TOOLKIT FOR MEDIATION ADVOCATES & ADVISORS

How to keep a mediation on track and achieve the best result for your client? [1]

This framework with best practices and general guidelines for professional mediation advocates includes an overview of the stages of a mediation process and describes your tasks in each of them. It is a helpful tool for party advisors to make sure you can maximize the possibilities that a mediation process offers and to effectively monitor the proceedings, so you can achieve the best result for your client. You will also find information of the main factors for succeeding in a mediation and also the pitfalls to avoid.

1. The role of a lawyer as a party advisor in a mediation

A lawyer who is representing and advising a client during a mediation process is called a 'mediation advocate or advisor'. The success rate of mediation is enhanced when all participants and especially the parties' advisers, know and apply the principles of the mediation process. The main factor is to apply interest-based negotiation instead of engaging in positional bargaining or pleading.

The first duty of all lawyers must be to their clients, to carry out their instructions and protect their best interests. A mediation process presents unique opportunities to carry out this duty and achieve outcomes that are unattainable in adjudicative processes, and that are generally easier to achieve than in unfacilitated settlement negotiations among lawyers.

Core tasks of a professional mediation advocate

Competency in mediation advocacy is achieved by applying specific knowledge and skills. According to the International Mediation Institute, IMI, the core tasks of a professional mediation advocate are:

1. **Advising** their clients about the (combination of) Dispute Resolution process choices and the best timing for each process; initiating mediation together with the other party, identifying the mediator and the suitable mediation style and process.
2. **Collaborating** with the mediator and the other party. Having a clear allocation of tasks between lawyer and client**.**
3. **Knowledge** of different negotiation and mediation techniques and process approaches, as well as the relevant (mediation) legislation.

General guidelines to keep in mind

- A lawyer can be the initiator motivating the client to choose mediation. During the mediation, s/he can be acting as coach, preparing the client for the mediation. Especially during the initiation and exploration phase of the mediation and while assessing alternative solutions, you can make a valuable contribution in your role as a legal advisor.
- Your client is the active party in mediation and will be doing most of the speaking.
- The mediator does not decide how the conflict is resolved, so does not need to be convinced with (legal) arguments. The most important is to collaborate with and convince the other party.
- In mediation the emphasis is on communication and relationship, (joint) interests, needs, concerns and motivations of each of the parties. Meaning that the discussion will evolve more about subjective perspectives instead of the legal merits and positions being held.

[1] Scheme based on Mediation Advocacy Competency Criteria of the International Mediation Institute, IMI, and Toolkit Mediation (Manon Schonewille, 4th edition 2013; published in Dutch, The Hague, BjU)

2. The phases and the structure of a mediation process[2]

I. Process control during the pre-Mediation phase

During the preparatory phase the advisor plays an active role and can add a lot of value.

Things to do prior to the mediation:

- Conflict (escalation) diagnose.
- Assessment of dispute, legal- SWOT- and risk analysis. Prepare a list of important facts and figures.
- Map out the client's interests, concerns, needs, motivations and separate them from the (legal) positions; make a hypothesis for those of the other party. Ditto for mapping out the constituency.
- Analysis of alternatives, BATNA, WATNA.[3] Identify norms to set ZOPAs[4] and leverage of each party.
- Process choice: identify (preferred) procedural options for this dispute and these parties, include where applicable possibility of hybrids in process design as displayed above under 1.1. *
- Initiating contact with the other parties or their representatives. *
- Select the mediator together with the other party and their legal counsellor, you can also enlist the help of a mediation institution to administer the mediation (if applicable). Suitability check of mediator:
  - ❑ Check any prior contacts or ties with one party or the dispute at hand; is the mediator unbiased and impartial?
  - ❑ Does the mediators approach fit with these parties and this dispute:
    - Specialized mediator or facilitative generalist? Mediation style.
    - Has the mediator the necessary time available?
    - Language skills, cultural, substantive, and/or specific knowledge?

