomes there might be, to list the party’s key needs, or to put on paper the strengths and weaknesses of its situation. Leaving a visual reminder of the task, such as the issues written on a flip-chart or white board may help that party focus on their task. Be sure to follow up with the work done by the parties between private sessions.

Opening up opportunities for opening up

One useful habit for the mediator is to start every caucus meeting with the question, “Is there anything that you particularly want to raise now?” and to end with “Anything more before I go?”

The first question gives the party the opportunity to define the things that most concern it. It hands greater responsibility to the parties rather than the mediator governing which issues will be dealt with. It also brings the mediator up-to-date with the party’s thoughts whilst he has been away.

At the end of a caucus it is useful to:

- **summarise** what has been said, giving the parties an opportunity to correct the mediator’s understanding or change the emphasis;
- **affirm confidentiality** over everything said unless otherwise authorised;
- explain the **next steps in the process**, particularly timing if the mediator will be seeing the other party in caucus for a period; and
- **suggest what the party should focus on next** (e.g., analysing the other party’s interests, or calculating the probabilities and costs of a law suit).

Working groups

During the mediation process, there may not be a need for everyone in a party’s team to take part in every meeting. Similarly, there may also not be a need for the mediator to be at every meeting. In fact there is much value in having groups working on specific tasks while caucus sessions are taking place. Working groups might comprise:

- individuals familiar with specific issues from each party;
- lawyers from each party;

- experts from each party; and/or
- party principals alone.

Such working groups need to be tasked clearly and given time to report back.

Altogether, these early sessions in the mediation where the mediator and the parties plough the ground of the dispute determine the possibilities for the rest of the mediation. Try to go beyond a light raking and dig deep to see what roots of mutual interest can be encouraged to grow. This phase of exploration also sets the tone for the whole mediation and establishes the relationships and the understanding that can, eventually, lead to a settlement.

Key points:

- Make the core goal to facilitate understanding between the parties.
- Explore issues fully by asking questions.
- Check if there have been previous settlement offers.
- Work patiently to uncover underlying interests and needs, and any relevant information.
- Note any possible options, common ground or agreements in principle.
- Use caucus sessions where they appear useful – but don’t overuse them.
- Check confidentiality.

7. Hammering Out a Deal: Helping Parties Negotiate

Starting negotiation is a bit like adolescent love. The stronger the attraction a boy feels for a girl, the more nervous he becomes about what he should say, whether he should be the first to signal interest, how much interest to show, what to say, how to express it, how not to foul it all up at the start. He doesn't yet understand his own feelings, which may be overpowering, confusing and even humiliating – let alone her feelings. Together with the lack of understanding between the two of them, the result may be blundering and even hostility as the real love interest remains hidden and the opportunity is lost.

Of course, love is rarely in the air in dispute negotiations! But the point is that parties often struggle with who should make the first offer, which should indicate willingness to compromise first, how they should pitch the proposal or counterproposal, and how to ensure it will not be misunderstood as a lack of confidence. The reason for this is typically that the parties haven't yet gained a deep enough understanding of their own needs and interests, or those of the other party.

This is one of the key reasons why ploughing the ground and exploring interests and issues before moving into negotiation mode is so very important. Just as understanding better the opposite gender over the years lets one communicate better, parties in negotiations find it much easier to engage in negotiation when they have had time to understand what they themselves need, as well as what the other party may need. Communication can flow far more easily and rapidly towards agreement.

Thus, once the parties and the mediator have a good understanding of the issues in dispute, their own needs and those of the other party, the process can shift gear to focus on solutions. This may involve a rapid-fire process of offer and counter offer concluding with an agreed compromise, or it may require a prolonged period of problem solving and creativity.

Sometimes for the mediator this is easy as the parties have worked out what they need and quickly gravitate towards a result with which each party can live. The author's law partner likes to quote Russell Crowe in *A Good Year* saying, "We just gotta agree a figguh" (or, as the screenplay has it, "It's just a matter of finding the right number").

But sometimes the zone of possible agreement is incredibly narrow, with a single target that the parties have to struggle endlessly to find, requiring the mediator to abandon preconceived formulas and "use the force" to find a very narrow target (ref, *Starwars*).

Adverse problem solving

As mentioned at the start of this manual, mediation is fundamentally a problem solving process, and the mediator's essential skill is to get the parties to work together in solving it. It is the parties who bring their problem to the mediator, albeit that they view it very differently. And it is the parties' common desire to resolve the matter that is the primary resource in getting them to think together about solutions. Regarding the dispute as their shared problem rather than just a win-lose situation enables the mediator to get the parties to employ their brains and their knowledge and think more creatively about how to deal with it.

Beyond positional bargaining

The difficulty is that, although the problem is shared, the parties come at it with adverse positions. Furthermore, their interests may be directly opposing. The simplest case is where the only option for resolving the dispute is through payment of money. One party has an interest in paying nothing or as little and as late as possible, and the other has an interest in gaining as much and as soon as possible. The positions and the primary interests are directly adverse.

This binary view of the negotiations (I win, you lose) closes down the imagination and communications dry up. Frustration over blockage goes the only direction it can – back into recrimination and accusation over liability and the rights that have been violated and duties neglected. Unless the parties have come with a wonderful willingness to compromise, there is an almost inexorable pull of negotiations back into positions and justifications.

Soon, the parties are stuck in positional bargaining, with each side:

- taking a position on what it demands;
- going back and forth in an effort to extract compromises from the other side; and
- making compromises until a settlement is achieved somewhere in the middle, taking into account the balance of power between the parties.

This leads to relatively unsatisfactory and troublingly slow negotiations, which often resolve only when the lack of resolution for one side becomes intolerable, for example because of its need for money or its need to clear a contingent liability.

Beyond win-win

A trite alternative is typically proposed: look for "win-win" solutions. Classic examples are given where a copyright holder and a distributor fall into dispute and the win-win scenario involves a joyful reconciliation whereby the parties renew and deepen their cooperation and create greater value to share. Some disputes are like that, but most are much harder.

The author is often involved in negotiations involving market liberalisation, for example, where an incumbent dominating the market is going to have to face greater competition in its sector. Sometimes the pie may get bigger with innovation in the market, but very often the incumbent stands to lose out. Negotiations become locked because the incumbent defends its position vigorously and no vision offering it advantages of settlement is given. In many cases, resolution will be win-lose.

Reality based negotiation

The real point in mediating is to help the parties find a solution that is better than their realistic alternatives. For example, the alternatives for a dominating incumbent may be to lose political favour on which it depends for stable operating rights, a regulatory investigation that may result in fines, loss of reputation and other examples.

Understanding the options happens at the level of the parties individually and in the negotiations between them. The main options a party faces are to settle or not to settle. Understanding what happens if there is no settlement is crucial. Exploring the likely unfolding of events is the backdrop to all discussions of settlement terms. The mediator needs to help each party work out what is its best case scenario if it doesn't settle – its best alternative to a negotiated agreement, or "BATNA" – and its worst case scenario if it doesn't settle – it's "WATNA." Understanding the probabilities of these and the variations between is the core context for reaching agreement.

For example, a party facing a claim may be able to live without a settlement for a long time if the other party doesn't sue. In the best case, the alternative to settlement may be the status quo with tolerable harm to reputation. It's BATNA is possibly much more desirable than a settlement where it must make a cash payment. But its WATNA may be to be sued and have to pay the claim in full together with accumulated interest and the other side's lawyer and expert costs. The other party may be facing a BATNA where it might sue successfully, but it may lack the money to bring the litigation, and so its WATNA is the uncomfortable continuation of a receivable or an uncompensated loss on its books and more questions from the auditors – and it may be prepared to take a lower payment for quicker resolution.

These all sound like very obvious things to say. The mediator's job is to ensure that these background realities are brought to the fore for each party so that it is conscious of them in making its decisions around what to propose, counter propose and finally agree. This often requires a clearly non-threatening, open mode of questioning.

The difficult part in mediating is in actually getting a party to identify and assess its alternatives to settlement in a realistic way. Parties usually don't want to admit their realistic alternatives to the other party (which is fair enough), but they often don't want to admit them to the mediator either. And that's usually because they don't want to admit them to themselves.

