



THE STAGES OF A MEDIATION PROCESS

Core tasks of a professional Mediation Advocate | Advisor based on the criteria of the International Mediation Institute, IMI:

- Advice on ADR procedures, initiating and timing for process, identifying suitable mediation approach & style, finding the suitable mediator
- Collaborate with the mediator and the other party
- Clear role division and tasks within client – lawyer team
- Knowledge of various negotiation & mediation techniques and styles
- Knowledge of the relevant legal framework for mediation and where required the substantive matters

Hereunder you find a checklist of the elements, the role of the mediation advocate, tools and tips for each phase in the mediation process. Please keep in mind that the stages is a teaching model to structure the process and support participation and preparation. However, mediation is not a serial process and during the mediation you can loop back and forth to various stages.

In short, there are the following stages:

0. Premediation preparation
1. Opening
2. Exploration
3. Generating options
4. Negotiation
5. Closing
6. Implementation

Elements	Role mediation advocate	Tools	Tips
0. Premediation preparation			
<p>Selection and preparation</p> <ul style="list-style-type: none"> • Suitability and strategy check: mediation, other, or mixed mode • Consultation with other party • Suitability check and finding of mediator: <ul style="list-style-type: none"> ▫ What combination of: e.g., personality, styles, skills, experience, practice areas, substance /industry expertise, language, cultural aspects. ▫ Conflict of interest check ▫ Single or co-mediators • Consulting/briefing mediator: note taking (if any), participants to include (or not), venue, duration of mediation meeting(s), online or in person, language of proceedings, deadlines, one-day mediation • Pre-mediation intake meeting and/or directional consultation with the mediator and/or other party • Administrative aspects (e.g., mediation agreement, confidentiality declarations, etc.) • Documents, if any; pre-mediation briefing or position paper, what documents are for the mediator only and what can be shared with the other party • Legal aspects: e.g., suspension of ongoing legal procedures or information of the mediator and other parties about other proceedings 	<p>Active and often in the lead</p> <ul style="list-style-type: none"> • Preparation of client and self, including a clear role division • Prepare intake (or directional) pre-mediation meeting, elements for opening statement • Prepare 	<ul style="list-style-type: none"> • ADR-Scan • 8 key procedural drivers • Glasl conflict escalation stairs • Checklist success-predicting factors for mediation • IMI decision tree finding the right mediator • Ask the Mediator to use the UDPM (Universal Disclosure Protocol Mediation) • [BATNA (W/R)] • Mediation Memo <p>Sample questions/ considerations:</p> <p><i>'What is necessary to solve this conflict?'</i></p> <p>Will a ruling solve all problems?</p> <p>Assessment of opportunities & risks litigation / mediation</p> <p>Role of constituency</p> <p>Your clients ICNM's¹</p>	<ul style="list-style-type: none"> ✓ De-escalate the conflict ✓ Try to collaborate as early and as much as possible in particularly on process aspects (a joint neutral topic). This makes the process from the outset less adversarial ✓ First select a process and the type of mediation style you prefer before you select a mediator ✓ Coach your client to be in the right mindset to optimize the opportunities for settlement ✓ Enlist the mediators help to mediate the process first

¹ ICNM's: Interests, Concerns, Needs, Motivations

Elements	Role mediation advocate	Tools	Tips
1. Opening phase			
<p>Set expectations, anchoring, quick scan</p> <ul style="list-style-type: none"> • Introduction by the mediator, rules and roles • Parties and/or their Mediation Advocates make their opening statements • First inventory of conflict matters and interests takes place 	<p>Supporting client</p> <p>As 'passive' as possible to put the client in the lead, unless this is not in the client's interest</p> <ul style="list-style-type: none"> • Open communication with the other party, indicating willingness to try to find a negotiated outcome • Continue to collaborate with the other party and mediator • Check whether all important issues get on the agenda 	<ul style="list-style-type: none"> • Well prepared opening statement • Active listening • Clarifying questions • Anchoring 	<ul style="list-style-type: none"> ✓ Prepare an impactful opening statement ✓ Include things like: information you like to get clarified, information you like to give, how you see the ICNM's of both parties, what you see as the core of the problem, what is blocking finding a resolution. ✓ Mention the support from the mediator you seek / their role ✓ Carefully prepare and place anchors ✓ Mind the structure: do not react (yet) or rebut but let each party speak as if they are the first to speak

Elements	Role mediation advocate	Tools	Tips
2. Exploration phase			
<p>Move from positions to interests, from past and blame to: future and what participants need and DO want</p> <p>The exploration phase is the most important part of the mediation and should generally take most of the time in the mediation process</p> <p>Mediator leads exploration of all relevant underlying interests of the various stakeholders</p> <p><i>Indications that the exploration stage is complete:</i></p> <p>Conversation shifts from: 'you did', blame, the past, what participants do not want to: 'I need', the future, perspectives and what the participants do want</p> <p>The participants understand each other's perspective (do not necessarily need to agree with it)</p> <p>The role that each party played in the emerging, escalation and continuation of the conflict is acknowledged, including their own role</p> <p>There is (some)productive communication between the parties</p>	<p>Supporting client: moderately to low activity depending on how the mediation progresses and the needs of your client, preferably your client is in the lead</p> <ul style="list-style-type: none"> • Coaching client, sparring partner for your client and the mediator, collegial consultations, • De-escalating and clarifying contributions to the mediation and indicating whether a plenary and/ or individual conversation is desired. • Ensure all joint and individual ICNM's get on the table • Enlisting help of the mediator where required 	<ul style="list-style-type: none"> • Active listening • Summarizing paraphrasing • Check assumptions • Ask questions • Acknowledge feelings • Information strategy: Give, Guard, Get • ICNM's analysis, • Identifying joint an individual interests 	<ul style="list-style-type: none"> ✓ Listen and ask much more questions than talking ✓ Ensure that interventions are done for both parties ✓ Refrain from focussing on legal issues, or mainly on the substantive aspects, nor finding 'the Thruth' ✓ Support that People, Process and Problem levels are all explored ✓ Check your assumptions ✓ Leave sufficient time for the mediator to explore the relationship between the parties and emotional issues ✓ Listen to try to find the blocking issue: why were the parties not able to find a resolution themselves

