Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates

Dwight Golann

An updated and revised edition of Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators, *the 1996 CPR Institute for Dispute Resolution co-winner for best book.*

Mediating Legal Disputes combines theory with intensely practical techniques that the reader can use to resolve difficult legal disputes. It provides dozens of examples, drawn from the author's extensive experience, that bring tactical suggestions to life. This book will teach you how to:

- Mediate effectively between hostile lawyers and parties.
- Deal with hard bargaining tactics such as "insulting" offers and reneging.
- Predict litigation outcomes without alienating disputants.
- Use impasse-breaking techniques such as confidential listener, range bargaining, and the mediator's proposal to achieve settlements.
- As a litigator, take advantage of a mediator's special powers to achieve better outcomes for clients.

An exclusive video

This book includes a unique DVD that demonstrates its techniques. You will see experienced mediators conduct an opening session, elicit offers, deliver an evaluation, apply impasse tactics and use other essential skills.

What others have said about this book

"Dwight Golann has assembled under one cover the broadest and most practical learning on mediation. This is the most useful, accessible, and comprehensive guide for practitioners of mediation and advocates representing clients in the process. Read it, use it, and settle your case."

Professor Eric Green, co-founder JAMS/Endispute, co-mediator, U.S. v. Microsoft and Enron v. Anderson

Visit us at www.ababooks.org.

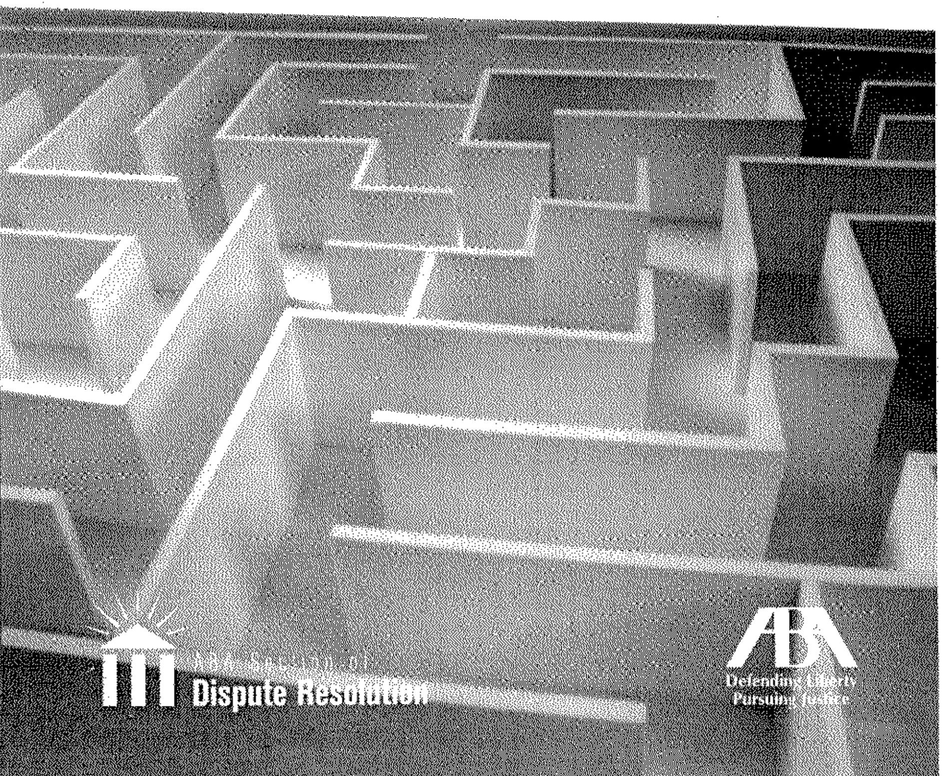
ISBN-13: 978-1-60442-303-7
Law/Reference
Price: $129.95
PC: 5100002
12995
9 781604 423037
Printed in the U.S.A.

Mediating Commercial Disputes GOLANN

DWIGHT GOLANN

MEDIATING Legal Disputes

Effective Strategies for Neutrals and Advocates



Part I

An Overview of the Process: Advice for Novices

Part I gives people new to commercial mediation an overview of the process. Chapter One provides a basic strategy for conducting a mediation and Chapter Two explains what to do at different stages of the process.

Experienced neutrals may wish to skip ahead to Part II, which examines the mediation process in more depth. Some experienced mediators find, however, that the first two chapters provide a useful framework, helping them to identify and organize techniques they apply instinctively in their practices.

Copyright 2009 American Bar Association. All rights reserved.

Chapter One

A Basic Strategy

1. **Build a Foundation for Success**
2. **Allow Participants to Argue and Express Feelings**
3. **Moderate the Bargaining**
4. **Seek Out and Address Hidden Issues**
5. **Test the Parties' Alternatives; If Necessary, Evaluate the Adjudication Option**
6. **Break Bargaining Impasses**
7. **A Strategy Chart**

In order to be effective a mediator needs to have a strategy. Some mediators develop their approach as they go along, relying on their experience to suggest the right tactic as issues arise. If you are new to the field, however, you will find it nearly impossible to think through your strategy in real time, while the parties are talking to you and arguing with each other. Even experienced neutrals prefer not to rely entirely on their reflexes and plan in advance as much as possible.

Your understanding of what is keeping the parties apart will deepen over the course of a mediation, and the obstacles themselves may change as the process goes forward. Ideally you would have a unique strategy for each case. In practice, however, this may not be possible. Many mediators use a similar sequence of techniques designed to overcome common barriers, customizing their approach as they go along.

This chapter sets forth a six-step strategy that works effectively in many situations and you can apply as a default framework. Suggestions for dealing with more complex issues follow in Chapters Three through Nine.

1. Build a Foundation for Success

The Challenge: Missing Elements—People, Data, Interactions. Negotiations often fail because some essential element is missing. One side may have the wrong people—a key decisionmaker may be missing, or one of the bargainers may be so emotional he cannot make good decisions. At other times parties do not have the data they need to settle: Defense counsel may not, for instance, know how the claimed damages were computed, and without this information cannot get authority to settle. Such problems are difficult to fix once mediation begins and the clock begins to run.

The Response: Identify issues and address them in advance. To identify and resolve such problems, it is best to start work before the parties meet to mediate. The first step is to ask the lawyers for mediation statements and set up telephone conversations with each of them. Ask

Copyright 2009 American Bar Association. All rights reserved.

each attorney who he plans to bring and who needs to attend from the other party. If a decisionmaker is absent, work to bring her to the table. If key information is missing, suggest a party provide it. You will find you can elicit information and persuade people to attend in circumstances where the same request would be rejected if made by a party.