Back to interests – again

The key, as with most elements in mediation, is to give all negotiations a foundation in the parties' broader interests. Bringing about movement in the positioning around the primary currency of the negotiation requires delving back constantly to their other interests. One party may need the resolution quickly for some reason, e.g., to close contingent liabilities before the end of the accounting year or to bring in revenue to cover immediate expenses. Another may be seeking resolution more to free its resources to focus on productive business rather than the dispute. Another's interest may be to protect or affirm its reputation in industry circles. These soon become the tradable items that may lead to the amount of a financial settlement being higher or lower. Ensuring that these broader interests are constantly in play and part of a discussion of the settlement amount will usually help negotiations advance more rapidly.

Thus throughout the negotiations, the mediator may need to help the parties move from positional bargaining to focus on interests, from what they think they are entitled to what they need from the situation or what they wish for. This may enable parties to move away from a confrontational approach to one of co-operation.

As parties make offers and counteroffers, it is likely to be useful for a mediator to spend some time examining why parties have adopted their positions and why they are making or resisting the claims. Getting behind the presented case leads to a better understanding of each party's pressures and emotions and may also reveal their hidden agendas.

Problem-solving techniques

Problem solving is typically most effective after the parties have begun to focus on getting something out of the mediation beyond simply casting allegations and blame on the other side. It is sometimes necessary to allow an initial discharge of latent resentment, whether in the opening session or in exploration of the dispute, before parties become minded to look for solutions.

There are numerous ways of approaching problem solving, and mediators can improve their skills by practising them and learning more about how they work.

Bringing reality home

The author has often represented and mediated between governments and corporations. In one case, his client, the Minister of Finance, continually repeated that the government could do what it wanted without settling with the corporation with which it was arguing. The force of energy that leads to – and the sense of omnipotence that comes with – high office can often give rise to fantasy. After the Minister's lawyer repeatedly and patiently went over the legalities without making the Minister do more than yawn, the Minister was finally brought face to face with reality when a neighbouring country settled a similar case for millions of dollars. Imagining the impact on the national budget, the Minister of Finance soon approved a settlement within a reasonable range. A good mediator will probe assumptions, and in particular enlist the party's lawyer to advise his or her client thoroughly on the consequences of different actions, but sometimes it is the story of a similar case that brings reality to life.

Generating options is not easy. Parties often come with fixed ideas of the possible outcomes, e.g., just a monetary payment from one to the other. However, it is much easier where parties have understood each others' interests. It may have become apparent that one needs a predictable source of revenue more than a one-time payment, or another needs a public statement affirming its reputation as part of a resolution, or a personal apology to overcome an affront.

Sometimes a structured brainstorming session can be useful to generate ideas and plan out how those ideas could be implemented. In brainstorming:

- the parties (whether together or separate in caucus meetings) are asked to come up with a bunch of ideas which are at first unedited – they are raw and not judged for their merit or even acceptability to either party; and
- once the ideas are noted down, the group can discuss them in light of their interests and needs, and at that time the real negotiation begins.

Although it is always a challenge to get parties to come up with ideas without holding back, a problem-solving approach can be pursued in an open-minded manner that does not commit the parties until they reach agreement. Succeeding at this depends on the mediator having made it very clear at the outset that the mediation does not commit the parties to anything unless they sign a settlement, and that all they say will be treated confidentially.

Sometimes it takes the person least invested in the dispute to come up with an entirely new way of seeing things. Those who have been on the front line, e.g., the customer and the customer relationship manager, may be too invested in the current assumptions and

nature of the dispute. Another pair of eyes may question these and come up with a bright idea. Just as most revolutions in science have been produced by younger generations of scientists questioning inherited order (ref, Thomas Kuhn, *The Structure of Scientific Revolutions*), a fresh pair of eyes may come up with the answer to the dispute.

It can help to get parties to suspend their prejudices and even character tendencies to imagine possibilities. This can even involve giving various individuals in a party a different role as they analyse the problem and seek solutions. For example, Edward de Bono's approach in his method and book *Six Thinking Hats*, for example, gets different individuals to take specific perspectives, focused respectively on:

- **facts** – being the group's source of neutral, objective information
- **emotions** – bringing in hunches, intuition, gut feelings
- **critic** – being the group analyst, logical negative
- **sunshine** – being the group optimist, logical positive
- **creative** – focusing on growth, possibilities, ideas
- **cool** – managing the agenda and organising the process

Ensuring that these voices within the parties are each heard helps provoke and nourish a creative spirit while ensuring it builds towards a realistic outcome.

Facilitating negotiation

Exploiting relationships

In complex negotiations, part of the problem, and indeed the start of the solution, may be that within each party team there are several individuals with different perspectives and styles. The mediator will need to observe the relationships within and between parties: which individuals carry most weight, how different individuals value different elements and how individuals work together.

This can be done by carefully following non-verbal behaviour, by directing questions to a silent team member and by opening up a discussion within or across teams. Be alert to opportunities to reconvene in a joint meeting or to speak informally during breaks or to put people to work together outside the joint or private meetings.

All negotiations have implicit personal human agendas. These might be strong emotions around the issues, personal dislike of an individual, hurt, pride or fear of harm to one's reputation. Watch for how these factors may inhibit movement, or can be used to create openings.

Conveying offers

When parties move towards settlement and look to the mediator to convey offers or concessions to the other party (rather than negotiate direct themselves), the mediator has a very sensitive role to perform. If and when offers are conveyed may make the difference to whether or not a mediation settles. An offer by one party that is so low that it could cause the other party to walk out is probably best retained by the mediator. Similarly, a concession may be stored and used to maximum effect when the right moment occurs. There is no obligation on a mediator to pass on information, nor at a time when a party asks for this to happen. Take responsibility for the timing of communication.

Options for the mediator include:

- trying to persuade each party to give the mediator an offer, specifically not to be disclosed to the other party until authorised – this allows the mediator to judge how far (or near) parties may be to a settlement;
- judging carefully whether any figures offered would be treated as insulting by the other party: if this is a risk, the mediator may choose not to convey the offer, or to challenge the offering party to make the offer direct, or to request that the party explains clearly the reasoning behind the offer, or to ask the offering party to step into the shoes of the receiver;
- if the gap in positions is still large, devising a strategy to work away at its component issues with each party; or
- conveying an offer conscious of the fact that a party may suddenly accept an offer much lower than their stated claim simply to bring the dispute to an end.

In conveying offers, the mediator should be aware of whether he is being used by one party to find out the other party's bottom line. Occasionally a party will come to mediation in bad faith for this purpose. If this occurs, the mediator should check whether that party will pose the same questions face-to-face, and even propose a joint session for that purpose.

Exploiting value differentials

Often, issues are of different importance and value to each party. The giving of an apology may be regarded as costing nothing, whereas the receipt of the apology may be fundamental to continuing negotiations. The phasing of payments or payment in kind, insurance-backed guarantees or offers of future work, are examples of elements which may have greater value to one party than cost to the other.

The mediator should explore each issue with each party to identify value differentials; something of great value to one party and little cost to another could lead to movement and may even be the gesture that clinches the deal.

Interpreting bottom lines

As a general rule the mediator should not ask for bottom lines. Despite assurances of confidentiality and impartiality, it is unlikely for a mediator to be told what the bottom line of a party is. Real bottom lines are rarely revealed and, even if they are, they may vary throughout the mediation to take into account new factors, to achieve a settlement, or even because parties genuinely come to see the situation in a new light. As such, it may be unproductive for a mediator to insist on finding out each party's bottom line. Instead, more can be learnt by being alert to parties' comments and reactions that illustrate the real situation.

If a party states a bottom line, treat it cautiously and try to judge how final it is. Acknowledge it in a way that leaves room for that party to make a change without losing face.

Waiting to deal with the figures at the right time

Inevitably, a successful mediation will settle on commercial basis, with a settlement sum that all parties can live with. A large part of the time, how the figure is eventually arrived at is only a part of the overall dispute. To avoid distractions and the unproductive use of time, try to leave the figures alone for as long as possible, concentrating on the issues and the needs of the parties and encouraging them to think broadly about options for acceptable outcomes. Once those broad lines are settled, a figure will eventually emerge that will be acceptable to all parties.

