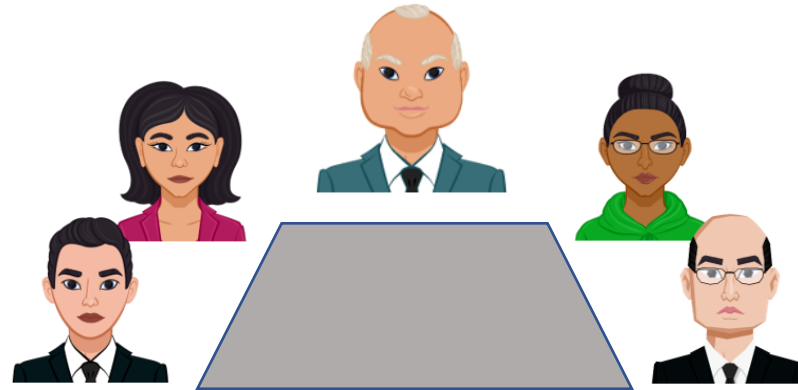


State Courts' Virtual Court Volunteer Mediator (CVM) Training

11 November 2022

Helping parties to negotiate constructively and effectively towards a settlement



Presenter:

David Lim

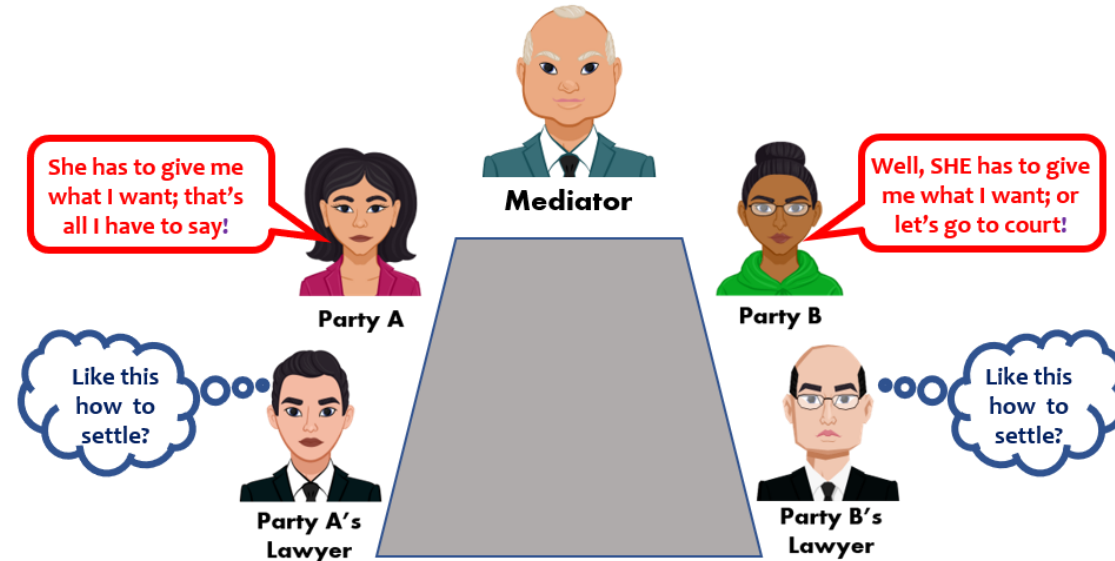
(Mediator / Mediation Trainer / Former District Judge)

Introduction

- **Mediation is meant to provide disputing parties with a non-confrontational platform to negotiate an amicable settlement.**
 - Parties to a mediation seek to resolve the dispute in a manner which addresses their interests /concerns in the best possible way in the prevailing circumstances.
- **Most parties do come to mediation intending to resolve the dispute.**
- **Often, however, they seem to come unprepared, or not knowing how to, negotiate constructively with each other.**
 - Preparation for the mediation is cursory and positional.
 - They also appear unready or unwilling to engage with each other.

