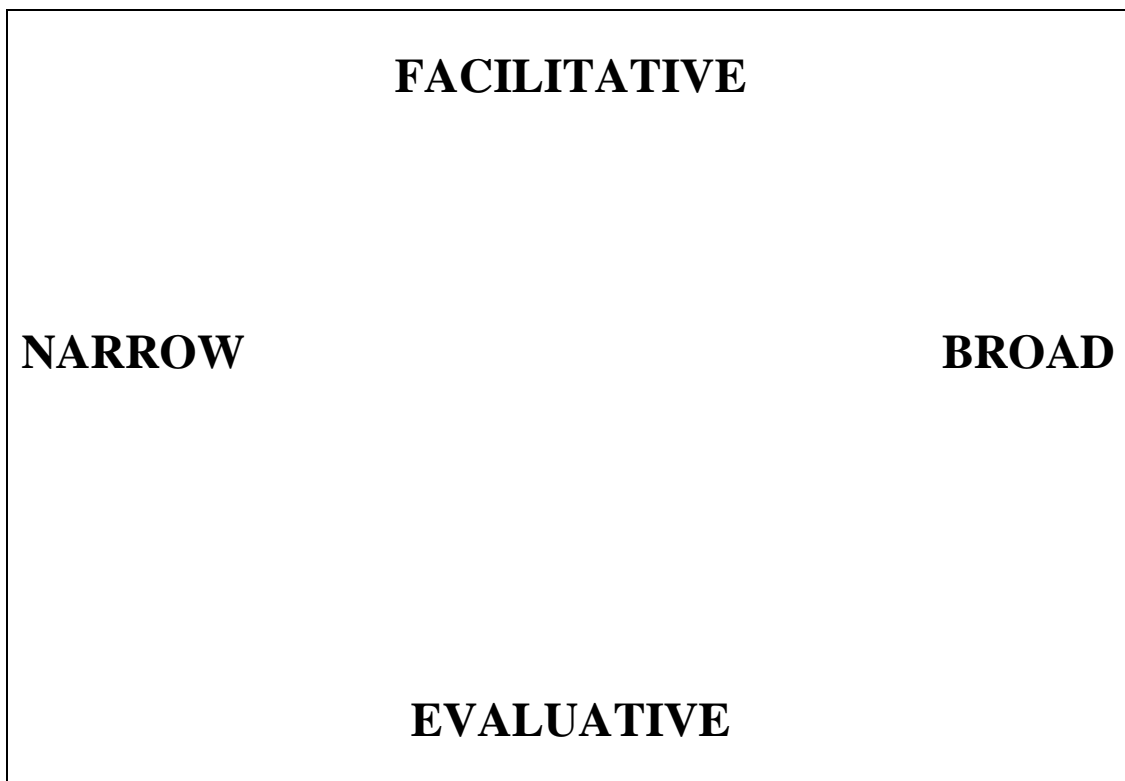


**A.R.C. Mediation Seminar
November 10, 2007**

**Mediation Strategies, Tactics, Theories, Ideas, Games, etc.
By
Steve Stinson**



Where do you fall as a Mediator and ethically how far can you move to the bottom of the chart, when can or should you ever move to the bottom of the chart, and what do you need to do to go there, if at all.

Facilitative style of mediation is probably what you learned during initial training. Open ended questions, without providing your own in-put. Identify & explore interests, concerns, motivations, goals and common grounds. Question as to weaknesses and strength on both sides, evidentiary problems on both sides, legal concerns, etc. Mediator gives no in-put of his/her own.

Evaluative style of mediation is where the Mediator based on his/her own experience and with the permission of one or more parties, usually in private caucus offers his/her own opinions on strengths or weakness and probably outcome. This is done only towards end and only with sensitivity and permission of parties. Pitfalls and do not want to step over line.

Narrow approach is where Mediator focuses on the legal positions espoused by parties and simple risk-analysis.

Broad approach is where Mediator also looks at underlying interests, (generally in commercial dispute.)¹

People's Interests = People's Wants and People's Needs. (Distinguish interests from needs—what going to do with the money.)

Must determine **Client's Needs versus Counsel's Needs**. Not always the same.

When Parties/Attorneys are discussing their respective positions, Mediator needs to go below the line to try and determine their underlying interests. It is as important to listen as much to what **NOT** telling you as what they are telling you. .