Reframing

Parties will often present settlement terms in ways that suit their particular constituents. The same sum of settlement money can be calculated, and therefore justified, differently by each party. Damages to one party may be an undesignated payment by the other. An apology to one can be a statement of regret to the other. The mediator can use this creatively, although not dishonestly, in helping parties view options positively and achieve settlement.

Helping parties to avoid losing face

A skilled negotiator will always give the other party a way out. Backing a party into a corner will very likely result in impasse. In order to facilitate negotiations, the mediator needs to ensure that there are always reasons available to justify movement, such as new information or new perspectives. At the end of every session, both parties should feel that they have had to work hard to achieve any progress.

Power imbalance

A key element of impartiality is the problem of power imbalance – where one party is apparently much stronger than the other. For example, a small retail company may be

pushed around by a large wholesale firm on prices it is allowed to charge and profits it is allowed to make. Or in the mediation, one party may be advised by a lawyer who is far weaker than the other party's lawyer.

Our human instinct is often to want to support the weaker party. Well wishing (and naive) mediators may succumb to a temptation to do this – to give extra time to the weaker party to speak or give them a supporting smile, or to put pressure on the stronger party to compromise or recognise how unfair the situation is.

To mediate effectively, mediators need to keep these instincts at bay, and put extra effort into treating the parties truly impartially. Likewise, if one party is poorly advised and supported in the mediation, the mediator should avoid becoming an adviser on legal or commercial issues, and avoid suggesting how to pursue their dispute more effectively.

Mediation is not about dispensing justice: it is about finding the best deal that the parties can live with under the circumstances. This means helping them consider the alternatives they face without a settlement, which may be justice in a court or before a regulatory authority, or may be a prolonged painful lack of resolution of any sort. The mediator's job is to help them understand those alternatives, and work out the best agreement they can in light of them.

A power imbalance is very simply part of the story each party brings to the table. The resolution will ultimately have to be worked out, and it will have to stick, in the light of the imbalance.

Being more than a messenger

A mediator can play a number of different roles during the negotiation stage of a mediation. The least productive is where the mediator acts as a messenger for the parties' positional negotiations, taking offers back and forth between the parties until they stop.

As a mediator, you can avoid this by reminding parties that realistic ideas for settlement can be lodged with the mediator in confidence, to be translated into an offer when parties and mediator agree that the time is right. However, it is sometimes useful for the mediator to "sound out" the other party's reaction to a possible offer. For example, a party might request the mediator to ask the other party if it would be receptive to an offer in a certain range. Only where the parties are really incapable of communicating directly is it a good use of a mediator's skills to shuttle back and forth as messenger of offers and counter offers.

Ensuring parties have ownership of the solution

It cannot be too highly stressed that an effective settlement is almost always the parties' own settlement, that is, one which they have arrived at themselves. This may cause some frustration to the mediator who may have an insight at a very early stage as to the likely outcome and have to wait for some time until the parties arrive at the same or a similar position themselves.

Dealing with crazy people

In one mediation the author conducted, one of the parties was advised by a lawyer whose mental state (speaking frankly now) appeared to border on insanity. His wild threats against the other party (e.g., to put them out of business) threatened to upset the mediation. He abused the mediator, refused to shake hands, saying "Don't you try to mediate me sonny." (The author was a fairly young mediator at the time.) The lawyers on the other side of the table from such a person might well use the situation to their advantage – to ridicule and otherwise discredit the advice and position of the mad lawyer and his client. However, the party on the other side of the table very much wanted a deal, and to get it on reasonable terms. The mediator worked with that party's lawyers to ensure that they acted as a steadying influence, containing the unpredictable behaviour. With the mediator's help, they understood that they needed not to undermine the other party's mad lawyer, but ensure that he did not destabilise the negotiations and cause them to crash.

If the settlement is to work, the parties must be convinced of its worth. Even the most ingenious solution may fail utterly to satisfy the parties if delivered in the wrong way or at the wrong time. The parties are unlikely to respond positively to having what they perceive as a solution imposed upon them, and they must be allowed to reach the necessary conclusion themselves.

Using communications infrastructure

Practical tools can make the world of difference to collaborative problem solving. For example, it is often useful to have whiteboards and flipcharts available to set out key things that arise. The parties then look at the chart – just doing that can bring their thinking closer together, as they look together at an image or set of words that perhaps more objectively summarises the issues. Whiteboards and flipcharts can be helpful also to refer back to later in the day to ensure that the key issues are being addressed.

These also allow the mediator to present figures or statements in a different way and confirm understanding. Writing figures up can in itself be a powerful way of testing reality. It also serves as a reminder for parties to reflect on while the mediator is away in a caucus session with the other party.

Computers and projectors can also be valuable. For example, one party may project calculations from an excel sheet onto a screen to explain how it arrives at certain figures. Both parties then look up to the screen instead of down at a paper print out which has been handed over. The very act of looking up as opposed to looking down is more inspirational, stretching towards vision and hope. Looking down is associated with introspection, submission and the underworld. (Stalin's images of Russian peasants had them looking up and afar to convey power and inspiration.)

These sound may like silly things to say, but the scientists even tell us that the very act of smiling releases neuron signals in the brain that cheer a person up. A good mediator will pay attention to the multiplicity of human interactions not only at the level of words but the physical aspects of how the body expresses intention, and how feelings can be influenced by positions and movement.

Back on the subject of technology, don't let the mediation become dominated by computers and projectors. Computers can also lead to passivity with one person controlling the input and the output.

The benefit of whiteboards and flipcharts, especially when the parties are invited to do the writing on them, is that they involve physical movement as a party stands up, approaches the board, writes on it, sits, and so on. As people move around the room, so do ideas. The handwriting on the board may be poor but it is personal and so the party has ownership over it – it's not written by a third party neutral determining everything for the parties.

Post-it notes can also be very useful. In a brainstorming session, many ideas can be thrown up by the group, each one written on a post-it. These can be physically stuck together in clusters according to the themes they evoke, creating an agenda for later discussion.

Ensuring that the parties have Internet access can be helpful if they have to do research, e.g., on current market prices, interest rates or other information. They may need email access to communicate with bosses back at HQ. On the other hand, it is usually wise to ask parties to turn off their phones and smartphones so that they are not constantly distracted by matters outside the room. Few things have a tendency to infuriate as much as a party that is looking down, fiddling with his thumbs while the other party explains an offer or reasons for its perspective on the dispute.

Restructuring meetings to improve negotiation

You can render negotiations more effective by tailoring the composition of the meetings to fit the issues – which may involve separating into caucuses or working groups or staying in joint session.

Joint sessions

Following the initial joint session, many mediators (particularly those with little experience) conduct the whole mediation in caucus sessions, shuttling between the parties throughout the day. This is perceived by many as the "safest" policy; it secures firm control for the mediator and minimises the unexpected. However, **working through caucus sessions alone has several disadvantages:**

- the parties have less control over the negotiations;
- the mediator can become a conveyor of messages that the parties would not themselves normally convey;

- negotiations may become protracted if discussions are duplicated in each caucus; and
- the role of the mediator, in the later stages, may diminish to that of a mere messenger.

The mediator needs to be alert to the usefulness of keeping parties together in joint session, whilst being prepared to revert to caucus sessions if it does not work. One role of the mediator is to enable effective communication between the parties, and that role may be difficult to fulfil if parties are not given the opportunity to speak to each other.

There is no particular rule stating when a mediator should use caucus or joint sessions; it is a matter of what feels appropriate at the time. The mediator does, however, have to be sensitive enough to recognise when a meeting is not going well, and confident enough to change strategy in order to improve matters.

The main disadvantage of a joint session is that parties will not give confidential information to the mediator in the presence of the other party. However there are nevertheless very important **advantages in holding joint sessions** in the negotiation phase of mediation:

- they enable parties to speak and negotiate directly;
- they can boost the momentum of the mediation;
- they remove the worry of unoccupied parties during caucus sessions;
- they can enable direct portrayal of a party's position, so avoiding any risk of the mediator giving different emphases or inaccurate messages; and
- they can break impasse by enabling parties to give explanations on specific issues or make statements directly to each other.