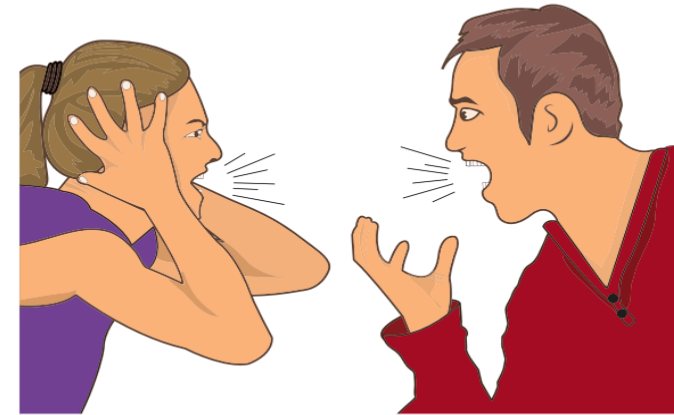
Common signs they're not prepared to engage or negotiate:

- Very brief, positional opening statements.
 - *"That's all I have to say..." / "I want to see what they have to say ..."*
- Rehash of pleaded claims and remedies.
- Reticence:
 - non-verbal cues that suggest discomfort or unwillingness to engage with each other.
- Lawyers tend to stick to legal positions, with not much else to add.



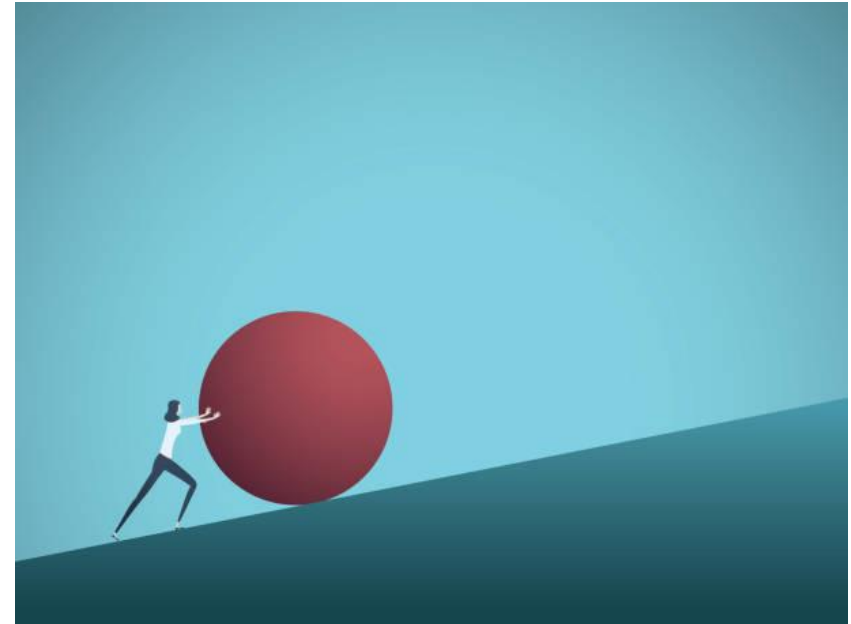
What's the cause?

- **Animosity / Suspicion / Mistrust**
 - Ongoing dispute & lawsuit.
 - Damaged relationship.
 - Discomfort engaging with each other.
- **Emotional / Psychological resistance**
 - Repugnance at having to negotiate or collaborate with the other party to resolve a dispute which they have caused.
 - Unwillingness to apply their minds to something considered unpleasant or uncomfortable.
 - Inclination towards litigation.
- **Entrenchment in legal rights and potential legal remedies**
 - Parties may each think they have a strong case.
 - Cue from lawyers.
 - Lack of careful analysis of their case.
- **Lack of preparation**
 - Lack of negotiation skills.
 - Lack of guidance (e.g. from lawyers).
 - Lack of motivation.



Challenges for the mediator:

- **Difficult to work the process.**
- **Difficult to get parties to engage when they're not ready or willing.**
- **Difficult to get parties to negotiate if they've not prepared themselves.**
- **Difficult to get the parties to collaborate if they're unwilling.**
- **Difficult to repair their relationship.**
(if significantly damaged).
- **Time constraints** for the mediation.
- **It's for the parties to persuade each other, and not for mediator to persuade parties to settle.**



What value can a mediator bring?