    Helpful tool: IMI decision tree.
  - ❑ Co-mediators?
- Procedural preparations, customizing the process: e.g., duration of sessions, how to start, joint sessions and/or caucus. Selecting the participants: the relevant parties and their representatives, are any other parties involved? Time scope, dates, venue, etc. Checking mandate, authorization.
- Counsel and prepare your client for the mediation:
  - ❑ Identifying the necessary documents to be exchanged including mediation briefings or position papers, checking mediation agreements and code of conduct, other papers to be shared in the mediation.
  - ❑ Determining information that is needed to get and/or shared.
  - ❑ Timing of sharing of information and discussing interests and options.
  - ❑ Allocation of tasks and roles.
  - ❑ Prepare opening statement: decide type and style of opening statement to use (e.g., argumentative, persuasive, explanatory, expressive, collaborative, etc.), what to include and omit. An aggressive opening statement is in most cases severely counterproductive. Decide who does the opening statement for your side? Or decide whether it is better to refrain from formal opening statements or to distribute with written documents.

The steps marked with * can be covered during a first information meeting or a directional introductory conversation under guidance of the mediator.

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[2] In practice mediations do not necessarily follow a predetermined serial scheme with steps in sequential order. Sometimes all phases are being completed during one mediation session, sometimes only a few or even a single phase is being worked with or revisited. Having said that, knowledge of a framework of the general stages that a mediation process will go through is a helpful tool for party advisors to make sure you can maximize the possibilities that a mediation process offers, so you can achieve the best result for your client.

[3] BATNA is the acronym for Best Alternative to Negotiated Agreement. This is the most positive scenario that can be envisaged if the negotiators fail to reach a settlement, WATNA: the Worst, RATNA: the Realistic.

[4] ZOPA: Zone of Possible Agreement.

II. Process control during the mediation phase

The role of a mediation advocate becomes more enabling, coaching of the client and checking if the mediation stays on track; s/he also functions as a sparring partner for the mediator

1 Opening and agenda setting

a) Introduction and setting of rules by the mediator.
b) Parties and/or their lawyer(s) hold their opening statements.
c) Followed by a first inventory of conflict matters and agenda setting.

Tasks:

- ❑ Supporting information exchange by listening, summarizing facts, asking questions and addressing questions from the other party or the mediator.
- ❑ Holding and facilitating an effective opening statement.
- ❑ Interpreting the other party's opening statement and identifying key information, interests, opportunities and impediments.
- ❑ First exchange of perspectives and information

Tips:

- Understand the effect of anchoring.[5]
- Do not react to the opening statement of the other party yet, but first let all involved hold or do their own opening as if they were the first, to make sure each parties side of the story is clearly coming across instead of following the lead of the other party.
- Listen well, especially to things that are different from what you expected based on your analysis. Hear what is not being said and identify underlying interests.
- Make sure the facts and important information are available and listed. Having a (brief!!) fact sheet with you during the mediation session helps.

2 Exploration

a) The mediator enables a substantive and relationship-oriented interchange between parties and explores underlying, joint and individual interests.
b) The interaction will be focussing even more on needs, motivations, concerns and away from (legal) positions and demands, as well as (mis)communication, misunderstandings, perspectives, etc..
c) The client preferably is speaking for himself (stimulate this).
Depending on the type of mediation, the client and the setting a more or less active role of the lawyer is required:
   - Less active: the client is well able to verbalize important issues, the other party is doing the same, the process is running smoothly, a conflict with a "personal dimension" where parties have to communicate or when they need to interact with one another in the future (e.g. a divorce, a quarrel among colleagues or business partners).

[5] **Anchoring:** A concept from social psychology. The process of thinking takes a lot of energy, so our brain tries to use a shortcut wherever possible. A familiar quantity is an easy anchor. So the moment a number or proposal is mentioned, this is very often used as a reference point. A proposal or a number influences our ability to judge and can therefore influence the course of a negotiation or mediation.