Caucus sessions

The mediator will need to work actively to help parties work out whether settlement is in their best interests. Even after an earlier exploration of interests and issues in the dispute, the parties will often need help from the mediator to move them from entrenched positions to a more flexible view of resolution.

During caucus sessions in the negotiation stage, the mediator may help the parties by:

- keeping the focus on the interests the parties have identified;
- being a sounding board – allowing the parties to test out their positions;
- being a reality-tester by feeding back to the parties and asking how realistic is a particular statement or position; this would also involve checking each BATNA (best alternative to a negotiated agreement) and WATNA (worst alternative to a negotiated agreement);
- identifying items of differing value – one party may place little value on something considered important by the other party; and
- shaping options or settlement offers that meet both the parties' needs.

The mediator has a key role as a reality-tester. It is not uncommon for a party who has been advocating a position for some time to become blind to facts that may be inconsistent with that position. As an impartial and disinterested third party, whose principal role is to facilitate communication between the parties to the dispute, the mediator may be able to point out in an objective and non-judgmental way, facts that a party may appear to have overlooked.

One major function of a mediator is to help the parties change what may be a limited, self-interested perspective and understand what common interests they share. When parties are enabled to concentrate on mutual rather than competing interests, an agreed settlement can be more easily achieved.

As the mediation progresses, parties will permit, or even request, the mediator to pass on information or offers during caucus sessions. As the manager of the mediation process, the mediator may choose to store the information for later use or not at all if it is likely to derail or delay the mediation process. The mediator is in the best position to judge whether information would help or hinder.

Getting stuck – and getting unstuck

The main reason parties come to mediation is that their direct negotiations are blocked. To understand how best to break such a blockage, it is usually necessary to first know what causes it.

The following are some of the most common reasons for getting stuck in negotiations:

- **Parties become entrenched in their positions.** It may be that one party's bottom line has been exposed too early and that there is nowhere else to go. Also, the nature of negotiation expects compromise. When one party stops at an early stage, even if it is because a reasonable solution has been tabled, the other side may interpret this as not "playing the game" and see the first party as being unreasonable. Similarly, parties may be wary of conceding too early. Parties could see a negotiating advantage by holding on to extreme positions so as to be able to negotiate from a perceived position of strength.
- **Delay tactics.** Sometimes, one party may delay progress in order to put pressure on the other party to soften and concede more, or simply in order to avoid reaching a settlement earlier than it is able or wants to bear.
- **Emotional baggage.** All negotiations involve human emotions. Parties and their advisers have their own pressures such as a reputation to make or maintain, competition with contemporaries, ambition, a matter of principle, dislike for the other party, a feeling of inadequacy or angry. In a team, it is also easier to be aggressive as opposed to conciliatory in a team, and there is the temptation to perform in front of colleagues to impress and gain approval.

- **Saving face.** The preservation of credibility and dignity especially is a deeply engrained human trait. A mediator needs to be sensitive to this dynamic and to ensure that parties' needs for saving face are met during the negotiations and in the eventual settlement. Indeed, meeting those needs may be the key to settlement.

Whether the parties become blocked before or during mediation, the mediator can greatly assist in shifting their negotiations forward by using a number of tactics.

These may include again getting beneath the situation as it appears on the surface:

- Go back to basics to focus on their own and each others' needs and interests, encouraging them to view the situation as a joint problem that can be jointly solved.
- Allow the parties to express their feelings. If strong emotions are suppressed or unacknowledged they may be a block to progress, preventing full participation in the process.
- Break the problem down into smaller issues. Agreement on small items often creates a momentum and a willingness to solve the more difficult ones. It may be possible to separate some of the issues from the dispute altogether and to defer them, perhaps to a future mediation.

Other solutions to blockage include switching the process itself:

- Take a break; allow emotions to cool; give parties time to reflect and reassess. Issues of principle tend to change in perspective over time, and in some cases it helps to defer discussion on particular aspects of the dispute.
- Introduce a deadline. Time pressure can spur greater movement.
- Change the team dynamics of the parties. Sometimes forming working groups that bring together a different mix of team members from the parties can lead to movement in a new direction.
- Suggest intervention by more senior executives. Sometimes a negotiating team needs a course of action to be imposed by a higher authority.
- Break the rhythm of the process by changing the surroundings, pausing for a meal or holding a fresh joint meeting to review progress.

Whatever you do, the mediator's mood is crucial. A sour faced pessimistic mediator who has no hope of the parties' ability to resolve the dispute will hardly help them get there. You need to be committed to optimism as a mediator – even if you are not an optimist by nature! It often helps the parties to highlight the progress made so far (without exaggerating it). Creating a sense of progress can encourage them to push ahead further.

Key points:

- Ensure that negotiations are soundly based on a good understanding of the parties' needs and interests, and don't be afraid to go back and examine these.
- Facilitate the negotiation between the parties as much as possible as opposed to becoming merely an intermediary.
- Encourage parties to see the situation as a shared problem and use problem solving techniques where useful.
- Use joint sessions, caucus sessions and working groups flexibly.
- Understand the reasons for negotiation blockage and use a variety of ways to release the energy of the parties.

8. Getting it Over the Line: Reaching Settlement

Concluding a settlement agreement

Mediators love to speak of their settlements. They prove their success as mediators. Some boast of settlement rates in terms of percentage of cases settled – 70% ... 80% ... even 95%! This business of competitive rating is not entirely vacuous. After all, the aim of the mediation is to achieve a settlement. It may be enough for some mediators to know that they assisted the parties to make informed decisions in light of their interests regardless of whether or not they settle. But ultimately, mediation's goal is to do one's best to find the place where the parties' interests overlap such that a deal can be done.

Still, the aim of a good mediator is not only to see a settlement agreement signed at the end of a day's mediation. It is to achieve a settlement that is viable and durable. The mediator's goal should be to ensure that the parties reach a real understanding that supports the settlement.

Every settlement should be genuinely accepted by both parties – even if it is far from their desired outcomes. It must be an agreement that can actually be implemented as a practical matter. And it should resolve the dispute in a manner that minimises the possibility of future arguments blowing up.

Achieving this requires significant effort, and depends on the mediator being as equally focused at the end as at the commencement of the mediation. Too often parties will sign a settlement containing vague statements that later only come back to haunt them as they realise they didn't really want to settle, and it is not even clear what they have signed means.

Reality testing – again

A good mediator will check that the parties are satisfied before signing an agreement. There are dangers in the mediator reality testing the agreement and undermining the parties' commitment to it, but it has to be done at some level. Parties often begin to have doubts after the mediation about the compromises they made to reach agreement and this could lead to a breach of that agreement or other disputes. It is better to address any reservations before executing the final settlement agreement.

Working it through to the last detail

The author dealt with a complex negotiation process that took over a year. The parties struggled across different languages and cultures, and lack of connection between the decision-makers. Led by the lawyers, they argued relentlessly for their positions and only gave way when pushed to the limit. They threatened litigation and expressed frustration with the unreasonableness of the other party. It may not have been a friendly relationship, but they worked and advanced on every issue steadily until they finally reached a deadline and signed the settlement agreement. Each party having chewed the issue over in full, having stretched the other party – and themselves – to the limit of what could be accepted, both were sure that they could not have achieved a better deal from the other party under the circumstances. It is not always necessary to negotiate every last detail for a settlement to be achieved, but it certainly helps ensure that the parties have thought all the way through how a durable resolution can work.

As the parties negotiate the specific terms of their agreement, you should check both parties have fully understood them. Sometimes one party may be stealing a march on the other by getting it to agree to something it doesn't really understand or want to agree to. Discuss with the parties any possible obstacles to implementing the agreement.

At the end of a long day when everyone is tired, there is a temptation to gloss over what may seem to be minor issues on the assumption that everyone knows what is meant or what points are obvious. All too often, however, such oversights lead to further disputes in the future. A rushed agreement is likely to raise as many problems as it settles.

