

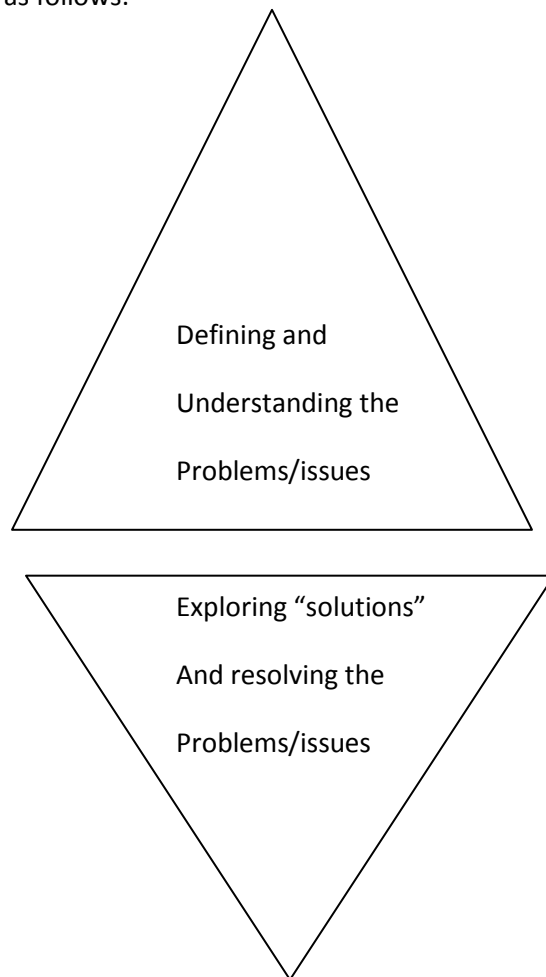
Notes on the Facilitative Model of Mediation

This document is designed to assist students in preparing for the mediation part of *the International ADR Mooting Competition*.

Facilitative mediation involves six phases. They are:

1. The Preparatory Phase
2. The Introductory Phase
3. The Understanding Phase
4. The Negotiation Phase
5. The Agreement Phase
6. The Concluding Phase

These phases can be divided into 2 major stages in the process which can be represented diagrammatically as follows:



The Preparatory Phase

Moore in *The Mediation Process* (1986) observes that “[t]he more preparatory work undertaken, the more likely the mediation is to produce a settlement; preparation lays the ground work for effective mediation.” The preparatory phase may involve the following:

- Initiating mediation and mediator selection
- Engaging the parties
- Screening and assessing suitability
- Collection and exchange of information
- The preliminary conference.

While the structure of this competition does not provide for these steps it is pertinent to acknowledge that they are normally a part of the process of mediation.

Introductory Phase

Most mediators provide a written protocol as to what is expected of legal representatives who are present at mediation. Broadly speaking legal representatives are expected to observe the problem-solving spirit of the mediation and restrict their client and themselves from being adversarial, positional and/or obstructive to the mediation process.

The main role of the lawyer is to be an advisor and a supporter of his/her client and to provide answers and suggestions to any matter put forward by the mediator or requested by the client.

Although the mediator usually makes recommendations on matters such as the seating arrangements, time constraints etc, the legal representative may also assist in these decisions if a possible difficulty is suspected that the mediator may not be aware of.

The Mediator’s Opening Statement

This is made by the mediator at the start of the mediation. It serves a number of useful purposes such as helping the parties attending, who may be feeling nervous or uncomfortable at the outset, to settle down. It enables the mediator to mark his/her authority on the running of the mediation. It provides the mediator with a forum for creating a positive atmosphere to start off the mediation. It enables the mediator to establish some rapport with the parties and to engender a sense of trust and credibility in both him/ herself as the mediator and in the process. It provides another opportunity for the mediator to educate the parties regarding the process and for the parties to seek clarification or information.

OPENING STATEMENT CHECKLIST

- Introduce yourself and welcome parties
- Establish names, mode of address and roles of all present
- Congratulate parties on choosing mediation
- Explain mediator's role (not a judge but a facilitator to help parties settle their dispute)
- Establish neutrality
- Explain parties' roles
- If necessary, explain the roles of lawyers and advisers
- Voluntary process and procedure to be followed if one party wishes to terminate
- Obtaining appropriate advice encouraged
- Explain what is likely to happen after conclusion of opening statement
 - Each party to make an opening presentation
 - Joint sessions and caucuses as necessary
 - Use of notes and white board
 - Settlement agreement
- Confidentiality and the extent of that confidentiality
- Privilege ("without prejudice") negotiations
- Explanation of the special nature of the confidentiality of the caucus
- Ground rules – positive commitment
 - One person to speak at a time and the other party to listen
 - Common courtesy – no personal oral attacks
- Authority to negotiate and settle
- Time
- Questions, now and later

Understanding Phase

1. The Parties Opening Statements

Each party to the dispute will be asked to make an opening statement. The mediator determines who will start. The statement should provide a brief history of the dispute from the party's point of view and issues or concerns that they want to resolve. Generally, the opening statements are made by the parties rather than their representatives.