- **Managing the process**
- **Facilitating communication**
 - Fostering the provision of information & better understanding between parties.
 - Interventions – questioning; summarizing; reframing; encouraging direct communication.
- **Managing communication**
 - Ensuring each party has a chance to speak & be heard.
 - Ensuring communication remains respectful & constructive.
 - Interventions – ground rules; maintaining control; interjections; time out; private sessions.
- **Where parties appear ill-prepared for negotiation, there can be a more proactive role for the Mediator to guide the parties —**
 - in their preparation for the negotiation, and
 - in the way they negotiate with each other,

with a view to ensuring that their negotiations should remain progressive, constructive & effective throughout the mediation session.

Parameters:

- **The mediator —**

- **must remain neutral & impartial;**
- **must not give advice;**
- **is not an agent / representative / advocate / negotiator / decision maker, for any party;**
- **must not resort to undue influence;**
- **may —**
 - **share his/her observations; or**
 - **offer some perspectives / suggestions;****but must allow the parties to decide whether to consider.**

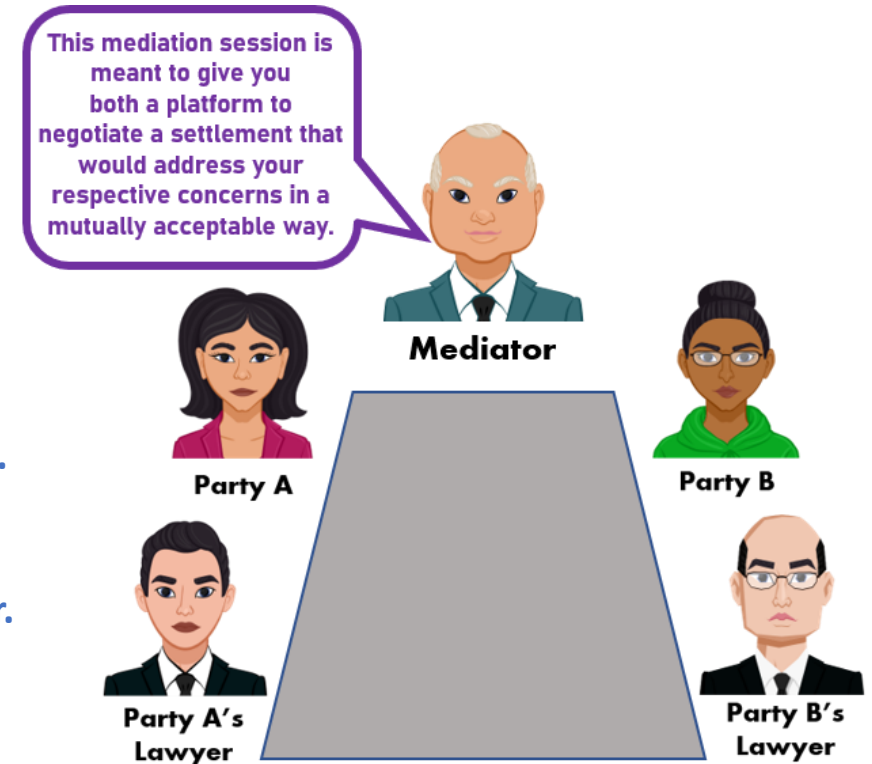
Recommendations:

Recommendations:

1. Set their mindset during the Mediator's Opening Statement

- Emphasize that –
 - mediation is meant to give them a platform to negotiate an amicable, mutually acceptable settlement.
 - they are the decision makers;
 - they need to factor each other's interests and concerns into the solutions.