> *Example:* A company bought a shipping line, and later sued an accounting firm for allegedly overstating the enterprise's profitability and misleading the buyer into overpaying for it. The buyer's lawyer called the mediator ahead of time to warn her that it was crucial his client, the buyer's CEO, attend the mediation. However, he said, the CEO would not come unless the managing partner of the defendant accounting firm did as well, and would not commit to attend first for fear of seeming overeager to settle. The mediator called the defense attorney, who agreed that it would be very helpful if the principals attended, but said his client also did not want to be the first to agree to come.
>
> The neutral decided to ask each side to tell her privately whether it would bring its principal if the other did so. They both answered positively. She then announced that both decisionmakers would attend.

Alternatively, you may learn that one of the participants is in the grip of strong emotions or for other reasons needs to talk with you. With the assent of the parties, you can meet privately with a disputant ahead of time, allowing the person to work through difficult emotions and arrive at mediation ready to make decisions. Or a lawyer may have a convincing reason to use an unconventional format for the process itself; if so, you can arrange it.

In summary, before the parties meet to mediate:

- *Ask for statements and talk with attorneys to identify potential obstacles.*
- *Address issues such as inadequate information or missing participants.*
- *If necessary, meet with an individual to work through an especially difficult issue.*

2. Allow Participants to Argue and Express Feelings

The challenge: Unresolved process and emotional needs. If parties do not settle, it is often because one or more of them want something more than the right settlement terms. A litigant may be looking for a process: The opportunity to appear before a neutral person, state his grievances, and know he has been heard. Or a party may have a need to express strong feelings directly to an adversary or a neutral.

People may enter litigation expecting to have this opportunity, only to learn that emotions are relevant to the legal process only when they serve a strategic purpose. As a result, disputants can remain trapped in feelings of anger and grief for years, never having a chance to speak freely. Until they feel heard out, however, parties are often not ready to settle.

Response: An opportunity to speak and feel heard. This aspect of the strategy has three elements:

Copyright 2009 American Bar Association. All rights reserved.

- Give disputants a "day in court."
- Allow them to express feelings to a mediator or adversary.
- Help them hear what others are saying.

Mediation is not a court session and mediators are not judges, but the process can give parties the experience of having received a hearing. They see their lawyer argue their case or present it themselves, and listen to their opponent's arguments. The mediator will not decide the dispute and may never express an opinion about the merits, but she can demonstrate she has heard the disputants. The experience of telling one's story and feeling heard out by a neutral person can have a surprising impact on a person's willingness to settle. Arguing the merits also focuses participants on the facts and legal principles relevant to the controversy. Knowing a neutral person will be listening encourages the parties to think through arguments and avoid extremes, helping them later to find acceptable compromises.

This aspect of the process often has an emotional component as well. The need to express strong feelings to one's adversary is a very human one, felt by executives and mail room clerks alike. In the opening session and later caucuses, parties can express some of their feelings about the dispute and each other.

A state trooper began a high-speed chase of a drunk driver in a small New England town. The driver ran a stop sign; straining to keep up, the policeman hit a third car that was crossing the intersection. The trooper was unhurt, but the driver of the third vehicle died instantly. He was a seventeen-year-old boy, only weeks away from his high school graduation.

The driver's family sued the state, arguing the trooper had been negligent in ignoring the stop sign. It was a typical tort case in which a jury would have to decide whether the officer had acted carelessly. Defense counsel investigated, looking for facts to show the victim had been drinking or careless. It seemed, however, that the boy was a model student, in fact the valedictorian of his class, and had left behind a loving family. On the other hand, the trooper was showing initiative in giving chase to a dangerous driver. It was a difficult case, but one the defense thought could be won, and counsel began the usual process of discovery.

Two years later, as trial approached, the defense decided to make a settlement offer. It was rejected. Defense counsel waited a few weeks and then made a more substantial offer. The word came back from the plaintiffs' lawyer that his clients would not settle. Why, the defense counsel asked: Didn't the family understand that juries in the area had been very hard on claimants lately, and the trooper had a reasonable defense? The plaintiffs' lawyer was apologetic, but said the family was adamant and refused even to make a counteroffer. Instead, he suggested they mediate, and emphasized that the family wanted to begin with a meeting with the trooper.

Defense counsel agreed to mediate but resisted the idea of a joint meeting: What was the point of having angry people rehash the facts, given that the evidence was largely undisputed and the state, not the trooper, would pay for any settlement? Eventually, however, they agreed to the process.

The opening session was an extraordinary event. The victim's mother, father and sisters came; they talked not about the case, but about their lost son and brother. The mother read a poem to the trooper describing the hopes she had had for her dead son, and the life she knew they would never be able to share.

Copyright 2009 American Bar Association. All rights reserved.

The officer surprised everyone as well. Although he maintained he had not been negligent, he said he felt awful about what had happened. He had three sons, and had thought over and over about how he would feel if one of them were killed. He had asked to be assigned to desk work, he told the family, because he could no longer do high speed chases.

The parties did not reach an agreement that day, but as the family walked out one of the children turned to the trooper. "It's been three years since my brother died," she said, "and now I feel he's finally had a funeral." Two weeks later the defense settlement offer was accepted.

Emotional discussions are often uncomfortable for the participants and make people temporarily feel angrier, but over the course of the process they can help disputants to let go of feelings and consider settlement. In this case, for instance, the fact that no legal issue was resolved at the meeting and the trooper denied being negligent did not matter. The key was that the family felt they had finally been able to express their feelings to the person responsible and knew he had heard them. You can achieve a great deal simply by allowing the parties to talk about their feelings and disagreements in a controlled setting. Chapter Six describes techniques for managing such discussions successfully. To facilitate expression of feelings and arguments:

- *Give the parties an opportunity to argue the merits directly to each other.*
- *Allow participants to express emotions, even unpleasant ones, intervening only as needed to maintain order.*
- *Don't focus on weaknesses in a party's arguments in front of an opponent. Wait instead for a private meeting to follow up on controversial issues or difficult feelings.*

3. Moderate the Bargaining

Challenge: Positional tactics leading to impasse. Negotiators often have trouble reaching settlement because they use a "positional" approach to bargaining, each making a money offer and then trading concessions until they reach agreement. Positional bargaining can be successful, but it often makes negotiators frustrated and angry. One party, for example, will open with an extreme position in the hope of setting up a favorable compromise. This will lead its opponent to complain the offer is "insulting" and refuse to counter, or make a very small concession. The result often is impasse.

