MEDIATION
The Senate Table

Lynn and Sandy have been law partners for 12 years. They have decided to part ways due to divergent interests. They have been able to divide all their assets with the exception of a table that sits in their office. The table was discovered at an antique sale by Lynn's spouse. Sandy’s spouse restored the table to its present beautiful condition. The partners paid for the table with firm funds and later discovered that it was a valuable piece of furniture because it had originally sat in the Senate chambers of the Missouri state legislature at the commencement of statehood. It has become quite a conversation piece for clients and other lawyers. Each of the partners wants the table.
<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
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<tbody>
<tr>
<td><strong>A</strong></td>
<td></td>
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<tr>
<td>Binding</td>
<td>Limited facts/time frame</td>
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<tr>
<td>Efficient</td>
<td>Winner/loser</td>
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<tr>
<td>Powerful Neutral</td>
<td>Limited solutions</td>
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<td></td>
<td>Difference in Standards</td>
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<td></td>
<td>Limited Standards/Fair?</td>
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<td><strong>M</strong></td>
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<tr>
<td>Win/win- compliance</td>
<td>Neutrality?</td>
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<tr>
<td>Party Satisfaction</td>
<td>Quality of mediator</td>
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<tr>
<td>Speed</td>
<td>Impasse</td>
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<tr>
<td>Preserves relationship</td>
<td>No clear standards</td>
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</tbody>
</table>
Characteristics

- Voluntary (usually)
- Neutrality of mediator
- Confidential
- Private
- Solution (not fault) oriented
Factors that Favor

• Courts can’t give relief
• Desire to preserve relationship
• Speed
• Costs
• No need to establish precedent
• Parties have difficulty negotiating
• Differing appraisals of law/facts
• Parties want control over process/outcome
• Private
• Unassisted negotiation could lead to polarization
• Multiple parties
Other rationales

- Resolve part of a case
- Narrow or focus issues
- Test a theory
- Evaluate other’s/your client’s jury appeal
- Work out procedural schedule
- Determine differing party interest in multi-party dispute
- Use mediator as a reality orienteer
When Mediation is inappropriate

• Legal precedent needed
• Desire for vindication or need for blame
• A party will not bargain in good faith
• Too great a power imbalance
Mediator Orientation

• Problem Definition

• Narrow: Efficient but more likely to result in impasse

• Broad: Expands pie but lawyers are often uncomfortable with it and it may create too many issues.

• Evaluative: Gives better idea of BATNA but parties may feel betrayed

• Facilitative: Can fine tune solution to parties’ needs but if parties are not knowledgeable or skilled at negotiation it may take too much time.
Another Approach

Transformative Mediation
Stages of mediation

- Introductory
  Contracting
- Understanding the problem
  Information gathering
  Identification of Issues
  Agenda Setting
- Generating options
- Reaching Agreement
- Drafting/Implementation
Introductory Statements

- Goals - explain process; contract with parties; set tone and structure
- Mutuality of process
- Role of Mediator
- Confidentiality
- Non-representation
- Caucus explanation
Information Gathering

- Provide opportunities for expression of emotion/feelings
- Identify perceptions of events
- Discover areas of agreement
- Use open-ended questions to gain additional information.
- Make tentative “diagnosis” identify strategies for helping
- Begin Identifying issues
Developing the Issues/Understanding the Problem

- What brings you here? Perceptions of events, feelings, wants and needs
- Interview techniques
- Re-framing
- Active listening
- Do you understand other’s point of view?
Generating Options

- Focus on interests
- Orient towards future
- Brainstorming
- What is the role of law- relevant but not controlling
- Reality orientation
Reaching Agreement

Strategies

> Build on shared interests
> Dovetail complimentary interests
> Compromise, trade-off conflicting interests
Drafting/ Implementation

• Clarify all terms
• Legal effect
• Attorney review
• Court approval
• Contract requirements
Confidentiality

Sources of Protection-
    Common law privilege
    Exclusion of settlement offers
    Agreements not to disclose

Statutory Privilege-
    what information is covered?
    where is it protected?
    who holds privilege?
    what are exceptions?
Representing Clients in mediation: Selecting a mediator

- Purpose of mediation?
- Evaluative/ Facilitative
- Expertise
- Training
- Encourages lawyer participation
- Neutral site
- Pre-mediation submissions
- Fees
Representing Clients in mediation: Pre-mediation Submission

• Concise statement of issues
• Strengths & weaknesses
• Chronology
• History of negotiations & proposals
• Who will be present
• Copies of pleadings? Cases?
Representing Clients in Mediation: Preparation

- Agenda (pre-mediation submission)
- Describing the process
- Need for continued discovery
- Legal advice re: issues
- Negotiating
- Attendance - How will role differ
- Encourage patience. Flexibility, open-mindedness, listening
Representing Clients in Mediation: Lawyers Role

• Rare chance to communicate directly with other party
• Do not cross-examine
• Do not allow cross-examination of your client
• Be a good listener
• Emphasize good faith
Representing Clients in Mediation: Opening Remarks

- Acknowledge belief in process & good faith
- Acknowledge strong feelings
- Humanize client
- Explain clearly your position & interests underlying them
- Avoid absolute words such as “won’t”, “never”
Representing Clients in Mediation: Understanding the Process

• Collective session: prepare client well
• 1st caucus: Mediator getting to know parties, identify issues, look for interests, permit expression of strong feelings and make an initial assessment
• 2nd caucus: trying to get parties to identify strengths & weaknesses
• 3d: caucus and thereafter: Negotiation dance