Elements	Role mediation advocate	Tools	Tips
3. Generating options phase			
<p>Option generation Generating several options for next steps and/ or solutions that meet the participants ICNM's</p>	<p>Active role: Actively contributing to generate potential solutions</p> <ul style="list-style-type: none"> • Support client in weighing the options • Indicating whether a plenary and/ or individual conversation or break is desired • Enlisting help of the mediator where required 	<ul style="list-style-type: none"> • Objective criteria • Alternatives analysis • Brainstorming • Expert support • Summarising • Check understanding • Yes and ... instead of No but... • Enlarging the pie • Working with time or stepping stones 	<ul style="list-style-type: none"> ✓ Explore and generate multiple options ✓ Separate option generating from critique and deciding ✓ Be open to explore various venues, even the ones your client does not like. It might lead to a new idea that your client does like ✓ Remember that no one is bound by positions taken or proposals made/explored until it is in writing and signed by all parties ✓ Ensure that all participants participate in the option generation ✓ Check power balance ✓ Check with constituency / mandate

Elements	Role mediation advocate	Tools	Tips
4. Negotiation phase			
<p>Reaching agreement on selecting an option</p> <p>The negotiation itself</p> <p>Test for understanding, using communication tools</p>	<p>Active / supportive</p> <ul style="list-style-type: none"> • Support client or if your client needs it actively negotiate yourself • Positively contribute by engaging in integrative / interest-based negotiation, work to find a mutual gain outcome. • Enlisting help of the mediator where required 	<ul style="list-style-type: none"> • Objective criterions • Alternatives • Anchoring • Test / interim / steppingstones agreements, • Conditional/partial agreements, or based on differing estimations/ expectations/time preference • Listen, Summary, Questions reflect on feelings, label, use only strong arguments 	<p>✓ See below</p>

Tips
<ul style="list-style-type: none"> ✓ Work with leverage (positive, negative, normative) rather than power ✓ If your alternatives are better than the other party thinks they are, share them (the mediator can help with this) ✓ Make the first offer if you know the optimal range (anchoring). If the other goes first: deflect or re-anchor if necessary ✓ Make many small concessions rather than one huge on at the end, this increases the other parties' satisfaction; ask something in return for each concession and/or ensure the other party understands you make a concession ✓ Appreciate concessions made by the other party: we tend to overestimate our own concessions and underappreciate concessions of others. ✓ Apply Harvard rules of thumb: 1. Do not mingle People, Process and Problem (be hard on the problem and soft on the people) 2. Focus on interests 3. Use objective criteria to generate more than 1 mutual gain option supporting the interests 4. Know the (best) Alternatives ✓ Prioritize your clients' and the other parties' ICNM's ✓ Test for understanding, listen & ask questions rather than counter-propose, label behavior except when disagreeing, no argument dilution, no irritators

Elements	Role mediation advocate	Tools	Tips
5. Closing phase			
<p>Record settlement, ensure smooth implementation</p> <p>1. Full or partial agreement</p> <ul style="list-style-type: none"> • Fulfil all formalities to enter into the agreement • Agree communication plan where applicable • Drafting agreement • Enter into a final agreement <p>2. Next mediation session</p> <ul style="list-style-type: none"> • Summarize state of affairs, progress made, ICNM's • Homework before the next meeting, => timing • Consult constituency/others • Written summary/documents => timing <p>3. No settlement, end of mediation</p> <ul style="list-style-type: none"> • Acknowledge the commitment and efforts made • Summarize any insights, understanding reached, • Possible next process steps 	<p>Active / in the lead</p> <p>to make sure:</p> <p>i) the wording of the settlement agreement is univocal, SMART and accurately reflects the agreement between the parties</p> <p>ii) all relevant stakeholders are involved</p> <p>iii) all formal requirements are met for parties to enter into the agreement</p>	<ul style="list-style-type: none"> • Drafting together with other counsel • Mediator prepares draft • One text procedure • Expert opinion • Mediator proposal 	<ul style="list-style-type: none"> ✓ A mutual gain outcome / each party's main ICNM's are fulfilled is best insurance for compliance. Bullying/overpowering someone into an agreement means issues during implementation ✓ Be mindful of possible hick-ups during the implementation (add a clause to enlist the help of the mediator) ✓ Check confidentiality and what information (not) to share with constituency

Elements	Role mediation advocate	Tools	Tips
6. Implementation phase			
<p>Implementing</p> <p>Implementation final settlement in conformity with the made agreements</p>	<p>Low activity, monitoring:</p> <p>Check implementation, where necessary enlist mediator help</p>	<ul style="list-style-type: none"> • Mediation clause in settlement agreement • Checking in 	<ul style="list-style-type: none"> ✓ Stay in touch with your client ✓ Support with constituency