Purpose of a settlement agreement

Following agreement, the final stage of a mediation calls for drafting the settlement agreed to by the parties. Essentially, a settlement agreement provides a record, documents the heads of agreement, incorporates the spirit of the settlement, sets out any important conditions – and most importantly binds the parties legally.

Beware of making an agreement to make an agreement later. In most legal systems, it is unenforceable by the law.

Writing the settlement agreement

If lawyers are present at the mediation, they are likely to assume the responsibility for writing the settlement agreement. However, it is useful for the mediator to assist with the first draft and then ask the lawyers to improve it. Issues often arise even during this last stage of the mediation. Parties are tired, nerves are frayed, minor issues can become major issues. It is safest for the mediator to keep some leadership over the process.

If lawyers are not present, the responsibility may fall onto the mediator to guide the drafting of the agreement using the input of the parties. The mediator may write a first draft of the agreement and then pass the responsibility on to the parties or their lawyers to refine, so that the final settlement agreement remains theirs. But watch out for getting into an awkward position of legal adviser, and taking on the ethical and contractual duties of counsel. Be sure to make it clear that you are doing no more than facilitating the parties' attempt to encapsulate what they agree, and that you are not providing legal advice.

Components of a settlement agreement

The following list is intended merely as a guide, and the mediator should feel free to adapt it as appropriate. Some of the clauses repeat those in the mediation agreement and may be unnecessary in some circumstances. The principle, though, is to include all relevant information in the one settlement document, whether or not it duplicates others.

- **Recitals:** It is often helpful briefly to recite the circumstances under which the agreement was reached, including the facts, date and location of the mediation, the people present during the mediation and identification of any legal cases pending. In some civil law jurisdictions, the recitals are a very important means of demonstrating to a judge that there is a justification for the agreement, that consideration has been provided, and that a responsible negotiation process has been followed.
- **Terms of agreement:** The principal terms of the agreement will be set out, such as the description of the dispute, the amount party A agrees to pay party B, and party B's agreement to withdraw the action now pending in court, together with claims for costs. The terms may be detailed or simple, depending on the parties' needs and what will ensure implementation. Terms may include conditions of payment, provisions for interest in the case of default, etc.
- **Full and final settlement:** The terms may include a statement that the agreement constitutes "a full and final settlement," that "each party fully releases the other" and that the agreement will be a "bar on initiation of legal proceedings" in relation to the matter. In general, the terms of the agreement should be sufficiently detailed to avoid future interpretation conflicts, but not so convoluted so as to cause confusion. After all the promises are set down and the parties have confirmed that they agree with the substance, it can be helpful for the mediator to get each of the parties to initial each of the paragraphs or each page.
- **Confidentiality:** If the parties so intend, and if permitted by law, the settlement agreement could include a paragraph to the effect that the fact and/or the terms of the settlement are confidential and should not be disclosed to any third party without the written consent of all parties, that no party shall disclose to any third party the contents or substance of any discussions during the mediation, and that any documents obtained from the other in connection with the mediation shall either be returned or destroyed. The parties may choose to issue a statement or press release;

if so, the wording should be agreed during the mediation to avoid potential disputes or the breaking of confidentiality. A schedule containing the agreed wording may be attached to the settlement agreement.

- **Mediator not to be called as a witness:** The parties will ideally agree in the mediation agreement that they will not call the mediator as a witness in any litigation or other adjudicatory process, either to testify as to the terms of the agreement or as to what was said or done during the mediation. If not, they ought to agree so in the settlement agreement. The purpose of this is to bolster the confidentiality of all communications with mediators and so to strengthen the institution of mediation as a safe space for effective exploration of potential settlements. In some jurisdictions, such as California, communications with mediators are already subject to very extensive privilege so that they cannot be called to testify in any case.
- **Warranty of authority:** The document should contain a confirmation that the individuals entering into the agreement have the authority to bind their principals to the terms agreed.
- **Writing accurately reflects the agreement:** It may be useful to include a provision to the effect that each party's signature and initials signifies that the document had been read and understood and that its provisions accurately reflect the terms of the agreement. The purpose of this is to avoid the possibility of any party later claiming that they did not clearly understand what the agreement said or that its terms do not reflect their understanding of what was agreed. This will also obviate the necessity for calling the mediator as a witness to the terms of the agreement, as the document will speak for itself. It may also be appropriate to include a statement that the settlement agreement supersedes the terms of any previous agreements between the parties which are inconsistent with it.
- **Dispute resolution:** The mediator should offer the option of including a provision that, if a disagreement subsequently arises as to terms of settlement, the parties will return to mediation, whether under the same mediator or not, to attempt in good faith to resolve the dispute before taking any action in court. If it is an international agreement, it may be more appropriate to provide for international arbitration in place of court litigation.
- **Signatures:** The parties must sign and date the settlement agreement. Where appropriate, the signature lines should indicate the capacities in which the parties have acted and the fact that they are agreeing on behalf of their respective principals.

After execution, the parties may choose to convert the settlement agreement into a consent order by an arbitrator or court.

Post-settlement involvement

Not all mediations settle on the day, and even those that do may need the mediator's continued involvement. However, many do settle not long after the mediation, and the settlement can be attributed to the work of the mediator and the parties. So, after the

mediation day, the mediator may be required to oversee the successful execution of the agreement and to act as settlement supervisor. It may be useful to arrange a follow-up telephone call a week or month after the mediation. Some deals require further mediation, and indeed some disputes are lengthy processes, and the mediator's job continues.

Partial or interim agreements

Some matters come to mediation with a number of separate issues that are capable of separate agreement. Where agreement is reached on some but not all matters, the parties may be happy to resolve those matters first and leave the remaining issues to be determined later.

In such a situation, the mediator may help by preparing a document similar to the settlement agreement above that contains the points of agreement. The mediator should also help identify and, if the parties agree, draft a statement of the issues that remain unresolved. Such a document could act as a useful agenda for future action by the parties to resolve the remaining issues after the conclusion of the mediation.

Failure to settle

To state the obvious, not all mediations result in a complete settlement. As mediation is generally a voluntary process, the mediator can but respect the parties' decision not to continue with mediation. Once you have ensured that the parties have fully reflected on their interests and the likely outcomes that will result from their decisions, they must be responsible for themselves.

Depending on the strength of any adverse feeling between the parties, it may be a good idea for a mediator to conduct caucus sessions to ensure that it is indeed each party's wish not to settle it at this time. It is also helpful to bring the parties together in a joint session to review progress, perhaps record issues settled and outstanding, and explore any future options, including charting out next steps to work towards a durable co-existence. It has been known for a party to make a crucial concession or put a further offer on the table, even at this late stage, which has led to a settlement.

Even if all efforts to keep the mediation going fail, the mediator should nevertheless maintain a positive approach by suggesting follow-up, whether to contact the parties to offer help or see if progress has been made after a cooling off period or plan a further day of mediation.

Regardless of how the mediation ends, always conclude on a courteous and hopeful note, thanking the parties for their patience and efforts and wishing them well for the future.

Key points:

- The best settlement is one that satisfies the parties even if it doesn't particularly please them, deals with all the issues in dispute, is feasible and practical and minimizes the possibility of future disputes.
- Reality-test the proposed settlement agreement.
- Take an active role in the drafting of the first draft of the agreement, regardless of whether the parties' lawyers perform the drafting.
- Ensure that the agreements terms are clear, simple and understood by the parties.
- If a complete settlement cannot be reached, try to keep the mediation going or, failing that, consider proposing a partial or interim agreement.
- Always end on a hopeful note.

Skills, Emotions and Ethics

9. Communication Skills

Mediation is largely about reopening communication between the parties. If parties could communicate effectively with each other in a constructive manner, aiming to resolve their problems, they would not need a mediator. The mediator's communication skills are central to his or her work. In many respects, these skills are human faculties that most of us have to some degree or another. However, a successful mediator is more conscious of them, and develops and uses them more effectively in his or her work than many other professions.

Non-verbal communication

A large part of human communication does not involve the words we speak. This means that without having to say anything, we still reveal feelings, attitudes and emotions. For example, a physical posture of shoulders forward and arms crossed, a tight jaw, avoidance of eye contact and a refusal to speak may mean, "I don't want to talk about it" or "Leave me alone." Despite our sophisticated language, humans still communicate strongly without words. Non-verbal communication typically reveals emotions and feelings rather than giving facts and statements, and it is sometimes more truthful than the words we speak.

