

Understanding The 5 Stages Of Mediation In A Virtual World

By **Wynne Carvill** (July 22, 2020, 6:28 PM EDT)

Mediation is a process with defined stages, each of which has a purpose. Whether the mediation is in person or takes place on a virtual platform like Zoom, the general process remains the same.

The rise of virtual mediation may, however, change the timing and manner of each stage. These changes may soon spread to in-person mediations and influence the expectations participants have for either process.

Stage One

In stage one, the mediator must establish a relationship with both counsel and the parties. Everyone must be heard, and the process must allow time not only to hear the participants, but to let them know that they have been heard.

This requires that the mediator digest the mediation statements in advance, hear what the parties say — listening especially for what they were unwilling to put in print — and then respond in a way that communicates understanding, if not agreement. The mediator's ability to do this is crucial to building trust.

In traditional, in-person mediations, this initial stage often takes the entire morning of the mediation day. With virtual mediations, though, this often occurs in pre-session calls the week prior to the mediation.

While I have always made such calls in advance of any mediation, with the rise of virtual mediations, it is not unusual for these initial consultations to be longer due to the need to discuss the technology that will be used and to make sure both counsel and the client are prepared. In the course of these discussions — particularly if the client is included — it is not uncommon for the discussions to delve into the substance of the dispute and the client's feelings about the dispute and the process. As a result, the first stage of the mediation is often started well in advance.

Counsel should take steps to prepare the client for participation in pre-session calls. A timely mediation statement can allow the mediator to prepare for the pre-session call. Ideally, these calls should take place on Zoom or a similar platform rather than by telephone. This will familiarize the participants with the platform, advance the first stage of the process and help all participants move beyond the



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adversarial posturing that all too often consumes the morning of the scheduled mediation session.

Stage Two

This stage involves each side moving beyond its position and the mediator discussing with each side its own interests and its perception of the other side's position. The goal is to determine what each side needs to achieve in order to meet its underlying business, personal or other imperatives.

The mediator should move the discussion from one that pierces whatever a party's current demand or offer is to one that focuses on underlying attitudes, personalities and circumstances. It is also an occasion to get each side to try to discern the other side's needs. This process often grows naturally out of stage one, but it cannot be rushed. If successful, this stage may lay the foundation for identifying nonmonetary solutions.

The parties can advance the progress into this stage by toning down the aggressive advocacy in their respective mediation statements, going beyond simply stating their positions on each issue, and suggesting areas where the parties may have mutual interests. Exchanging mediation statements drafted in this way can advance the process by signaling a willingness to step back from combative litigation and, at least in the context of the mediation, look at the broader picture.

For some reason, a number of mediators have noticed that the virtual platform assists in changing the tone of the discussions — perhaps because counsel does not feel obligated to demonstrate his or her advocacy skills in the virtual setting, or maybe just because counsel and client are each in the more comforting setting of their home or office.

Stage Three

This stage involves exchanging the initial demands and offers. This should not be done prematurely.

Too often, one or both sides have opening demands or offers that are too extreme and can be counterproductive. If trust has been established and each side has shared its perspectives on its underlying interests and those of its counterparty, a mediator may be able to coax a more reasonable offer or demand, which may in turn evoke a reciprocal response.

In virtual mediations, fostering a more in-depth engagement in the pre-session calls may make it easier to move into this stage earlier on the day when the mediation is formally scheduled. Too often in traditional, in-person mediations, this stage is not reached until later in the morning or even after lunch.

Stage Four

This stage focuses on follow-on negotiations. During this phase, depending on the case, some mediators may find themselves more engaged in case evaluation and challenging the premises underlying each side's positions. As counsel will know their cases better than the mediator, in order for the mediator to be effective, each party must clearly and objectively identify the strengths and weaknesses of its case.

In this phase, it is not uncommon for a mediator to press counsel to state the opposing side's case in front of the client to ensure they fully appreciate its strengths. The mediator may supplement that with perspectives gained from discussions with the other side. When the process stalls, one of the parties or the mediator may propose brackets to get each side to discuss ways to narrow the gap separating them.

Follow-on negotiations are similar in both in-person and virtual mediations. In a mediation that involves highly charged allegations or emotional parties, a virtual setting may dissipate the tension because people — especially, those who are more vulnerable — are usually more comfortable in their own homes rather than an office environment.

A virtual mediation may also allow broader participation by decision-makers, underwriters, family members and the like — all of which can be very constructive. On the other hand, a virtual mediation may introduce distractions such as children or pets. Potential distractions should be addressed in the pre-session call and mitigated by providing for scheduled breaks or taking other measures.

Stage Five

This stage involves closing the deal. Sometimes this can be done only with a "mediator's proposal," but that should be a last resort, as it may keep one or both sides from fully and candidly engaging with the mediator.

The best settlements are almost always those reached by both sides remaining engaged in the process rather than relying on the mediator to come up with a solution. While the mediator may suggest a critical feature or twist, the ability or willingness of one or both parties to make a dramatic move at the end should not be discounted.

However a deal is reached, the best practice is to document the agreement in a manner that makes it enforceable.[1] Drafts should be exchanged in advance and discussed at different points in the negotiations. Differences on the template often provide a welcome change of pace or break at points when negotiations stall.

Discussions of the template may also uncover other issues that need to be resolved for the parties to reach agreement. With the ubiquity of laptops, it is easy to generate successive drafts during the mediation. If the mediation is virtual, DocuSign or a similar technology may be used to secure the necessary signatures.

Increasingly, some mediations continue beyond the scheduled day due to lack of agreement. On those occasions, there is a sixth stage, which involves the mediator following up with the parties either shortly after the mediation or in an event such as a ruling on a summary judgment or other motion or the conclusion of expert depositions.

Once a mediator is invested in a case, he or she will want to follow up to see if a settlement can still be reached. However, the parties should resist deferring a deal until outstanding contingencies are resolved. The ultimate contingency, of course, is trial, and parties often view mediation as a way to avoid that risk and expense. It is rarely too early to settle. When parties reach a settlement, they sometimes look back and wonder what they actually gained from any intervening delay and the additional expense.

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[1] See, e.g., California Code of Civil Procedure § 664.6.