OPTIONS: Only Proposals that include others needs succeed.
(SEE ATTACHED DIAGRAM.)

Five Methods of Integrative Negotiations:

1. Expanding the Pie—increasing available resources.
2. Nonspecific compensation—one party gets what he/she wants; the other party is repaid with different compensation.
3. Logrolling—each party concedes on low priority issues in exchange for concessions on higher priority issues.
4. Costcutting—one party gets what he/she wants; the other party's costs are reduced or eliminated.
5. Bridging—neither party achieves their initial demand, but a new option is created that satisfies the most important interest underlying their demands.

BATNA: Best Alternative to a Negotiated Agreement.

WATNA: Worst Alternative to a Negotiated Agreement.

¹ Picker at pp. 40-43. (See Bibliography below for more information as to each book.)

MLATNA: Most Likely Alternative to a Negotiated Agreement.²

Bibliography from Wakeen's materials attached

Some lists from Picker:

Qualities of an Effective Mediator:

1. Absolute impartiality; 2. Trustworthiness; 3. Mediation Experience; 4. Good listening skills; 5. Ability to understand the law and facts; 6. Good people skills; 7. Good leadership & management skills; 8. Problem solving skills; 9. Strong negotiation skills; 10. Flexibility; 11. Good business sense; 12. Patience; 13. A sense of humor.³

Identifying & Overcoming Barriers to Resolution:

1. Selective perception in making evaluation, 2. Wrong baselines, 3. Reactive devaluation, 4. Failure to communicate, 5. Gaps in information, 6. Insufficient focus on underlying interests, 7. Inability to align client's interests, 8. Disconnects between attorney and client, 8. Anger & embarrassment, 9. Behavior and tactics of parties & counsel, 10. Poor negotiating skills, 11. Inappropriate reliance on experts, 12. Preoccupation with winning, 13. Inability to break impasse, 14. Process barriers.⁴

Checklist of Some Facilitative Questions for Parties⁵

- What was the sequence of events-facts?
- What business interests are involved in this dispute?
- How do you feel about the dispute?
- How do you believe the other side feels about the dispute?
- What do you want/need?
- What is most important want/need?
- What is least important want/need?
- What do you believe are the strengths and weaknesses of your case?
- What are the strengths and weaknesses of your opponent's case?
- What alternatives would you consider if agreement cannot be reached?
- What is the most attractive alternative?

² Theresa Wakeen Materials.

³ Picker at pp. 38-39.

⁴ Picker at pp. 49-50 & 56-64.

⁵ Picker at pp. 84-87. Even though these are listed in the context of questions attorneys need to ask their clients prior to Mediation, they also appear to be questions that the Mediator might want to ask the Parties in Private Caucuses.

- What is the least attractive alternative?
- How would you prioritize the alternatives?
- What are the bottom line monetary recovery needs?
- What are your non-monetary needs?
- What are your settlement expectations?
- What compromises will you consider to reach a negotiated settlement?
- What are you unwilling to compromise under any circumstances?
- What do you believe are the opposing party's interests, goals and objectives in the dispute?
- Can you prioritize the opposing party's interests?
- What is the opposing party's interest in a negotiated settlement?
- Are you interested in privacy or do you prefer a public forum?
- Are you interested in a speedy resolution?
- Do you have an interest in preserving a continuing relationship with the opposing party which are not the subject of this dispute?
- What are barriers to a settlement?
- Do you believe that emotions or hostilities will be a barrier to settlement?
- Who are the decision makers for the other side?
- How would you describe the personalities of the other side's decision makers?
- Are there any other potential parties with an interest, who, if notified, would increase the likelihood of serious negotiations taking place?
- What particular concerns do you have about mediating this dispute?

Bibliography from Picker's book attached.

Thinking modes of Participants and Attorneys (& even Mediators) :

Vertical or convergent thinking (Dominant left brain). Bringing things together and synthesizing of information & knowledge to arrive at a single solution to a problem.

Lateral or divergent (Dominant right brain). Provocative and generative thinking. Brainstorming and expanding ideas and solutions.

Important to identify which type of person dealing with because approach to Mediation will be different.

Vertical Thinking:

Analytical
Sequential
Selective
Correct at every step.

Lateral Thinking:

Provocative
Can make jumps.
Generative
Need not be correct at every step.

Uses negatives to block pathways.
Excludes what is irrelevant.
Categories & labels may not change.

Follows most likely path.
Seeks the right answer.