This can be useful in a mediation – both to understand the parties as well as to improve how the mediator works with them. And awareness of one's own non-verbal communications can also make a person a much more effective communicator and mediator.

A perceptive mediator will watch the body movements of the parties and listen for the pitch of their voices and how they speak to pick up the underlying reality going on in the party. That can help the mediator detect the person's need to resolve the matter, defiance in resisting any kind of settlement, distress at the tension of the ongoing dispute and other information that is very useful for the mediator in timing interventions and suggestions.

Active listening

Mediators need to be good and understanding listeners. This is both important in building the parties' trust in the mediator – that you "get them" – and in ensuring you do indeed fully understand each party. This enables you to judge better your interventions to facilitate progress in the mediation. Active listening is not just receiving the sounds but understanding their meaning. It is actually very difficult, as it requires the mediator to focus fully on what the party is saying, and to put aside his or her own instinctive reactions, feelings and other internal (and sometimes external) noise.

Mediators that do not actually listen will not be able to accurately understand what is being said and, more importantly, will not be able to pick up opportunities to bring the parties closer to settlement.

Open questioning

As in life, how a mediator asks questions greatly influences not only the responses he or she will get, but indeed the very thinking process triggered within the mind of the party asked the question. Particularly useful in mediation – especially early on – are open questions, i.e., questions that do not limit the answer but open the opportunity for the party to unfold his or her views or experience.

Closed questions have a limited range of possible answers. For example, in a case of a breach of contract dispute, asking a party, "Did you give notice of the breach to the other party at the time?" solicits a "Yes" or "No" answer. This has various disadvantages:

- it provides the mediator with very limited information;
- it risks the person trying to give a "correct" answer as opposed to an answer that might be disadvantageous; and
- it is a leading question in that it assumes there was a breach, so the other party (if present) may object to the assumptions in the question itself (as the old joke goes, "Have you stopped beating your wife?").

The mediator might instead ask, "What steps did you take to communicate with the other party when the situation arose?" This might lead to an explanation of various exchanges of correspondence and phone calls and a fuller version of events. And the mediator has not committed to any interpretation of the situation in his or her question – i.e., neutrality is maintained.

Nevertheless, as common facts are established or areas of continuing disagreement are clarified, it will sometimes be efficient and appropriate to ask questions that ask only for the key information. E.g., "When did you send the notice you mentioned?"

Probing and reality checking

Parties often come to mediation with unrealistic positions, and even distorted recollections, perceptions and interpretations of events. The skill of a mediator in opening the parties up to alternative ways of looking at their situation is one of the key elements in mediation that can help parties overcome key blockages.

This kind of probing has to be done extremely carefully, as it is easily perceived by a party as doubting their version, questioning their position, and undermining their negotiating basis. The mediator may be quickly viewed as partial to the other side. Thus probing at

unrealistic positions and statements needs to be done delicately – once the mediator has developed a relationship of trust with the person. And it is best done with an open and curious genuineness on the part of the mediator. Sometimes it is enough simply to ask, “Why do you think that?” Or “What do you think they will do if you take that approach?” The purpose is to get the party to think more deeply and realistically about its position and behaviour.

Sometimes, failing to question a party’s statement will be perceived by the other party as accepting the statement without examination. The mediator thus needs to be sensitive to the impact of such prodding both on the party he or she is asking, as well as the other party.

An effective challenge to a party’s statement may sometimes come in the form of a closed question which puts the party on the spot. For example, “Are you saying that you would prefer to leave this dispute unresolved than work out a solution along the lines the other party proposes?”

Demonstrating understanding

It is often very valuable for the mediator to feed back to a party what he or she has said. This demonstrates that you have heard and understood the party. It gives the party greater confidence that his or her side of the story is being heard and acknowledged – even though you are not expressing agreement.

Giving feedback to a party also helps the party hear what he or she is saying reflected back to them. The mediator might say, “So let me make sure I’ve heard you correctly. What you’re saying is ...” This can help them realise where an interpretation or position is unrealistic or distorted. It is also very useful for the mediator to summarise for a party what has been said to ensure that the mediator can help the discussion proceed with the other party on an accurate basis. On countless occasions, even a good mediator will find that a party corrects him or her, saying, “No, that’s not what I said, or not what I meant. What I’m saying is ...”

All of these ways a mediator employs involve slowing down the conversation to some degree, which can even be frustrating at times, but ensuring a clear understanding – that is not unnecessarily offensive to the other party – is centrally important to the success of a mediation. The parties are there to get help communicating, and that is where the mediator’s skills add the greatest value.

Detoxing communication

As is the nature of disputes, parties will sometimes say things in an inflammatory or provocative way that reflects their own positions and does not reach out for understanding with the other party. In giving feedback to a party, the mediator will therefore sometimes need to re-characterise what the party has said while retaining the basic content. This is essentially the language of “non-violent communication” that was popularised by Marshall Rosenberg in the 1960s (ref, *Non-violent Communication*). For example, where a party exclaims, “They have cheated us and we demand that they pay for it!” the mediator might respond, “So you feel that the results here are unfair and that the appropriate remedy is compensation.” Naturally, a mediator needs to avoid coming across as patronising, but it is often helpful to remove the “toxic” content of a statement to make it more palatable.

Key points:

- Be aware of non-verbal communication – from the parties as well as from yourself.
- Build trust through honesty and openness.
- Be a good, active listener – pursue genuine understanding.
- Be familiar with the different types of questions and their uses.
- Challenge and prod parties to help them think through the realities of their views and positions, but do it at the appropriate moments.

10. The Mediator's Emotions

It may sound strange to focus on the mediator's emotions more than the parties, but if the mediator can handle his or her own emotions well, the parties are far easier to deal with.

Mediations involve a range of emotions, and sometimes these are strongly felt. Parties may be angry, arrogant, desperate, worried about the dispute and even about meeting the other party in the mediation itself. Sometimes it will be a necessary part of the resolution of the dispute for a person to express strong feelings – particularly if it is a sense of having been treated unjustly. Expressing emotion is a core aspect of communicating, and mediation is all about improving communication. It could even be a breakthrough that could lead to one or the other party compromising – after having expressed what he or she needed to express, or after seeing the other party's strength of feeling.

The important thing is to ensure that the emotion does not weaken the process. Thus the mediator needs to be “big enough” to hold together the calm of a room despite eruptions from the parties. Emotions may come out, but the key is to ensure that the parties restore respectful communication – which may require taking a break, or acknowledging the strength of feeling expressed. Remaining calm through the storm depends on the mediator not feeling personally threatened by the possibility of the emotions taking the mediation off track, and derailing any possibility of a settlement. A mediator's primary concern is often to want to beam proudly as he or she later recounts his or her successes in mediations, and there is no worse feeling than a mediation that appears to be failing. These feelings need to be put to one side.

The mediator may also have anxiety about performing well, particularly if he or she lacks experience. Showing such nervousness can be unsettling for the parties, and so it is important that you find ways to restore your confidence. Strengthening internal resources through meditation, breathing and basic calming exercises can be helpful – and worth developing for any mediator.

Using breaks constructively

In a large mediation in which the author acted as mediator, he felt particularly worried about his ability to keep his head on top of all of the issues, all the parties were saying, all they were expressing in non-verbal communication. Sometimes it was difficult just to think straight! The solution was to schedule breaks regularly to allow the mediator to walk for 15 minutes, look around at the scenery, breathe fully and think. The parties also benefited from these regular breaks, as they also had time to reflect, and to discuss the dispute informally over coffee with the other party.

You may also get frustrated with the parties when they don't readily agree to what appears to be the most natural compromise – or after you have worked hard they will not settle. Mediators need to be careful not to become too personally invested in the results of the mediation, or in their own view of what is a reasonable settlement. It is a tough judgment to know when to remain respectful of the parties' own need to work things out in their own way and when to intervene to nudge them forwards. The mediator may even have a feeling of prejudice in favour of one party, where the other party's behaviour appears to have been unfair or immoral. Maintaining impartiality can be hard work, and run against the mediator's personal feelings.