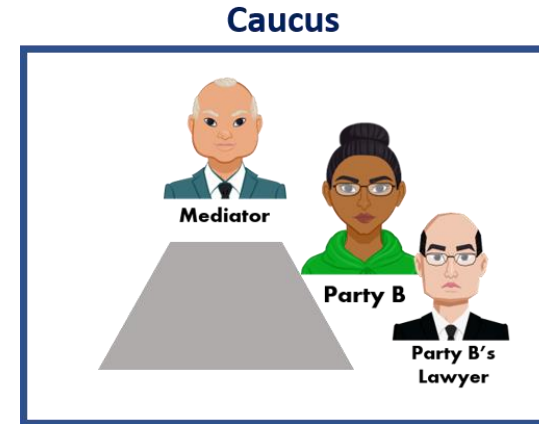
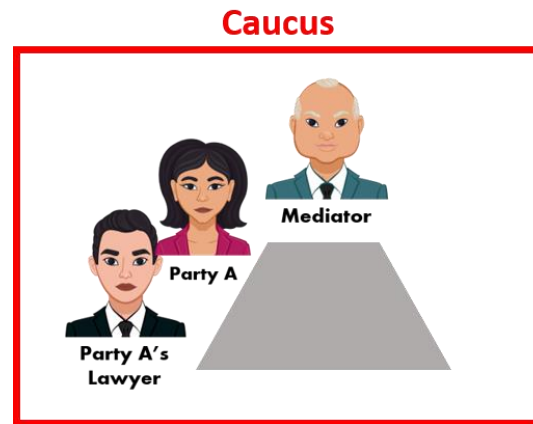
(Do this in ANY case.)
- Observe their interaction during their Opening Statements.
- Don't suffer the parties to endure a joint session if they appear unready, unwilling or uncomfortable to be together.
- Break into private sessions to help them prepare for constructive negotiation.



Recommendations:

2. Prep them in caucus

- **Private sessions create a safe space for candid, focused, objective discussion.**



- **What are your Goals for mediation?**
- What do you seek to achieve/avoid?
- What might their goals be?

- **What concerns are you seeking to address?**
- What might be the concerns they are seeking to address?

- **What are your Best (BATNA) & Worst (WATNA) case scenarios if there's no settlement?**
- What might theirs be?

- **What do the parties agree on?**
- **What do the parties disagree on?**

- **What are the issues that need to be discussed with them?**
- What issues might they want to discuss with you?

Recommendations:

3. Help them formulate constructive Settlement Proposals

A constructive settlement proposal is one which –

- a. seeks to address the parties' respective concerns in the best possible way in the prevailing circumstances;**
- b. is based on fair, objective and reasonable criteria and considerations;**
- c. is systematic and feasible (SMART);**
 - Specific / Measurable / Achievable / Realistic / Time-related
- d. has significant likelihood of helping to resolve the dispute in a mutually acceptable manner;**
- e. is presented with explanations as to —**
 - ♦ why it is being made;
 - ♦ the basis / objective criteria on which it is being made; and
 - ♦ how it is envisaged to resolve the dispute in a mutually acceptable manner.

Recommendations:

3. Help them formulate constructive Settlement Proposals (cont'd)

- **Five methods of resolving conflict:**



Recommendations:

3. Help them formulate constructive Settlement Proposals (cont'd)

- **Five methods of resolving conflict**

Competition: Non-negotiable Demand: What the party must have.	Accommodation: What the party is prepared to give to the other party.	Avoidance: What the party is prepared to forgo.	Compromise: What the party is prepared to give in exchange for receiving something from the other party.	Collaboration What the party is prepared to work on jointly with the other party.
<i>"He has to pay me something. Otherwise, let's go for trial."</i>	<i>"I can let him keep the items he claims are his, although I doubt the validity of his claim."</i>	<i>"I won't lodge a police report against him as I don't see how that will help us resolve the matter."</i>	<i>"The goods do not exactly meet my specifications, but since he's prepared to give me a 25% discount, I'm prepared to accept them."</i>	<i>"I'm prepared to jointly appoint a surveyor with him to assess the damage, and share the costs, if that'll help us resolve this dispute quickly."</i>

Recommendations:

3. Help them formulate constructive Settlement Proposals (cont'd)

- **Often in dispute negotiation, parties may not be able to find any positive Zone of Possible Agreement (ZOPA)**



- **The factual and circumstantial matrices may not support a “win-win” outcome.**
- **However, through parties compromising or otherwise applying a combination of the 5 conflict resolution approaches —**
 - **the bargaining gap may be narrowed or closed, and**
 - **a “good enough” outcome may be achieved.**

Recommendations:

3. Help them formulate constructive Settlement Proposals (cont'd)

- **What is your settlement proposal?**
 - **Details**
 - apply the 5 methods for resolving conflict **having regard to the parties' respective interests / concerns.**
 - **How is it going to work ?**
 - Process & feasibility testing.
 - **How does it address their interests / concerns?**
 - **Piecemeal or package?**
- **How would you explain it to them / persuade them to consider or accept it?**
 - Reasons;
 - Basis;
 - Criteria;
 - Values and benefits;
 - Other persuasive factors;
 - Relationship / goodwill, etc.