- More active: an internationally operating client (esp in Anglo-Saxon countries) being used to having the lawyers play a more active part, a very emotional client or a client having trouble expressing himself. Furthermore, in business mediations with many legal aspects.

Tasks:

- ❑ Exchange information prioritize interests.
- ❑ Active listening, reformulate and apply good communication skills.
- ❑ Enable the mediator to deal with underlying issues, interests, emotions and relationship.
- ❑ Preventing that the discussion mainly evolves around (legal) demands
- ❑ Coaching of client, making sure s/he can express everything that needs to be discussed.

Tips:

- Know when to request a caucus and what issues to preferably discuss in a joint session.
- Have the mindset to be part of the solution, not part of the problem.
- Actively enlist the help of the mediator to address or deal with specific issues or for breaking through impasse.
- Check balance of power, if necessary, ask the mediator to help establish equilibrium.

3 Option generation and negotiation

a) Generating options and developing objective criteria.
b) Subsequently negotiating a solution and reaching an agreement based on subjective criteria (interests) and objective criteria's and norms.
c) Or conclude that it is not possible to reach an agreement at this time.
d) Probably you have seen already many different solutions to similar problems and now you can fully call forth all your know how in that field. In this phase you can be an important sparring-partner for the mediator. After all he may not introduce possible solutions himself, however you can.

Tasks:

- ❑ While generating options the party advisor can make a valuable contribution by playing a more active part (brainstorming, doing suggestions).
- ❑ As a legal counsel you have seen many different solutions to similar problems and now you can fully call forth all your know how in that field. Be active during brainstorming and support the mediator by introducing several possible solutions.
- ❑ Separate the search for possible solutions from making decisions.
- ❑ During the actual negotiation a party advisor can support the client in weighing the options and comparing them with subjective and objective criteria.

Tips:

- Know how apply interest-based techniques as well as other effective negotiation practices.
- Understand the concept of expanding the pie and reactive devaluation.[6] Know when and how to 'use' the mediator to deliver proposals to the other side.
- Consider using a caucus to privately discuss settlement options and proposals with the mediator.

[6] During negotiations several psychological factors such as the **fixed pie assumption** can kick in. Here, parties see the issues at stake as slices of a metaphorical pie that have to be divided during the negotiation. As a result, each negotiator is inclined to think 'The more the other party gets, the less remains for me'. This leads to positional bargaining, makes it difficult to create value (expanding the pie) and it can lead to **reactive devaluation**: the idea that 'a proposal from the other side will by definition be bad for me, so I am against it.' A mediator can support breaking through these barriers or prevent them from occuring.

- Try verifying the BATNA of the other party and compare possible solutions with the BATNA of your client. Also consider the WATNA and RATNA, they might offer you a fall back. Do reality testing.
- Identify and use leverage
- Apply reality checks, also for your own side. The mediator can help with this.
- Always leave 'the door open' to re-initiate negotiations if you do not reach a settlement. Communicate this to the other party.

4. Closing

a) Verify if all interests are being attended to before deciding on a final settlement.
b) If you have made the restriction your client is only committed to certain arrangements after written confirmation, you will have to send this announcement to the mediator and the other party.
c) Reaching agreements, finalizing and establishing univocal arrangements, putting them SMART in a settlement agreement:

S pecific	Everybody knows what has been discussed, who is taking action, when and how.
M easurable	Its clear if arrangements are being observed and how all parties will be informed.
A chievable	It is achievable and possible.
R ealistic	Parties will (most probably) keep their promises.
T ime	A clear time limit has been agreed.

Tasks:

- ❑ During finalizing stages the party advisor can fulfil an active role by taking care that the agreements being made are univocal and agreed with the constituency of both parties.
- ❑ Urge the mediator to make a SMART settlement agreement, or you can propose doing this yourself (possibly together with the advisor of the other party).