Although being genuine is central to good mediating, the emotions of the mediator should not be allowed to interfere. Mediation is not psychotherapy, but mediating effectively depends on being aware of the parties' and the mediator's own emotions.

Key points:

- Be aware that all participants in the mediation will have emotions.
- Be conscious of your own emotions and find ways to strengthen yourself.
- Allow feelings and emotions to be expressed and vented.
- Do not allow emotions to derail the mediation; intervene when necessary.

11. Ethics in Mediation

The role of the mediator is a sensitive one. The parties need to place considerable trust in the mediator. This position of trust can lead to some ethical issues for the mediator.

Impartiality and conflicts of interest

Impartiality is fundamental to the neutral role of the mediator, who must act impartially at a number of different levels:

The mediator needs to be independent of the issues that are the subject of the dispute and have no interest in the result. You must manage the process impartially, allowing all parties a fair opportunity to participate.

No conflict of interest can be permitted to exist between the mediator and any of the parties. You should disclose anything that could be perceived as a conflict to the parties in advance, and should be ready to withdraw if there is any objection. If you know a party or its lawyer socially, disclose this too.

Illegal activity

On very rare occasions, a mediator may encounter proposals or activities which may raise the suspicion of illegality or crime. In the case of proposals, you can use challenging and reality-testing techniques to question the wisdom of any such course and to seek out alternatives. As a last resort, a mediator can withdraw from the mediation, and yet without obligation to breach any confidentiality.

Very rarely will circumstances require breach of confidentiality without permission – only where such matters are subject to laws requiring disclosure such as in the case of public safety, national security and criminality.

Withdrawal

A mediation agreement, or other legal instrument such as a code of practice, will typically set out the circumstances under which a mediator must or may withdraw from a mediation. For example, a mediator may be required to withdraw from the mediation where:

- a party so requests;
- there is a conflict of interest; or
- the mediator is in breach of a law, ethical code or the mediation agreement.

While such circumstances may appear to arise, it is nevertheless desirable for a mediator to continue the mediation until he or she can be sure that there is no alternative to withdrawal. Reasons for withdrawal should be given to the parties and a confidential record of the circumstances prepared and kept.

Key points:

- Disclose any possible conflicts of interest
- Do not lie or mislead.
- Carry professional indemnity insurance if available.
- Try to continue with the mediation until you can be sure that there is no alternative but to withdraw.

Some Key Points

The following key points can serve as a short checklist for a mediator:

Preparing for a Mediation

- If possible, bring an assistant mediator on board.
- If there are suitably experienced fellow mediators with whom you have a good rapport, consider working with them as co-mediators.
- Prepare the parties; hold a pre-mediation meeting or conference call if appropriate.
- Confirm the parties understand the mediation process and mediation agreement.
- Prepare the venue and logistics carefully.
- Read the summary of facts and any supporting documents.
- Prepare mentally for the mediation.
- Ultimately, don't forget that you owe it to the parties to do the best job you can for them, so deploy the best possible resources you can and, like a Boy Scout, Be Prepared!

The Relationship with the Parties

- Let the parties own the mediation and the outcome.
- Be impartial; treat all parties equally.
- Avoid giving a particular view.
- Be aware of preconceptions or prejudices.
- Assume everything said in private is said in confidence.
- Check confidentiality before revealing any information.
- Show respect and accept each person as an equal.

Opening a Mediation

- Arrive at the venue early to check arrangements (i.e., seating, meals, refreshments, etc.).
- Make introductions.
- Set the tone of the mediation and set out its features (i.e., voluntary, confidential, authority to settle, etc.).
- Invite parties to make their opening statements.
- Summarize the opening statements.
- Set an agenda for the mediation with the parties.

Exploring Issues and Interests

- Make the core goal to facilitate understanding between the parties.
- Explore issues fully by asking questions.
- Check if there have been previous settlement offers.
- Work patiently to uncover underlying interests and needs, and any relevant information.
- Note any possible options, common ground or agreements in principle.
- Use caucus sessions where they appear useful – but don't overuse them.
- Check confidentiality.

Helping Parties Negotiate

- Ensure that negotiations are soundly based on a good understanding of the parties' needs and interests, and don't be afraid to go back and examine these.
- Facilitate the negotiation between the parties as much as possible as opposed to becoming merely an intermediary.
- Encourage parties to see the situation as a shared problem and use problem solving techniques where useful.
- Use joint sessions, caucus sessions and working groups flexibly.
- Understand the reasons for negotiation blockage and use a variety of ways to release the energy of the parties.

Reaching Settlement

- The best settlement is one that satisfies the parties even if it doesn't particularly please them, deals with all the issues in dispute, is feasible and practical and minimizes the possibility of future disputes.
- Reality-test the proposed settlement agreement.
- Take an active role in the drafting of the first draft of the agreement, regardless of whether the parties' lawyers perform the drafting.
- Ensure that the agreements terms are clear, simple and understood by the parties.
- If a complete settlement cannot be reached, try to keep the mediation going or, failing that, consider proposing a partial or interim agreement.
- Always end on a hopeful note.

Skills, Emotions and Ethics

- Be aware that all participants in the mediation will have emotions.
- Be conscious of your own emotions and find ways to strengthen yourself.
- Allow feelings and emotions to be expressed and vented.
- Do not allow emotions to derail the mediation; intervene when necessary.
- Disclose any possible conflicts of interest
- Do not lie or mislead.
- Carry professional indemnity insurance if available.
- Try to continue with the mediation until you can be sure that there is no alternative but to withdraw.

Appendix A: Sample Mediation Agreement

Note – this agreement is a sample and should be adapted in light of local laws relating to mediation and legal privilege, confidentiality and any other relevant laws.

Mediation Agreement

THIS AGREEMENT is made on [date].

BETWEEN THE FOLLOWING PARTIES (“the parties”)

[Name of party and address]

[Name of party and address]

AND THE MEDIATOR (“the Mediator”)

[Name of the Mediator and address]

Appointment of Mediator

1. The parties hereby appoint the Mediator to mediate the dispute between them in accordance with the terms of this agreement. The dispute is briefly described in Schedule 1 to this agreement (the “Dispute”). The Mediator accepts the appointment to mediate the Dispute at such time(s) and place(s) as agreed to by the parties and the Mediator.

Role of the Mediator

2. The Mediator will conduct the mediation in such manner as the Mediator determines.
3. The Mediator will assist the parties to attempt to resolve the dispute by helping them to:
 - (a) improve communications and the exchange of needed information;
 - (b) clarify the issues in the Dispute;
 - (c) explore their underlying interests;
 - (d) develop and study options for the resolution of these issues; and
 - (e) achieve a resolution that is acceptable to the parties.

4. The Mediator may meet with the parties together or separately as the Mediator determines.
5. The Mediator will be neutral and impartial and will not:
 - (a) give legal or other professional advice;
 - (b) have authority to impose a result on any party; or
 - (c) make decisions for any party.
6. The Mediator will not accept an appointment or act for any party in relation to any proceedings concerning the Dispute.

Conflicts of Interest

7. To the best of the Mediator’s knowledge, the Mediator has had no prior dealings with any of the parties and has no interest in the Dispute.
8. If in the course of the mediation, the Mediator becomes aware of any circumstances that might reasonably be considered to affect the Mediator’s capacity to act impartially, the Mediator will immediately inform the parties of these circumstances. The parties will then decide whether the mediation will continue with the Mediator or with a new mediator appointed by the parties.

Co-operation by the Parties

9. The parties must co-operate with the Mediator during the mediation and will comply with the reasonable requests and directions of the Mediator in relation to the conduct of the mediation and any preparatory steps.

Preliminary Conference

10. As part of the mediation, the Mediator may schedule a meeting or conference call at a time and in a manner suitable to the parties and the Mediator in order to establish a timetable for the exchange of information and the arrangements for the mediation.
11. The parties and their representatives and advisers who are to attend the mediation session must attend the preliminary conference with the Mediator.