- **What might cause them to reject it?**
 - Step into their shoes...
 - Review how the proposal addresses their interests.
- **What adjustments would you make?**
 - How would these adjustments help?
- **What if the proposal is not accepted?**
 - Find other ways to persuade?
 - Let them counter-propose?
 - Make a new proposal?

Do the same to help the other party formulate the counter-proposal.

Recommendations:

4. Pick the best person to convey the message



the Mediator?



the Party?

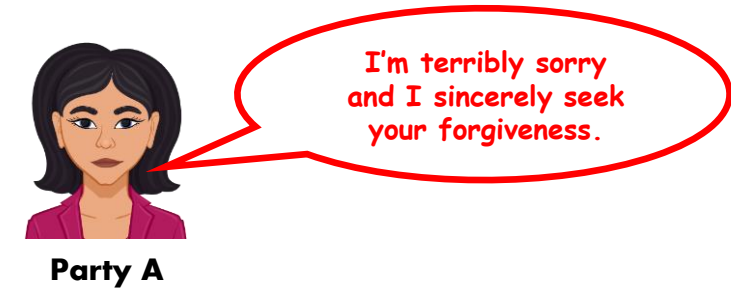
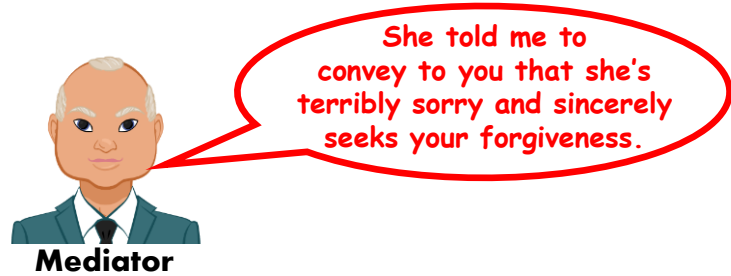


the Party's lawyer?

- **What is the desired impact?**
- **Would it be more advantageous for the message to be conveyed by a particular person?**
 - E.g., because of the need for neutrality & objectivity / preserving rapport / persuasiveness / softening the blow, etc.

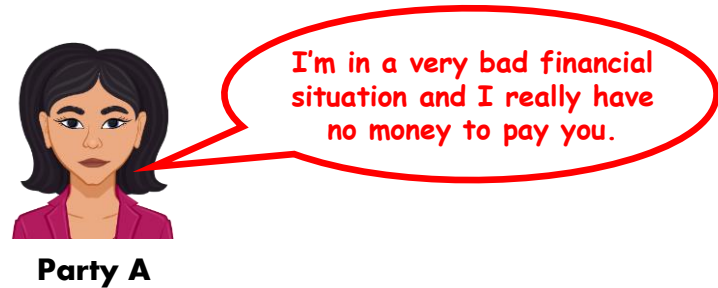
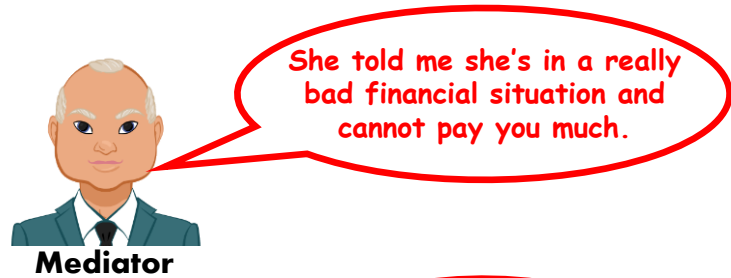
Recommendations:

4. Pick the best person to convey the message (cont'd)



Recommendations:

4. Pick the best person to convey the message (cont'd)



Recommendations:

4. Pick the best person to convey the message (cont'd)



Mediator

Generally suitable for conveying all messages neutrally.

Difficult message that needs to be heard and considered objectively.



Party A's
Lawyer

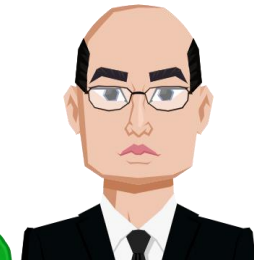
Message has high legal content.