There must be a right answer.

There is no negative.
Welcomes the irrelevant.
Categories & labels may change.
Explores least likely path.
Seeks restructuring of patterns.
There may be no answer at all.

Cooley cites, Dr. Edward DeBono, Lateral Thinking: Creativity Step by Step, as describing the **following strategies for lateral thinkers**

:
Suspending Judgment
Brainstorming
Challenging Assumptions
Generation of Alternatives
Fractionation
Visualization
Thought Reversal
Using Analogies
Random Stimulation⁶

Left brain function

Analytical
Rational
Logical
Linear
Certain
Goal-oriented
Concrete
Sequential
Explicit
Serial processing
Mathematics
Language

Right brain function

Generative
Intuitive
Emotional
Visual
Artistic
Holistic
Spontaneous
Playful
Symbolic
Parallel processing
Synthesis
Pattern recognition⁷

Flow chart for creative problem solving:

⁶ Cooley, Vol. 1 at p. 8.

⁷ Cooley, Vol. 1 at pp. 7-11.

1. Situational Analysis -} 2. Problem Analysis –} 3. Information Gathering -} 4. General Approaches -} 5. Action Plan -} 6. Evaluation (Need to Re-evaluate and start over at some point.)

1. Situational Analysis:

- What is happening right now?
- What is wrong with the client/lawyer's current situation?
- What are the symptoms?
- What is the client's/lawyer's preferred situation?

2. Problem analysis:

- What is the Client's problem?
- Do we need anyone else's help in identifying the problem?
- Whom/what does the problem affect?
- Who/what is responsible for the problem?
- Is it part of a larger problem? If so, what should we address first?
- Could it have been prevented?
- What are the client's/lawyer's objectives?
- What are the client's/lawyer's underlying interests?

3. Information Gathering:

- What else do we need to know (Facts? Feelings? Legal issues?)
- Who/what can help us?
- Are we the appropriate person/entity to fix the problem?
- How could this problem have been prevented?

4. General Approaches:

- What would the Client like us to do?
- What approaches does the law allow us to do?
- What other approaches might there be?
- What are the costs and Benefits of each approach?
- What new problems might each approach create?
- Can any potential new problems be prevented?
- Which approaches might be most effective?
- What values and objectives does each approach reflect?

5. Action Plan:

- What is our course of action to solve this problem?
- Who should be involved?
- Who is responsible for implementation?
- How should decision be made?
- What specific steps should we take now?
- What effect will these steps have?
- What steps should we take to prevent further problems?

6. Evaluation:

- Are we on the best path?

What new problems have been created?
Do we need to re-evaluate?

Plug back in at one of the previous numbers and start over. ⁸

Scenarios/Suggestions from Cooley, Vol 2.:

1. Convening for Mediation Success:

Judy Cohen suggests that the Mediator contact each of the Attorneys before the actual Mediation day. Discuss five topics with each side in a very neutral way:

- a. Issues (their Own and Other Sides)
- b. Goals (Their Own and Other Sides)
- c. Likely Outcomes
- d. Obstacles
- e. Other Players

Idea is to help Attorneys/Parties prepare for a successful Mediation.⁹

Teresa Wakeen calls Attorneys several weeks before Mediation to determine who is going to be there and whether anyone else needs to be there from that Attorney's side or whether he/she believes someone should be there from the other side. She also asks what information each attorney/decider needs from the other side to have a successful mediation. Tries to set up for success. Encourages each side to provide you at least and preferably the other side a Mediation Memo/Brief.¹⁰

Also suggested later with a list of topics to probably discuss:

- A. Mediation Agreement—including confidentiality and handling of fees.
- B. Time constraints. Flight other reasons to conclude at certain time.
- C. Style of mediation: facilitative, evaluative, elicitive, directive, distributive, collaborative, transformative, etc.
- D. Meeting format
- E. Specific identity, position of authority of participants.
- F. Spouse attending.
- G. Insurance and person attending from insurance company.
- H. Fact witnesses, or experts, structured settlement representative.
- I. Telephone conferencing of additional participants and understanding covered by confidentiality.

⁸ Cooley, Vol. 1 at pp. 280-283 citing Morton, Teaching Creative Problem Solving: A Paradigmatic Approach, 34 Cal. W.L. Rev. 375 (1998).

⁹ Cooley, Vol 2. at p. 40.

¹⁰ Wakeen notes.