Response: Become the moderator of the process. Ideally a mediator would avoid adversarial bargaining over money entirely, by convincing parties to look for a settlement based on fair principles or that satisfied their underlying interests. In commercial mediation, however, parties usually arrive suspicious of each other and determined to engage in money bargaining. A mediator's only practical option in such cases is to facilitate the process the parties want, while looking for an opportunity to move to a more effective approach.

One way to facilitate money negotiations is to act as a coach to each side. You can, for example:

- Ask a bargainer to support its number with an explanation ("I'll communicate it, but if they ask how you got there what should I tell them?)

Copyright 2009 American Bar Association. All rights reserved.

- Help a disputant assess how its planned tactic will affect its opponent ("What do you think their response will be if you start at $10,000?")

If coaching is not enough you can become a moderator, giving bargainers advice about what they need to do to keep the process moving ("If you want them to get to $100,000 with the next round, I think your offer to them needs to be in the range of 700 to 800K …")

Chapter Four gives suggestions for facilitating money bargaining. By using these steps in combination with a continuing discussion of the legal case, you can often orchestrate a "dance" of concessions to move the parties toward settlement. In sum:

- *Parties in commercial disputes usually arrive determined to negotiate over money. When this occurs, help the disputants conduct monetary bargaining effectively.*
- *Coach each side, helping them to see how their tactics will be received and encouraging them to provide explanations as well as numbers.*
- *If necessary moderate the bargaining, advising parties how to move toward settlement.*

4. Seek Out and Address Hidden Issues

The Challenge: Disregard of hidden issues and missed opportunities. Negotiations in legal cases are often blocked by hidden psychological obstacles. They may include the following:

Strong feelings. I have talked about the usefulness of drawing out feelings in pre-mediation discussions or the opening session, but this is often not possible. Participants in commercial mediation typically arrive with "game faces on," presenting a businesslike demeanor even as feelings boil beneath the surface. When this occurs, simply giving a disputant the chance to express emotions is often not enough.

Unexploited opportunities for gain. Negotiators can often create more valuable outcomes by including non-money terms in settlement agreements. The key is for teach side to offer the other things that carry a low cost for the giver but provide high value to the recipient. A discharged employee, for instance, might value a change to her personnel file to indicate a voluntary quit or outplacement assistance, while her employer would value the employee's agreement to keep any settlement confidential. Even "pure money" settlements can be enhanced by terms that meet the parties' underlying interests, such as provisions for payment over time.

The response: Probe for and deal with hidden issues. Even as you are carrying out other tasks, look for clues to hidden emotions and overly-narrow approaches to settlement. Chapter Five describes ways to promote valuable settlements, while Chapter Six gives suggestions about how to identify and deal with emotional issues. In general,

- *Look for clues that hidden issues are present. Ask about them in private discussions.*
- *Don't be discouraged by initial brush-offs, and raise the issue again later.*
- *If you sense an issue exists, encourage disputants to talk about it. If necessary, advocate a solution yourself.*

Copyright 2009 American Bar Association. All rights reserved.

5. Test the Parties' Alternatives; If Necessary, Evaluate the Adjudication Option

Challenge: Lack of realism about the outcome in adjudication. Participants in legal disputes often justify hard bargaining positions in terms of the merits of the dispute. They are asking for a great deal or offering little, they say, because they have a strong legal case. The problem, of course, is that both parties usually argue they will win in court.

To some degree parties bluff about their litigation options to justify aggressive bargaining positions and do not expect to be taken literally. However, to a surprising degree disputants actually believe in their clashing predictions. Even when parties are told, for example, that their predictions of success in court add up to over 100 per cent (one believes that it has a seventy per cent chance of winning, for instance, while the other thinks it has a sixty per cent chance of prevailing) and this is impossible, their confidence in their own prediction remains unshaken. It is the other side, they say, that is being unrealistic. The problem is illustrated by the following experiment:

> Students at Harvard Law School are preparing to negotiate the settlement of a personal injury case. Before they begin, the students are asked to make a private prediction of their chances of winning based on their confidential instructions. What the students don't know is there is nothing confidential about the instructions: Both sides have received exactly the same data, with different labels. Since both sides have the same information they should come out with the same answers, but this is not what occurs.
>
> In fact, hundreds of law and business students told to negotiate for the plaintiff assess her chances of winning as being nearly 20% higher than students who are assigned to the defense. The two sides' predictions total nearly 120 per cent.
>
> Asked to estimate what damages a jury will award if the plaintiff does win, there is a similar disparity: Plaintiff bargainers estimate her damages at an average of $264,000, while defense negotiators looking at the same data estimate a verdict of only $188,000.

What caused these distortions? It was not due to disparities in information, because both sides had the same facts. Nor was it due to lack of experience: When I asked litigators training to be mediators to take on plaintiff and defense roles in the same problem, their predictions were similarly distorted. Disagreements like these are a serious barrier to settlement, because parties understandably resist accepting an outcome worse than their honest (but inflated) estimate of the value of their case.

As we will see in Chapter Seven, there are two basic causes for disputants' distorted thinking about their legal alternatives. One is lack of information. The other is their inability to interpret the data they do have accurately.

First Response: Foster an information exchange. Your first response to a disagreement over the legal merits should be to help parties exchange information. Modern discovery rules are intended to require parties to disclose key evidence, but it is often surprising how little one side knows about the other's case, even after years of litigation.

Copyright 2009 American Bar Association. All rights reserved.

You can be an effective facilitator of an information exchange. If, for example, a plaintiff has explained its theory of liability in detail but has given no explanation for its damage claim, you can suggest it flesh out damages. Parties will often respond cooperatively to your request although they would have refused the same inquiry coming from their opponent. Suggestions about how to foster information exchanges appear in Chapter Seven.

Second Response: Reality test. As the Harvard study showed, even when parties have the relevant information they often do not interpret it accurately. Another way to help to solve merits-based problems is therefore to help disputants analyze their legal case.

The least intrusive way to accomplish this is through questions that help parties focus on evidence and issues they have missed. It is important both that you ask questions pointed enough to prompt someone to confront a problem and avoid comments so tough the disputant concludes you have taken sides against her.

Questions. Begin with open-ended questions asked in a spirit of curiosity; in this mode, you are simply trying to understand the dispute and the parties' arguments. ("Tell me what you think are the key facts here..." or "Can you give me your take on the defendant's contract argument?") Your questions can progress gradually from open-ended queries ("Have you thought about . . . ?") to more pointed requests ("They are resisting making a higher offer because they believe you won't be able to prove causation . . . What should I tell them?")

Analysis. You may also want to take a party through an analysis of each element in a case, applying a systematic framework to prevents disputants from skipping over an embarrassing weakness.