2. Mediator Summarises the Parties Opening Statements

The mediator will summarise back to the parties what has been heard, including feelings, facts, concerns and issues. By doing so the party knows that the mediator is listening and understanding. When summarizing, the mediator should make it clear to the parties that they are free to correct the mediator if the summary is incorrect. The mediator will re-phrase

negative or inflammatory language into a more neutral version and will check that the summary is correct.

3. Identifying Common Ground

Common ground refers to identifiable areas of agreement between the parties (substantive, procedural or psychological) or to something of mutual concern to the parties albeit for entirely different reasons. By highlighting the common ground, the mediator re-enforces the positive atmosphere of the mediation. It serves to engender a climate for future agreements.

4. Identifying the Issues and Setting the Agenda

The mediator is now able to identify, with the parties assistance, the issues and concerns which will form the focus of the mediation. As the issues are identified the mediator will note them. A joint list of the issues should also be written down after the completion of the opening party statements in full view of the parties on a white board or flip chart. The issues should be framed in neutral, positive language and should be mutualised where possible. They should not be numbered until they have been prioritized by the parties. Having identified the issues the mediator can facilitate the parties to work together to prioritise the agenda i.e. deciding in which order the issues will be discussed.

5. Exploring of Issues

The purpose is for the parties to be able to discuss and comment on opening presentations, clarify issues, facts and misunderstandings, express their feelings in a controlled environment and understand each other's underlying concerns and interests. The mediator needs to facilitate constructive communication and focus the parties onto needs and interests by use of open and clarifying questions, summarizing and re-framing.

If there is a separate caucus or meeting between the mediator and one of the parties the following applies;

What is said in caucus by the mediator and that party remains confidential from the other party to the mediation. The mediator is not to disclose anything said during the caucus unless specifically given permission to do so by the caucusing party.

Negotiating Phase

The mediator will use a series of joint and caucus sessions during this stage to facilitate option generation, reality-test these options, overcome any impasses in the negotiations and lock in an agreement. Wherever possible it is preferable to commence option generating with the parties together as people agree more easily to a resolution they have had a role in formulating.

(i) Option Generating

The mediator encourages parties to communicate directly with each other.

The mediator fosters an open, non-judgmental atmosphere, conducive to encouraging the parties to think creatively without analyzing or criticizing each other's options or having to make a commitment.

(ii) Reality Testing Options

Once a number of possible options have been generated it is necessary for the parties either jointly or in caucus to assess these in terms of how they meet their own and /or the other party's needs and interests. The mediator should encourage the parties to consider the possible consequences of the various options in terms of whether they can be implemented and are durable or viable. The mediator could also encourage the parties to consider 'in principle' agreements pending further advice or consideration.

(iii) Bargaining/Making Offers

This is the stage in the mediation when the mediator's role is to assist the parties to formulate and make offers based on the options generated. These offers may be made directly by the parties in a joint session or through the mediator in caucus sessions.

(iv) The Negotiation Impasse

This is the stage in the mediation when the parties become "stuck" or entrenched. Mediators need to be aware of possible causes and strategies for dealing with/or resolving the impasse when it arises. It is also beneficial for the legal representative to have knowledge of these particular strategies and to have an understanding as to what the mediator is trying to do and avoid upsetting that particular strategy. The legal practitioner should understand why these deadlocks occur and try to advise his client in relation to avoiding situations that may provoke a deadlock.

Agreement Phase

1. Reaching Final Agreements

The mediator needs to check potential agreements in joint and caucus sessions to determine whether all the agenda items have been resolved and whether the agreements satisfy the parties' interests.

2. Final Reality testing the Terms of the Agreement

The agreement, if there is one, is then finalized in joint session to reality test and 'fine tune' the terms.

3. Drafting the Agreement

Once the agreement has been satisfactorily reality tested, it can be turned into a written document. If the parties have lawyers present the drafting is usually done by the lawyers. If lawyers are not present, the mediator will draft the Settlement Agreement with the parties' assistance and involvement.

Concluding Phase

1. Closing Statement

Regardless of whether settlement is reached or not, the mediator should end the mediation in a courteous and positive manner. He or she should commend the parties for trying mediation and on their efforts and conduct throughout. He or she should reassure them regarding the confidentiality and explain post-mediation procedures.

2. Post Mediation

Although not directly relevant to the ADR Moot, the mediator post mediation is generally involved in:

- Guiding the settlement agreement through a process or review and ratification by external experts or bodies to whom the parties are accountable.
- Filing any necessary paperwork/certificates.
- Monitoring and supervising the implementation of the terms of the settlement agreement.
- Conducting follow up reviews to ensure compliance or to remedy any problems.
- Releasing of documents or funds once an obligation under the settlement agreement has been fulfilled.
- Referring the parties to other professional/experts or to other Dispute Resolution Processes without breaching the confidentiality principle.
- Leaving the offer open for parties to return to mediation at a future date if no agreement or only a partial agreement was reached.