Difficult message that needs to be delivered without breaking rapport between the actual parties.

Mistrust between parties, but not between parties and each other's lawyers.



Party B



Party B's
Lawyer



Party A

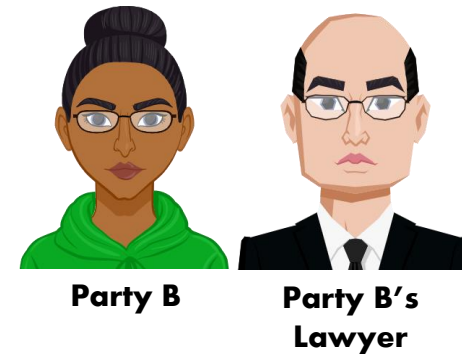
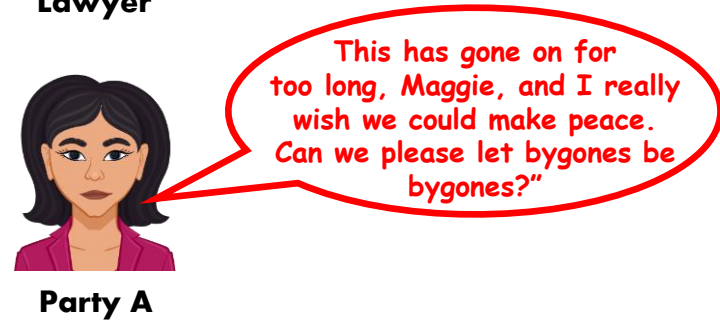
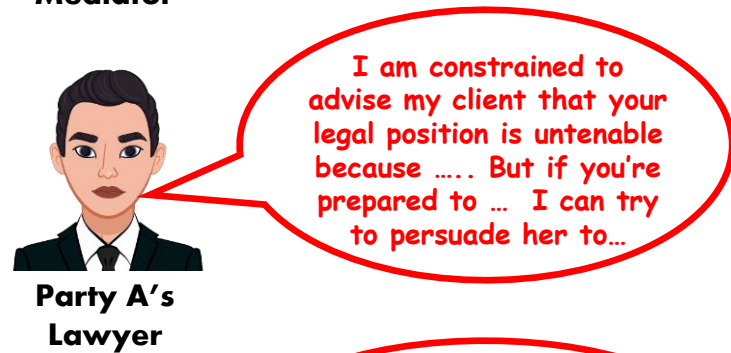
Message has high personal or intimate content.

Message needs to be delivered with sincerity.

Party wants to repair relationship.

Recommendations:

4. Pick the best person to convey the message (cont'd)



Recommendations:

5. Coach them to say it right

- **A well-intended message, if not delivered appropriately, can —**
 - **create a wrong impression[and/or**
 - **evoke an unwarranted reaction.**
- **It is important to craft and deliver the message –**
 - **clearly**
 - **consistently**
 - **and with emotional intelligence.**
 - Maximize chance of positive reception.
 - Minimize chance of negative reception.

Questions for the party to consider:

- What's the message you want to convey to them?
- How are you going to say it? (Let's hear it)
- How do you think they might react? (Be them for a moment...)
- Will that be helpful? (Why yes? / Why not?)
- Is there a better way to say it?
- Do you want to practice first?



Recommendations:

5. Coach them to say it right (cont'd)

- **Encourage / support** the party with suitable eye contact or gestures.
- **Prompt / remind** the party if he/she seems to have forgotten certain important points.
- **Use questions** to elicit crucial details if the party seems to have glossed over them.
- **Gently bring the party back on track** if the party seems to be losing focus or direction.
- **Step in to do damage control** if the party seems to be going on a potentially detrimental tangent.
- **Invite the party's lawyer** to reinforce the party's points.
- **Summarize the party's key points** at the end of the party's speech.
- **Call for a break after summarizing.**



Recommendations:

6. Give a party time to process significant information before responding

- **“Significant information” = information that may —**
 - impact or shift a party’s perspectives;
 - affect a party’s feelings;
 - necessitate a party reconsidering his/her own stances / demands;
 - bring the parties closer towards settlement.
- **Examples:**
 - Apology;
 - Plea for understanding / compassion;
 - Explanation of a situation;
 - Revelation of intimate information;
 - Provision of important data;
 - Explanation of a legal position;
 - Making / variation / rejection of a settlement proposal.
- Sometimes the significant information might not be something the recipient expects.
- **Mediator’s aim:**
 - avoid knee-jerk / rash responses (e.g. because of cognitive biases);
 - encourage a measured, well-thought-through, constructive response from the recipient.