Discussing the merits can help to narrow litigants' disagreement about the likely outcome in adjudication for several reasons. For one thing, it helps counteract disputants' tendency to be overoptimistic. Doing so also assists lawyers who are dealing with an unrealistic client but are reluctant to disagree with the party for fear of damaging the client's confidence in them. Talking over the merits can also give a disputant a face-saving excuse for a compromise it secretly knows is necessary.

Evaluative feedback. In some cases questioning and analysis is not enough; a disputant may be wedded to an unrealistic viewpoint or require support to justify a settlement to a supervisor. In such situations you have the option to go further, by offering an opinion about how a court is likely to decide a key issue or even the entire case. Evaluations can be structured in a wide variety of ways, for example "My experience with Judge Jones is that she usually denies summary judgment in this kind of situation" or "If the plaintiff prevails on liability, what I know of Houston juries suggests they would value damages at somewhere between 125 and $150,000."

One key point to note about these examples is that the mediator is not saying how she *personally* would decide the case, but rather is *predicting* the attitude of an *outside decisionmaker*. Expressing your personal opinion about what is "right" or "fair" in a dispute is almost always a bad idea, because it is likely to leave a listener feeling you have taken sides against him. Properly performed, a neutral evaluation can be helpful in producing an

Copyright 2009 American Bar Association. All rights reserved.

agreement. However a poorly done or badly timed opinion can derail the settlement process. More advice about how to use evaluation effectively appears in Chapter Eight.

To deal with disagreements about the merits:

- *Ask each party open-ended questions about the case.*
- *Ask them to respond to specific points.*
- *Lead each side through a systematic analysis.*
- *If necessary, offer a prediction of how a court would decide a specific issue or the entire case. Delay any evaluation as long and keep it as general as possible.*

6. Break Bargaining Impasses

Challenge: Closing the final gap. Often the barriers to agreement are too high, causing bargaining to stall and provoking an impasse.

Responses: You have several options to deal with a stalled bargaining process.

Persevere and project optimism. The first bit of advice may seem overly simple but embodies a basic truth about mediation: When in doubt, persevere. Even experienced mediators find more often than not that parties get stuck at some point. It often happens during the late afternoon or early evening, when energy levels decline and each side has made all the compromises it feels it ought to and more. The key thing to remember at this point is: This mediation probably *will* succeed. If you can keep the parties talking and avoid a freeze-up, they will find a solution.

The disputants will be looking for signals from you about whether it is worth continuing, and it is important to send positive signs, as long as you remain within the bounds of reality. You can say that you believe a deal is possible, but don't suggest you are ignoring the very real gap that must be bridged.

Return to a prior tactic. Another option at impasse is to return to an earlier stage or tactic. You may wonder why, if an approach has not worked once, it would be successful the second time around. Surprisingly often, however, something that was rejected earlier will evoke a positive response later in the process. Peoples' emotional states shift over the course of a mediation, they learn new facts, and they realize their original strategy is not working. As this occurs they often become more open to compromise.

Invite the disputants to take the initiative. A simple tactic is to ask the disputants to take the initiative. You could, for instance, say, "What do you think we should do?" and then wait quietly. If disputants realize they cannot simply sit back intransigently and demand you produce results, they will sometimes offer surprising ideas. If you do this, however, be prepared to wait a couple of minutes.

Copyright 2009 American Bar Association. All rights reserved.

Test flexibility privately. Another option is to test the disputants' flexibility in private. Parties may refuse to offer anything more to an opponent whom they think is being unreasonable, but still be willing to give private hints to you. You can, for example, ask "What if?" questions ("What if I could get them down to $50,000; would that be acceptable?) or use techniques such as "confidential listener" or a "mediator's proposal" described in Chapter Nine.

Adjourn and follow up. If the disputants are psychologically spent or have run out of authority, the best response may be to adjourn temporarily. You can follow up with shuttle diplomacy by telephone, propose a second mediation session, or set a deadline to prompt a parties to make difficult decisions.

In summary, to deal with bargaining impasses:

- *Persevere and remain optimistic. Even parties in apparent impasse will usually find a path to settlement.*
- *Return to a prior tactic, such as analyzing the legal case or exploring non-legal concerns.*
- *Ask the disputants to take the initiative.*
- *Probe the parties' flexibility in private.*
- *Adjourn and follow up with telephone diplomacy, another session, or a deadline.*

Conclusion

This six-step strategy will produce success in many situations, particularly when a case is relatively straightforward and the parties have a strong incentive to settle. It is a solid foundation on which to premise your mediative efforts. No single set of strategies, however, can overcome all obstacles. Relying on these tactics alone is like playing a musical instrument with only one octave or being a pitcher with only two pitches: You may accomplish less than you are capable of, and will sometimes fail where a more comprehensive approach would bring success.

Experienced mediators use this basic strategy as a foundation, modifying their approach to deal with the specific obstacles they encounter in each dispute. In Part II we will go deeper into the process, exploring a variety of barriers, and approaches to overcome them.

7. A Strategy Chart

A Basic Strategy

Challenges	*Responses*
1. Missing elements: People, data, emotions	□ Contact counsel ahead of time to learn about the dispute. □ Arrange for information to be exchanged and decisionmakers to attend.

Copyright 2009 American Bar Association. All rights reserved.

	☐ If necessary, meet with participants ahead of time to begin working through emotional issues.
2. Lack of opportunity to present arguments and express feelings	☐ Provide disputants with a "day in court" to argue their case. ☐ Provide a setting in which they can express their feelings to you and the other party. ☐ Encourage participants to listen to each other's views.
3. Positional tactics leading to impasse	☐ Encourage principled and interest-based approaches, but support pure-money bargaining if the parties want to use it. ☐ Advise bargainers about the likely impact of their tactics. ☐ If necessary coach or moderate the bargaining.
4. Hidden Issues	☐ Probe for hidden emotional obstacles. ☐ Identify personal and business interests. ☐ Treat emotional and cognitive problems. Encourage the parties to consider imaginative terms.
5. Lack of realism about the outcome in adjudication	☐ Foster an exchange of information. ☐ Ask questions about legal and factual issues. ☐ Point out neglected issues and lead an analysis of the merits. ☐ If necessary, predict the likely court outcome on one or more issues.
6. Inability to Reach Agreement	☐ Persevere and remain optimistic. ☐ Invite the disputants to take the initiative. ☐ Repeat earlier tactics. ☐ Adjourn and follow up.

Copyright 2009 American Bar Association. All rights reserved.

Chapter Two

The Stages of Mediation

1. **The Opening Session**
    a. **Goals**
    b. **Techniques**
2. **Private Caucuses**
    a. **Early caucusing**
    b. **Middle caucusing**
    c. **Later caucusing**
3. **Joint Meetings**
4. **Follow-up Efforts**
5. **Summary of Key Points**

Commercial mediation usually moves through several stages: Pre-mediation, the opening session, and private caucuses, often accompanied by follow-up. This chapter focuses on the time the parties and the mediator spend together in the opening session, caucusing and joint meetings, discussing what occurs at each stage.