Representation at the Mediation

12. In the mediation, each party will primarily act through a representative designated by them.
13. [Name of party] appoints [name of representative] to serve as its representative and [name of party] appoints [name of representative] to serve as its representative. Each representative has the authority to participate in the mediation on behalf of the Party whom he or she represents.

14. At the mediation, each party may have one or more other persons, including legally qualified persons, to assist, advise or otherwise support them, subject to any such persons signing the Attachment to this agreement and the relevant party ensuring that any such person observes clauses 16 to 18 of this agreement. The number of such other persons attending the mediation will not exceed [number of other persons] for each party.

Authority to Settle

15. The representative of any party must attend the mediation with authority to settle within a range that can reasonably be anticipated.

Confidentiality and Privilege

16. Any information disclosed to the Mediator in private will be treated as confidential by the Mediator unless the party making the disclosure states otherwise. Anything said by the Mediator in private will not be disclosed by that party to the other party.
17. The parties and the Mediator will not disclose to anyone not involved in the mediation any information or document given to them during the mediation unless required by law to make such a disclosure, except for the purpose of obtaining professional advice. In the case of such exception, the party must advise such adviser that the information or document is confidential and will ensure that such adviser will observe this clause and clause 18 of this agreement.
18. The parties and the Mediator agree that the following will be privileged and will not be disclosed in, or be the subject of, a subpoena to give evidence or to produce documents, in any proceedings in respect of the Dispute:
 - (a) any settlement proposal whether made by a party or the Mediator;
 - (b) the willingness of a party to consider any such proposal;
 - (c) any statement made by a party or the Mediator during the mediation; and
 - (d) any information prepared for the mediation.
19. If a party produces a document for the purposes of the mediation that is, or otherwise would be, privileged from production or admission into evidence, that party will not be taken to have waived that privilege by producing the document.
20. The Mediator will not be a witness, consultant or expert in any proceeding relating to the Dispute.

Termination

21. A party may terminate the mediation at any time after consultation with the Mediator.
22. The Mediator may terminate the Mediator's involvement in the mediation if, after consultation with the parties, the mediator feels unable to assist the parties in the resolution of the Dispute.

Settlement of the Dispute

23. If agreement is reached at the mediation, the terms of agreement must be written down and signed by the parties before they leave the mediation.

Exclusion of Liability and Indemnity

24. The Mediator will not be liable to a party for any act or omission in the performance of the Mediator's obligations under this agreement unless the act or omission is fraudulent.
25. The parties separately release and indemnify the Mediator against any claim for any act or omission in the performance of the Mediator's obligations under this agreement unless the act or omission is fraudulent.

Costs and Fees

26. Each party will be liable separately to the mediator for its share of the Mediator's fees and costs described in Schedule 2 of this agreement.
27. Unless the parties to the mediation otherwise agree, the fees and costs of the mediation will be borne by the parties in equal shares.
28. Each party will be liable to pay such fees and costs in the manner set forth in Schedule 2 to this agreement.
29. Each party is responsible for its own costs and fees incurred in preparing for and participating in the mediation.

IN WITNESS WHEREOF the parties and the Mediator have signed this agreement to mediate:

[Name of party and signature]

[Name of party and signature]

[Name of mediator and signature]

Schedule 1: Description of the Dispute

The Dispute is subject to the following proceedings:

Case no:[number] of[number] in the [name of court]

The Dispute concerns the following:

[Brief description of the Dispute]

Schedule 2: Costs of the Mediation

1. Mediator's Fees

For the preliminary conference and preparation for the mediation: \$[amount] per hour

For each hour of mediation during mediation sessions: \$[amount] per hour up to a maximum daily fee of \$[amount].

2. Venue rental, travel and other expenses

At cost.

3. Payment arrangements

Each party will pay its share of fees and costs at the conclusion of the mediation within [number of days] of the receipt of a tax invoice.

Attachment

Confidentiality Agreement – Advisers and Third Parties

In consideration of my being permitted to be involved in the mediation of the Dispute described in the Agreement to Mediate to which this agreement is attached, I,

[name and address]

[name and address]

Independently and separately agree with each of the parties and the Mediator that:

1. I will not disclose to anyone any information disclosed to, or received by, me during the mediation, unless it is already in the public domain or I am required by law to make such a disclosure.
2. I will not disclose to anyone involved in the mediation any document received by me in relation to the mediation from a party to the mediation unless expressly authorized to do so by the party producing the document.

AGREED this [day] [month] [year]

[Name and signature]

[Name and signature]

Appendix B: Further Resources

Further Reading

Below are various books which can be helpful for persons starting out to become mediators, or for mediators seeking to grow and improve their skills.

Abramson, *Mediation Representation*

Bush & Folger, *The Promise of Mediation: The Transformative Approach to Conflict*

Bruce & Macmillan, *Dispute Resolution in the Telecommunications Sector*

Cloke, *Mediating Dangerously*

Cooley, *Creative Problem Solver's Handbook for Negotiators and Mediators*

Cornelius & Faire, *Everyone Can Win: How to Resolve Conflict*

Crum, *The Magic of Conflict: Turning a Life of Work into a Work of Art*

Fisher & Ury, *Getting to Yes and Getting Past No*

Goleman, *Emotional Intelligence and Working With Emotional Intelligence*

Kolb, *When Talk Works*

Macmillan, *The Liberalisation of ICT Dispute Resolution*

Mayar, *The Dynamics of Conflict Resolution – a Practitioner's Guide*

Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*

Rock, *Quiet Leadership*

Stone, *Difficult Conversations: How to Discuss What Matters Most*

Mediation bodies

Below are listed leading mediation institutions which provide training, accreditation and publications. They happen to be drawn from the Anglo-American tradition.

Arbitrators and Mediators Institute of New Zealand (AMINZ) www.aminz.org.nz

Australian Mediation Association (AMA) www.ama.asn.au

ADR Group International www.adrgroup.co.uk

Bond University Dispute Resolution Centre <http://www.bond.edu.au/faculties-colleges/dispute-resolution/index.htm>

Centre for Effective Dispute Resolution (CEDR) www.cedr.com

Harvard Program on Negotiation www.pon.harvard.edu

International Mediation Institute (IMI) www.imimediation.org

Arbitration and Mediation Service (JAMS) www.jamsadr.com

Institute of Arbitrators and Mediators Australia (IAMA) www.iama.org.au

New Zealand Association of Dispute Resolvers (LEADR) www.leadr.co.nz

MACMILLAN KECK

ATTORNEYS & SOLICITORS

72 Boulevard Saint Georges	469 7th Avenue, Suite 419
Geneva 1205 Switzerland	New York, NY 10018 USA
Tel: +41 22 322 2231	Tel: +1 212 359-9599
Fax: +41 22 322 2239	Fax: +1 646 349-4989

www.macmillankeck.pro

Written by a leading international expert in dispute resolution, Rory Macmillan, *A Practical Guide for Mediators* is a manual on how to become a successful mediator. In its pages, Rory puts you right into the mediator's seat and guides you through the entire mediation process. From preparing for the first meeting to helping the parties reach a settlement, he explains your role as the mediator each step of the way.

Using real-life examples from his experience, Rory explains why and how mediation works. He also highlights the problems of mediating with difficult people and in challenging situations, providing valuable advice on how to overcome them.

Taking a broad view of mediation, Rory addresses the wide range of issues a mediator faces, from the emotional to the technical. Emphasizing the value of dealing with the people as well as the problem, he shows you how you can diffuse tensions and create an environment conducive to problem solving.

The *Practical Guide*, commissioned by the *Office of the Regulator* and funded by the *World Bank* to assist with the development of mediation in Samoa, also gives pointers on where you can find further resources on mediation, including tips on where to obtain further training and accreditation as a mediator.



The author, **Rory Macmillan**, is a founding partner in the law firm Macmillan Keck Attorneys & Solicitors. He has acted as mediator, negotiator, counsel, arbitrator, expert witness and expert adjudicator in numerous multi-million dollar disputes involving governments, corporations and individuals. Based in Geneva, his practice takes him worldwide. His work in international dispute resolution has been recognised by nomination for Europe's prestigious CEDR Award for Excellence in Alternative Dispute Resolution.