- J. Prehearing submission: Length and content, confidential or exchanged, timing if exchanged.
- K. Any additional documents needed from opposite side to confirm damages, etc.
- L. Opening statements
- M. Use of exhibits, Power Point, films, etc. ¹¹

2. Pie Charts and Use of Two Mediators (Co-mediation) in Large Construction case.

Massive construction case between Owner, GC and numerous Subs relative to serious water intrusion, with various cross claims, etc. They used two very experienced Mediators with somewhat different backgrounds. Mediators had different viewpoints and less downtime, because each consulted different parties initially. . They then suggested that each Party prepare two pie charts; one using dollars and the other percentages of fault. Most parties were overly generous with their own percentage of fault and money owed (I.e., not much of either) but lot of commonality as to others. Mediators then averaged all the charts and let the Parties know. With a little more effort, resolved the case very close to the averaging of the two pie charts. ¹²

3. Property Division subject to Divorce.

Example is a vacation house fully paid. After discussion and agreement, each party submits a piece of paper to the Mediator with what he/she thinks the fair market value is. If identical FMV, they flip a coin to determine who becomes buyer and who becomes seller. If one higher than the other, highest FMV becomes buyer and lowers becomes seller and they average the two amounts. For instance one indicated \$150,00 and the other \$100,000. The person indicating \$150,000 becomes buyer and price is \$125,000. Buyer saves \$25,000 and Seller gains \$25,000. Alternatively, simply designates high bidder as buyer and low bidder as seller and then they negotiate a fair market price. ¹³

4. Chicken Sandwich case.

Food poisoning from eating chicken sandwich. During caucus, attorney for bread stood up and commented that everyone knew bread had less liability than chicken or mayonnaise suppliers did. Same with lettuce (although no longer so true.) Got each Defendant to write down or confidentially supply Mediator with their best offer and if combined amount equaled or exceeded the Plaintiff's demand would settle. If equaled, would reduce each pro rata to dimply meet demand. ¹⁴

¹¹ Cooley, Vol. 2 at pp. 129-130.

¹² Cooley, Vol. 2 at pp. 40-41.

¹³ Cooley, Vol. 2 at p. 42-43.

¹⁴ Cooley, Vol. 2 at pp. 47-48.

5. Double blind ranges.

Monetary damages case and parties have impasse far apart. One won't go below \$1.2 million and other has top offer of \$300,000. Then suggest that parties individually tell Mediator whether they will accept a range of say \$650,00 to \$850,00, with proviso that only if the party says yes, will he/she/it find out what the other party did. Tell party paying that this means he/she agrees to pay no more than \$650,000 and party getting paid, will accept no less than \$850,000. Not accepting other person's number and more chance of possible movement somewhere within the range.¹⁵

Alternatively, if Parties are sufficiently close, and no more movement, Mediator suggests that he writes down a number that he thinks the case should settle for, somewhere in between the two numbers (not necessarily what is fair or what Judge or Jury would award.). Parties will retire to separate rooms and caucus. If both bring out piece of paper with "Yes" on it, the number is revealed and becomes the settlement number, If either side says no, number not revealed and case impasse.¹⁶

6. Use of Flip Chart/Writing Board:

As Parties express themselves, statements are summarized, validated and recognized. Mediator get agreement that he had captured essence of statement correctly. May want to add check marks or initials as mentioned again or by opposite side. Validates and generates movement. Creates a public Agenda.¹⁷

7. Use of Silence in Mediation:

Well placed silence at a strategic time can be effective mediation tool. Person or persons can reflect, deliberate or just think about the process. Most people are uncomfortable with silence—therefore will speak and possibly move process forward. Mediator must be comfortable with silence.¹⁸

8. What would It Sound Like to You If They Understood.

Stalled mediation. Tempestuous environment. Different wavelengths. "What would

¹⁵ Cooley, Vol. 2 at pp. 68-69.

¹⁶ Cooley, Vol. 2 at p. 130.

¹⁷ Cooley, Vol. 2 at p. 87.

¹⁸ Cooley, Vol. 2 at p 89.

you like to hear them say back to you if they got it.? How would it sound to A if B were to ‘get it’ and ‘interpret it’ back to A. Party A was asked what it would sound like to them if party B were to paraphrase their message. What does A imagine B would say, while paraphrasing A, which would convince A that B had understood A. thoroughly?” Look at the issue from a different perspective.¹⁹

9. Use of Strategic Breaks, particularly in heated cases, such as Divorces.

If you think it is going to be emotional case, announce up front that you reserve right to call for breaks whenever it seems appropriate. Permits Parties to cool down and collect their thoughts. Suggest it if someone threatens to walk out.²⁰

10.Starting BATNA/WATNA conversations between Attorneys and Clients.