1. The Opening Session

The opening session is the first time in most mediations that the disputants meet as a group. It is often referred to as the "joint" session, but I use "opening" to avoid implying that this is the only time disputants will meet together. Lawyers and usually the parties are present during the opening session and the mediator moderates it.

Should you hold an opening session at all?

In some areas commercial mediation is now conducted almost exclusively through caucuses and participants do not meet together at all. Even where opening sessions are customary, lawyers often suggest skipping them. Among the less persuasive reasons given for avoiding an opening session are:

- We've heard it all before (Who is "we"?)
- They'll blow up (Not likely, in commercial cases)

Copyright 2009 American Bar Association. All rights reserved.

- They'll get angry and refuse to settle (For how long?)
- We don't have time (What's more important?)

> A condominium association sued a developer over major defects in construction. The developer in turn sued its architect, contractors, and insurers. The parties agreed to mediate for two days and more than forty people convened for the event.
>
> The lawyers had strongly advised the mediator not to hold an opening session. Just hearing from fifteen parties, they said, would chew up most of the first day, leaving little time for private discussions and bargaining, and in any case they all knew each other's arguments. The better strategy, they said, would be to caucus immediately. The mediator agreed and went directly into caucusing.
>
> The discussions were difficult, but by the end of the second day the parties had narrowed an initial gap of $5 million to $400,000. At that point, however, the condo association directors refused to move any further. When the mediator asked why, one of them complained of years of frustration with the development company's predecessor. He insisted on explaining this to the current developer's CEO who, he said, didn't know what the unit owners had gone through.
>
> The mediator adjourned the process, and a week later convened the plaintiffs and the developer for a special two-hour meeting. Reading from binders full of documents, the board members traced their past frustrations while the developer's CEO listened. The discussion deteriorated into thinly-veiled threats, and the meeting broke up without apparent progress. Two weeks later, however, the board agreed to an additional compromise and the case settled.

Be very reluctant to eliminate an opening session because of lawyers' claims that "we've heard it all before," for example. Even if this is true for the lawyers, it usually is not for the parties. And, as long as basic ground rules are enforced, even angry parties can talk with each other without provoking a damaging confrontation.

There are a few circumstances in which there is little risk in skipping an opening session, for instance if each of the following factors is present:

- All of the participants are dispute professionals: Lawyers, adjusters, etc.
- The professionals are the real decisionmakers in the case
- Each side has received full discovery about the other's case
- No one is too angry—it is largely, if not entirely, about money

> A large manufacturer sued two insurers to recover the cost of remediating a large plume of pollution that had been spilled from one it its plants and entered the water table hundreds of feet below the ground. The estimated cost was more than $20 million.
>
> Despite the large amount of money involved none of the people at the mediation seemed emotional about the case. The spill had occurred in the late

Copyright 2009 American Bar Association. All rights reserved.

1960s and no one now involved with the company felt responsible for it. The adjusters representing the insurers viewed the case as a typical problem of trying to allocate risk under uncertainty: The underlying facts were buried in the past, relevant insurance policies had been lost, and so on. In addition, a nationally-known venture capitalist who controlled the defendant insurance company was, by coincidence, that very day making a takeover bid for the manufacturer. As a result, both sides' negotiators knew the dispute might soon be "all in the family."

At the participants' request I agreed to dispense with an opening session and go directly into caucusing. My role turned out to be a small one. The disputants had gone to mediation primarily to create a settlement event and did not need much outside help. They quickly traded concessions of $1 million or more, and within a few hours had a deal.

a. Goals

Your overall goal for the opening session is to create a foundation for productive bargaining. You should structure it as a serious meeting rather than an adjudicatory proceeding. You will want to:

- ***Begin to build good working relationships***
- ***Explain the process***
- ***Give lawyers an opportunity to argue and the parties to listen***
- ***Give disputants a chance to express viewpoints and feelings***
- ***Help parties exchange information***

Begin to build good working relationships

Your primary goal from your first contact with the disputants is to build their trust and confidence so that they will accept your guidance. You need to give each party the feeling you are genuinely interested in their viewpoint and want to help them achieve a good result. The opening session is usually the first time the parties, and perhaps also the lawyers, have met you, apart perhaps from a brief chat in the waiting room. Particularly if you have a goal-oriented, "get it done" personality, this may seem pointless, but as noted in the Introduction, surveys of clients of commercial mediators show that this is crucial to success. Don't let your interest in moving the process along get in the way of trying to make a personal connection with each disputant.

Explain the process

The opening session is also your best opportunity to explain mediation to the disputants. Often the parties are first-time participants. By describing the process you can clear away misconceptions and make them feel on more of a level playing field with experienced participants. Even lawyers who are familiar with mediation often welcome a

Copyright 2009 American Bar Association. All rights reserved.

brief explanation, both for the benefit of their clients and to confirm that key ground rules are understood by everyone.

Before reaching mediation the parties will often have been involved in bitter litigation and failed negotiations, so you also want to set a positive tone for the process, suggesting it will be different from what has gone on before.

Give lawyers an opportunity to argue and the parties to listen

We have seen that opening sessions can play a significant psychological function for both attorneys and clients—the opportunity to have a "day in court." Lawyers sometimes also need to demonstrate the strength of their arguments and their commitment to their clients. And the opening session allows a client to hear, often in blunt terms, what his opponent will say if the case goes to trial.

Allow the disputants to express views and feelings

The opening session allows participants, directly or through their attorney, to express feelings such as anger or grief directly to the other party. Indeed, mediation is often the first and only chance a party has to talk directly with its opponent during the entire litigation process. Parties are free to talk about business and personal issues, but commercial litigants usually focus on their legal case.

Exchange information

The opening session is an opportunity for disputants to exchange information. This is particularly valuable when mediation takes place at the outset of a dispute, at a point when the parties have not conducted formal discovery.

b. Techniques

Overall format

The format of an opening session is flexible, but typically follows this structure:

- ***The parties meet and introduce themselves.***
- ***The mediator welcomes the participants and explains the process.***
- ***The lawyers, and perhaps also the parties, make statements.***
- ***Disputants exchange questions and comments, and the mediator may pose clarifying questions.***
- ***The mediator concludes the session and transitions to caucusing.***

Opening moments

Greet people as they arrive and make small talk as you would at the start of a business meeting, but don't put yourself in a position one side may interpret as bias toward the

Copyright 2009 American Bar Association. All rights reserved.

other. For example, unless it has been cleared in advance, a party should not arrive to find you talking with its opponent behind a closed door.