Tips:

- Work with package deals. This is also a safety net for last minute grabs from the other side based on discussions with their constituency.
- Do not include any arrangement in the settlement agreement which is depending on an unexpected event, or uncertain factors (contingencies)..

III. Post-mediation phase

Follow-up and implementation, if necessary you can always enlist the help of the mediator if anything comes up during the implementation.

3. Factors for success and failure in a mediation

The appropriateness for mediation can not only be established by the factual characteristics of a case or the persons participating. Research is showing that the main factors for success in a mediation are that parties are willing to look for a solution of their conflict and are prepared to negotiate. Besides this, it is crucial to select a mediator with the right characteristics and experience.

Key factors for success for mediation advocates in mediation

- ❑ Parties want to solve the conflict.
- ❑ Parties are prepared to negotiate about a solution and they are having negotiating space.
- ❑ Selection of the right mediator for this case and these parties.
- ❑ Being well prepared yourself, having a pragmatic approach and keeping in mind a clear strategy about how to tackle the mediation.
- ❑ Adequate factual knowledge and a realistic approach of the strengths and weaknesses of a case.
- ❑ A good preparation of the client.
- ❑ Client and lawyer can team up with a good division of roles and clear arrangements.
- ❑ Paying attention to the opening statement.
- ❑ Being familiar with the real interests of the client (and having thought about the possible interests of the opponent) and let them be a part of the mediation process, if necessary in a caucus. It is about how to reach the best solution considering the future and the underlying interests. It is not about having the best (legal) arguments, or exerting power.
- ❑ Looking for possibilities to enlarge the pie, so all parties have more to share. Not being content with as quick compromise.
- ❑ The lawyers of both parties are cooperating well during the mediation and the preparation.
- ❑ Both parties are represented by delegates with full mandate.
- ❑ Mapping out the constituency and being explicit about the settlement procedures.
- ❑ Having sufficient negotiating space.

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Key factors for failure in mediation

- ❑ Not being prepared, without an overall plan.
- ❑ Having not prepared the client.
- ❑ A lack of factual knowledge with yourself or your client.
- ❑ Having no clear agreement about the division of roles, not teaming up with your client.
- ❑ Not wanting or being able to cooperate.
- ❑ A too small space to negotiate or a restricted mandate.
- ❑ Having no thought for the necessity of an internal legitimization and consultation with the constituency.
- ❑ Not being well-represented or incompatible participants. Together with your client you will have to identify the issues and assess on which level solutions can be found. Here the right participants should join in, so top management if a strategic approach is required or the management who is directly involved when a solution for a specific project is required. Both sides of the table require the same number of participants with a comparable status and/or impact.

- ❑ Making an aggressive opening statement or making unreasonable demands or giving an unrealistic presentation. This is not only the case with respect to the opponent, but this also applies to the lawyer giving his client a too positive impression of the chances 'to win this case'. As a result the client has too high expectations about the potential compensation to be received and will not focus on a realistic win-win result.
- ❑ Having no idea about the real interests of the client, BATNA WATNA or leverage.
- ❑ Beforehand aiming for 'the largest piece of the pie' instead of looking for possibilities to 'enlarge the pie' so all parties will be getting more.
- ❑ Being content too soon with one possible solution or trying to reach a compromise too quickly.
- ❑ Having a very narrow perspective to one's own role in the mediation (explaining the process, preparing or making an opening statement, giving legal advice and for the rest the client is on his own).
- ❑ Wanting to dominate the process, treating the mediation as if it is a legal battle, preventing the client from really participating in the process.
- ❑ Not presenting the interests during the mediation.
- ❑ Having no idea of the position, perspective or the interests of the opponent.

This overview is an excerpt from the Toolkit Company courses 'Mastering Mediation Advocacy' and 'Mastering Negotiation' and based on checklists in the "Pocket Toolkit Mediation Advocacy", a quick "how-to" reference guide to manage the mediation process efficiently, in every stage of the mediation process and "Toolkit Generating Outcomes".

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