Mediator makes following statement during Caucus.

“You have come to the mediation today with a very capable attorney who has prepared you to evaluate your options. Because some mediations parties are either not represented or not as well prepared, at this point in the mediation, I typically ask each side such questions as how much it will cost to litigate the matter if we don’t resolve it today, how long it will take to resolve it through litigation, what are the chances that you may lose in court, etc. so that each party can evaluate their options and make the best decision for themselves about settling., I won’t take the time to go through those questions with you now as your attorney feels that you already know all this information.”

One of three things will happen: 1) this has already been discussed,2) client will start talking to attorney right then or 3) client will question attorney when you are caucusing with other side.²¹

11.Sixty-six techniques for Overcoming Roadblocks:

1. Start gently & with generalities.
2. Emphasize the future and de-emphasize the past.
3. Focus on solutions
4. Use the ‘in principle’ technique.
5. Build an affirmative positive movement of the core agreement.
6. Beware of the premature caucus.
7. Look for opportunities to use transformations.

¹⁹ Cooley, Vol. 2 at pp. 124-125.

²⁰ Cooley, Vol. 2 at p. 142.

²¹ Cooley, Vol. 2 at pp. 148-149

8. Help a party work through discomfort.
9. Help a party reality check.
10. Lead the parties in brainstorming.
11. Use easel or blackboard,
12. Use hypotheticals.
13. Use the phrase 'some folks.'
14. Relieve a party of ownership.
15. Help parties overcome fear of 'going first.'
16. Use decision analysis.
17. Reflect with parties on their bargaining model.
18. Test the margins of positions and focus on interests.
19. Encourage a party to take person ownership of his/her position.
20. Be alert to discern 'nickel and diming' and 'auction' tactics.
21. Explore options to setting precedent.
22. Be alert to identifying 'reactive devaluation' and 'selective perception' behaviors.
23. Control your impatience.
24. Maintain momentum and a positive outlook.
25. Focus on relative priorities.
26. Help parties take a 'fresh look.'
27. Suggest setting an issue aside temporarily.
28. Suggest taking a break.
29. Change something.
30. Give parties' views on the stalemate.
31. Refocus the parties on something else.
32. Ask parties to describe fears.
33. Clarify that parties are not 'locked in' to interim issue resolutions.
34. Use a global summary.
35. Summarize areas of agreement.
36. Suggest a trial period or plan.
37. Creatively explore enforcement/resolutions options.
38. Translate options into a party's personal language.
39. Help parties develop criteria for an acceptable outcome.
40. Be a catalyst, and be creative.
41. Use humor.
42. Consider using homilies.
43. Try a 'think again' approach.
44. Try role reversal.
45. Let each party play 'devil's advocate.
46. Use a 'time-out' mini-interventions.
47. Try listening and interpretation exercise.
48. Try being blunt about the parties' choices.
49. Use reality checking questions.
50. Check to see if all necessary parties are present.
51. Politely handle a dominating attorney or other representative.
52. Consider caucusing with the representative alone.

53. Consider disaggregating gains and aggregating losses.
 54. Be aware of the parties perceptual and emotional connection to money.
 55. Accentuate the positive.
 56. Use parallel option development.
 57. Consider substituting non-monetary thing of value for money.
 58. Consider having the parties write their views.
 59. Foster an appearance of fairness.
 60. Break a whole problem into parts.
 61. Let parties share the burden of the impasse.
 62. Ask one or both parties if they want to end the mediation.
 63. Allow parties and their representative to reflect on their options.
 64. Consider proposing to conclude the mediation.
 65. Consider asking the parties to develop their 'best and final' offers.
 66. Present a summary and overview of the status and progress of the mediation.²²
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Articles, handouts and notes from Fifth Annual Advanced Mediation Workshop: “Intentional Excellence: Mastery of the Mediation Process,” presented at Vanderbilt University, October 12, 2007 and sponsored by the Tennessee Supreme Court Alternative Dispute Resolution Commission with Principal Speaker and Moderator, Teresa Wakeen of Wakeen & Associates Mediation Services.