Follow the cues of the disputants concerning formality. If they already are on a first-name basis or doff their suit coats, you can do so. If, however, you sense a participant is uncomfortable with this, err on the side of formality at the outset. Disputants from other cultures may interpret American casualness as lack of respect.

Mediator's comments

Mediators almost always make opening comments. Experienced mediators tend to keep these relatively short, especially if the parties are professionals who have probably been briefed by their lawyers. They also know most people cannot remember more than a few minutes of oral comments when they are tense, as is often true of disputants. A transcript of suggested opening comments appears in the Appendix.

Parties' statements

After opening comments, the mediator gives each side the opportunity to speak. What a party says its in its discretion, but typically lawyers make statements, sometimes supplemented by comments from a party or an expert. As the mediator you will want to:

Set the agenda and encourage participants to listen. The plaintiff usually speaks first as a matter of convention. Occasionally, if the plaintiff's position has been explained in advance and the defendant's views are not known, it may make sense to start with the defense. Notify the lawyers in advance if you decide to do so.

Participants often listen with a focus on rebuttal, rather than taking in what they hear. Encourage the parties to listen carefully to what their adversary says, noting that it may well be a preview of what they will hear in court if the case is not resolved.

Listen carefully, and show you are doing so. Remain quiet but engaged. As each person speaks, turn to look at them. Demonstrate you are listening by nodding or taking notes. Intervene as moderator only if necessary: This is the disputants' chance to speak freely.

You may want to pose a clarifying question or make a comment occasionally to show you are listening or that you have "done your homework." If you sense your comments may be misinterpreted, explain your intent ("My questions are meant only to clarify what I'm hearing; I don't mean to express any view about the merits of the case, and I expect to be asking the same kinds of questions when the other side speaks.")

Encourage the parties as well as the attorneys to talk. Lawyers' instinct is often to keep clients under wraps, and parties themselves may be reluctant to talk. Encourage them to speak but make it clear there is no pressure to do so.

Copyright 2009 American Bar Association. All rights reserved.

A retired executive bought an antiques company, only to conclude a few months later that the seller had deceived him about its condition. He filed suit but then agreed to mediate. The mediator called each lawyer before the mediation and mentioned he would invite their clients to talk. The executive's lawyer said he thought his client would welcome the chance. The attorney for the seller, however, warned that her client was an "engineer-type" who would not want to say much.

The purchaser showed up with a four-page single-spaced text and described how he'd entered the deal in good faith, only to find himself betrayed by deceptions ranging from inflated inventory to a clientele outraged at the prior owner's failure to meet shipping dates.

After thirty minutes the purchaser finished and the seller began to talk. Belying his counsel's prediction, he spoke articulately and at length. There was a back-and-forth discussion in which the attorneys participated but which was dominated by the principals. When the discussion became heated and repetitive, the mediator deferred to the lawyers' request they move into caucusing. Still the opening session went on for 2 ½ hours and later that day the case settled.

Promote discussion but maintain order. The opening session is often the first time the principals have met since the dispute began. Parties are sometimes hostile and lawyers sometimes feel the need to play aggressive roles. Your goal when this happens should ordinarily be to manage a "controlled confrontation." This includes confrontation—allowing participants to express conflict and emotions—and control—not permitting the process to degenerate into bitter accusations. You might think of your role as similar to a chef preparing pasta: To cook it well the water should boils vigorously, but not overflow the pot. Success in mediation also lies in having enough heat to produce change, without making a mess.

In commercial cases outbursts are rare, probably because disputants feel they would lose face if they were chided by a mediator in front of an opponent. (This is also a reason also to be very polite when intervening, so you are not perceived to be "slapping the disputant's hand.") If a discussion starts to spin into a confrontation, a cautionary comment will restore order quickly. ("The plaintiff has the floor at the moment Mr. Smith. I'll ask you to take careful notes, and once the plaintiff is finished I want to hear how you see this.")

Information exchange

Opening sessions are an excellent opportunity for parties to exchange information. Parties can also do this once they are in caucuses, of course, but at that stage questions and answers must be relayed through the mediator.

Once each side has made an opening statement and offered a rebuttal if it wishes, I encourage the parties to talk directly with each other. If attorneys want to head prematurely for their caucus rooms I encourage them to stay. As a rule of thumb I do not

Copyright 2009 American Bar Association. All rights reserved.

become concerned about moving out of joint session until one-third of the expected time for mediation has gone by.

Transition to caucuses

At some point in almost every session one or both lawyers will suggest the parties go into caucuses. Or you may decide the joint discussion has run its course or that the participants are becoming too adversarial and decide to move into caucusing.

Confidentiality rules in caucusing

One question is what rule of confidentiality to announce for the caucusing phase. Will everything a disputant says be confidential unless the disputant authorizes the mediator to disclose it, or will the mediator have discretion to transmit information unless a disputant affirmatively flags it as confidential? I prefer the second option, because I find that in the heat of mediating I often forget to ask for permission, and in any event I cannot foresee what I will need to disclose in the other caucus room.

3. Private Caucuses

Almost all commercial mediations involve some private caucusing, with the mediator moving back and forth between parties sitting in separate rooms, and in most cases disputants spend most of their time in caucuses. The typical format of commercial mediation thus contrasts sharply with family and community mediation, where parties typically remain in joint session throughout.

Should parties caucus at all?

Most commercial mediators believe the advantages of having private conversations with disputants strongly outweigh the disadvantages of separating them. Occasionally, however, even commercial mediators do not caucus, usually because the parties prefer to talk directly.

> Two women built up a small graphic design firm. Then one of them decided to take an inside position with a large client of the firm while her partner opted to continue the business on her own. The women remained friendly but the situation created tension. The partner who planned to stay was anxious about becoming solely responsible for the business and felt somewhat abandoned. Her colleague, by contrast, tended to take an everything-will-work-out approach to life and found it hard to credit her partner's concerns.
>
> The mediator ordinarily used a caucus-based format, but decided in this case to keep the two women together. He thought that with assistance they could negotiate directly and was concerned that if he held separate meetings it would be taken as a signal their disagreements were serious. Most important, the women

Copyright 2009 American Bar Association. All rights reserved.

expressed a preference for face-to-face discussions. The mediation went forward smoothly, although between sessions each partner would occasionally communicate concerns to the mediator over the telephone.

Patterns in caucusing

A mediator's goals and techniques will change as caucusing progresses. In the first round your primary goal will usually be to allow disputants to explain their perspective, express feelings, and develop confidence in you. To do this, focus on listening and drawing people out and try not to challenge what you hear.

As the process goes on, you will want to become more active, posing pointed questions and offering advice about bargaining, and during the last stages of the process you will often feel it appropriate to make specific suggestions about what the parties need to do to achieve a settlement and perhaps give an opinion about the likely outcome if the case is litigated.

Mediators tend to progress from a restrained to a more active role for several reasons. First, as the process goes forward participants become increasingly convinced they have been heard and gain confidence in the mediator, making them more willing to listen to suggestions. At the same time the mediator learns more about the legal issues and the parties' concerns, making the neutral more confident about giving advice. Disputants are also likely to become increasingly frustrated with the results of traditional bargaining, making them more receptive to suggestions about other ways to approach the dispute.

a. Early Caucuses

(1) Goals

During the first round or two of caucusing, you will have the following goals:

- ***Continue to build relationships***
- ***Make the disputants feel fully heard***
- ***Gather sensitive information and control negative communications***
- ***Identify interests and probe for hidden obstacles***

Continue to build relationships

A primary goal continues to be to build a working relationship with each side. Good relationships will make you more effective later in the process as you deliver unwelcome news and suggest painful compromises. The first caucus is usually the first time you talk privately with either principal, making the interaction particularly important.

Make the disputants feel fully heard

Copyright 2009 American Bar Association. All rights reserved.

It is important to create an atmosphere in which disputants feel free to express feelings, perspectives and wishes they may not have felt comfortable stating in the presence of their opponent. In the privacy of the caucus parties, can speak their minds without concern about being embarrassed. Your goal at this stage is to listen well and show you are listening; it is not to offer advice. I try to keep in mind that during the first caucus the parties and lawyers are entitled to "have it their way." There will be time later to point out the errors and inconsistencies in their case if I have to.

Gather sensitive information

Caucuses allow a mediator to gather sensitive information the parties want to hide from an adversary. Disputants may be guarded about disclosures at first, but will often become more open as the process goes on.

Control negative communications.

The caucus format allows you to translate one side's angry or provocative language into words the other party can hear. If you cannot put a statement into acceptable language, you can withhold it until the recipient is able to listen or the speaker has become calmer.

Identify interests and probe for obstacles

Because caucus discussions can be less guarded and more free-ranging than joint meetings, they are a good opportunity to look for hidden obstacles and encourage disputants to identify underlying interests.

(2) Techniques

During the first caucus meeting with each side try to follow these guidelines:

- ***Ask open-ended questions***
- ***Engage the principals***
- ***Start slowly and listen carefully***
- ***Show interest and empathy***
- ***Perhaps start the bargaining process***
- ***Keep track of time***

With whom to start?

The convention in mediation is to meet first with the plaintiff. You will occasionally want to start with the defense, however, particularly if it is the defendant's turn to make an offer. Even then I usually begin with the plaintiff, if only for a few minutes. Disputants sometimes read significance into where a mediator begins, so give a reason

Copyright 2009 American Bar Association. All rights reserved.

for your decision ("It's traditional to begin with the plaintiff, so that's what I'm going to do…." or "Since the plaintiff made the last offer, I think I will start with the defense….")

Ask open-ended questions

Start with open-ended questions that invite disputants to talk freely. I often start with: "Is there anything you didn't feel comfortable mentioning in front of the other side, but you think I should know to understand the situation?" Alternatively, if a party seems to have been in a personally trying situation, you might begin by acknowledging this and inviting the person to elaborate ("This sounds like it was an awful experience for you Ms. Smith…")

Focus your initial comments on the issues raised by the people with whom you are meeting, rather than the other side's comments. Most disputants want to know their own views have been considered before they will deal with an opponent's concerns.

Engage the principals

Focus some of your questions on the parties rather than the lawyers. To avoid making them uncomfortable, ask factual rather than legal questions ("Mr. Yao, can you tell me where you feel the pain?" or "Ms. Green, I heard your counsel say you were seeking reinstatement. Do you know if your position has been filled?") Or you might ask a general question such as, "Jim, how do you feel about all this?"

Start slowly and listen carefully

Resist the temptation to "cut to the chase." Unless the process is operating under a tight time constraint, be wary of directing the agenda, making suggestions or using confrontational tactics during the first round of caucusing. Even evaluative mediators rarely offer opinions during their first caucus meeting with each side.

Show interest and empathy

It is vital the participants feel heard out. Listen in a way that shows the speaker she has been heard and understood. You can convey this by taking notes, maintaining eye contact, and checking your understanding ("So if I understand you correctly, you feel the defendant never intended to comply with the contract?") Suggestions about good listening are set out in Chapter Six.

Perhaps start the bargaining process

You can wait until the second round to ask for offers, or suggest a party make an offer at the end of the first caucus meeting. If there is no clear signal you can offer the party whose turn it is to move a choice ("You could make a first offer now, or treat this round of talks as focusing on information and wait for the next round to put out a number. We probably won't get an offer from the other side until you have made one, but we have time. It's really up to you.")

Copyright 2009 American Bar Association. All rights reserved.

Keep rough track of time

Early caucus meetings are usually much longer than later ones because more information is being gathered and communicated. Disputants are sometimes frustrated at waiting as a mediator talks with the other side. If a session extends for much more than an hour, you may want to step out and "touch base" with the side that is waiting.

b. Middle caucuses

As the caucusing progresses, parties gradually move from exchanging data and arguments to analyzing the case and making offers. Mediators become more active participants in the discussions, for example by pushing parties to consider the costs and uncertainties of litigation. Middle caucuses tend to mix case analysis with active bargaining and sometimes exploration of interests. During this stage you are likely to:

- ***Moderate the bargaining process***
- ***Encourage information exchange***
- ***Ask about interests and probe priorities***
- ***Reframe disputants' views***
- ***Change disputants' assessments of the merits***

Moderate the bargaining process

Bargaining over money, coupled with arguments over the value of each side's litigation option, take up most caucus discussions in the typical commercial case. Facilitating hard money negotiations is a frustrating and difficult task. You can play a helpful role by advising disputants how to interpret offers, predicting an opponent's likely reactions to a party's planned offer, and suggesting tactics to move the process forward.

Bear in mind that parties often come to mediation with unreasonable expectations about what the other side will be willing to do, and even realistic parties often take extreme positions for tactical reasons. Disputants often realize only gradually how much they will have to compromise to get a settlement and need time to adjust to unwelcome news.

The first caucus is usually too soon to ask a party to make a real effort, but as the process progresses you will probably need to push and coach parties to compromise. Chapter Four gives suggestions on how to facilitate "pure money" negotiations.

Encourage information exchange

We have seen that one of the main reasons people are unable to negotiate successfully is they do not have enough information, and a mediator can help negotiate exchanges of data. This process is likely to become more intense as it becomes clearer where the parties disagree.

Copyright 2009 American Bar Association. All rights reserved.

You might, for instance, say to a defendant who has refused to disclose information: "I thknk the defendant is not coming up because he hasn't seen a detailed critique of his statute of limitations defense. In order to get the kind of movement you need here, I'd suggest you authorize me to explain how you plan to defeat it."

Ask about interests and develop options

At first parties and their lawyers usually want to talk only about their legal case and money offers. As time goes on, however, disputants sometimes become more open to considering non-legal issues and options. The middle caucuses are a good time to suggest that disputants focus on their own business or personal interests and factors that might motivate their opponent to settle. You can also ask about the parties' relative priorities and give each side a signal about what is more or less acceptable to the other. Suggestions about how to do this appear in Chapter Five.

Reframe disputants' views

Mediators work to change disputants' views of the controversy and each other, by suggesting a different way, or "frame," in which to see a situation. For example:

> A homeowner was bitterly opposing a neighboring business's expansion plans before a local licensing board. The company proposed a buyout of the homeowner's property. The homeowner reacted angrily, saying he could not understand why the company would try to "drive me out of my home."
>
> The mediator responded, "From what they're telling me in the other room, the company is impressed by your tenacity. They're convinced you'll fight every effort they make to grow their business. In one sense it's not too surprising why they see it that way, You've filed protests to their expansion applications for the last ten years, and succeeded in delaying a lot of them.
>
> "To them, paying you money to drop this particular objection looks like giving you a war chest to fight the next battle. I think this is what's motivating their request for a buyout. Is there anything we could tell them that would give them confidence if they settle without it they'll be able to live peacefully with you?"

Change disputants' assessments of the merits

Middle caucuses are also the time when a mediator can start to push parties to assess their best alternative to settlement, which is usually to continue in litigation. The court outcome may be the focus of your discussions, but you should seek to define "alternative" more broadly to include:

- The cost of litigation: How much will the party have to pay to pursue the adjudication option?

Copyright 2009 American Bar Association. All rights reserved.

- The intangible costs of remaining in conflict: Personal stress, business distraction, and other non-legal factors.
- Whether the alternative is in fact adjudication: Only a small percentage of cases are ever decided on the merits. Most parties who break off talks spend time and money litigating, only to find themselves back in negotiations in the future.
- The likely outcome if a court adjudicates the dispute.

During this stage you can help parties analyze each of aspect of their alternative to reaching agreement, bringing each side's arguments and perspectives to the other and asking for help responding to them. ("They are challenging your claim for emotional distress because they say there aren't any medical records to back it up. Is there anything I can give them to "paper" your injury so they will make a better offer?")

As the process goes on you can become increasingly active, explaining and emphasizing each side's key points to the other and probing assumptions about liability, damages, and the cost of litigation. Your goal will be to make each side confront, perhaps for the first time, the full costs of pursuing the dispute and the possibility that if they do so they will lose. Ideas on how to do this appear in Chapter Seven.

c. Later Caucuses

As the process moves toward closure, disputants focus less on the value of their case and more on pure bargaining. Indeed toward the end caucus sessions may last only a few minutes. Disputants are usually more willing to accept advice from the mediator at this stage, but at the same time are resistant to making additional concessions, feeling they have already given up more than they should. During the later caucuses a mediator can:

- ***Maintain momentum***
- ***Set up joint meetings***
- ***Offer or initiate process options***
- ***Commit agreements to writing***
- ***If necessary, adjourn and try again***

Maintain momentum

Maintain the momentum of the process by keeping the mediation in session. Participants will look to you for cues about whether there is real hope of settling; to the extent possible you should you should emphasize the positive.

Set up joint meetings

Many commercial mediators stay in caucus continuously after the opening session, bringing participants together only to sign a settlement agreement. In can be helpful, however, to convene the participants to talk or bargain directly with each other. Full teams can meet, but more often one or a few members of each side will gather for a

Copyright 2009 American Bar Association. All rights reserved.

private discussion. The participants may be CEOs, lawyers, or experts: what is appropriate depends entirely on the situation. Chapter Nine gives suggestions about this.

Offer or initiate process options

If bargaining process falters you can suggest options to restart the process or apply them on your own initiative. They may include:

- "Confidential listener" or a "mediator's proposal," discussed in Chapter Nine.
- An evaluation of one or more issues, discussed in Chapter Eight.
- Anything else that seems likely to be helpful.

For ideas about what a mediator can do to overcome impasse at the end of the process, see Chapter Nine.

Commit agreements to writing

If the parties reach agreement, the next step is to convene the lawyers to write up the terms. Usually disputants prepare a handwritten memorandum that sets out key terms and calls for the execution of formal documents and payment within a specified period of time. Lawyers may take over this process, but often you will be asked to serve as the moderator or scribe; if you do, be careful to avoid acting in a way one side may interpret as biased.

4. Follow-up Contacts

If parties are not able to reach agreement, don't give up. Instead suggest they adjourn and think things over. Contact them a day or two later to take the temperature of each camp, and then either conduct shuttle diplomacy by telephone or email or schedule another mediation session. Suggestions about how to conduct a follow-up process appear in Chapter Nine.

Conclusion

Mediation is a flexible process. Don't hesitate to modify the usual structure to meet the needs of particular situations. That said, opening sessions and private caucuses, preceded and often followed up by telephone contacts and in-person meetings, are the settings in which most commercial mediators do their work.

5. Summary of Key Points

Opening Session

- *Introduce the participants*
- *Explain the process*

Copyright 2009 American Bar Association. All rights reserved.

- *Give the lawyers an opportunity to argue and parties to listen*
  - *Encourage listening*
  - *Show you are doing so*
  - *Encourage the parties to talk*
  - *Promote discussion but maintain order*
- *Encourage discussion and pose clarifying questions*
- *Make a transition to caucuses*

Private Caucuses

a. **Early Caucuses**
  - *Ask open-ended questions*
  - *Engage the principals*
  - *Start slowly and listen carefully*
  - *Show interest and empathy*
  - *Perhaps start the bargaining process*
  - *Keep track of time*

b. **Middle caucuses**
  - *Moderate the bargaining process*
  - *Encourage information exchange*
  - *Ask about interests and probe priorities*
  - *Reframe disputants' views*
  - *Change disputants' assessments of the merits*

c. **Later Caucuses**
  - *Maintain momentum*
  - *Set up joint meetings*
  - *Offer or initiate process options*
  - *Commit agreements to writing*
  - *If necessary, adjourn and try again*

Copyright 2009 American Bar Association. All rights reserved.