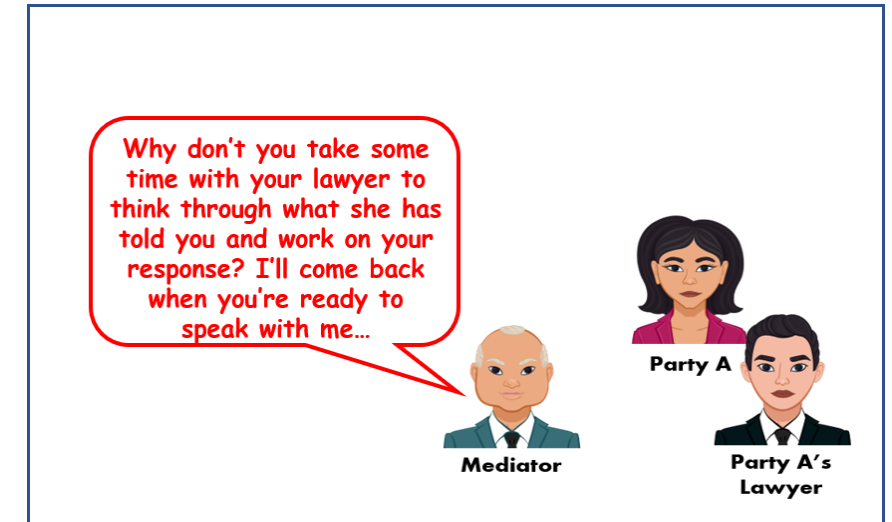


Recommendations:

6. Give a party time to process significant information before responding (cont'd)

Steps:

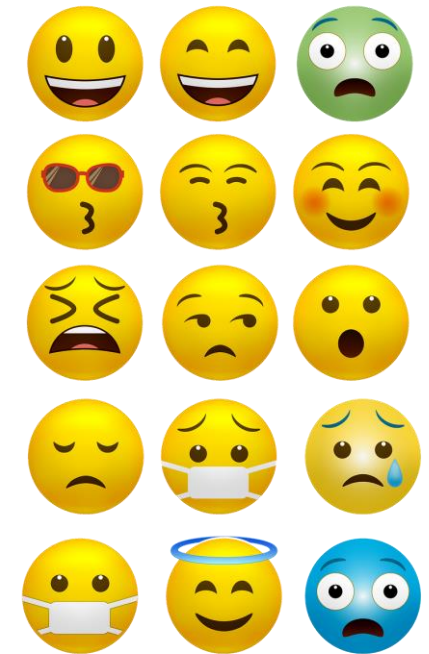
- Call for a **short break** after the delivery of the significant information.
- In caucus, **highlight key points** for consideration.
- Allow the recipient **time to mull over the significant information** with his/her lawyer and work on his/her response.
- **Review the intended response** with the party and his/her lawyer.
- **Coach the recipient** to deliver his/her response constructively.
- **Bring parties together** for the recipient to deliver his/her response.
 - (this time giving the other party time to process before responding).



Recommendations:

7. Help them recognize and address emotional impediments

- Negative emotions —
 - are often **indicative of an underlying concern**; and
 - can **hinder the negotiation process** in a mediation, e.g.:
 - distract attention from substantive issues;
 - hinder thought & decision making processes;
 - engender mistrust;
 - complicate communication;
 - foster positional bargaining.



Recommendations:

7. Help them recognize and address emotional impediments

- **Possible (conventional) approaches to dealing with emotions:**

- **Teflon**

- (Ignore / don't respond)

- **Relevancy check**

- (“How will this help to resolve the dispute? We need to focus on ...”)

- **Normalization**

- “It’s alright to feel this way; that’s how most people in your situation will feel... (But ...)”

- **Mutualization**

- (“I’m sure both of you have very strong feeling about ... (But...)”)

- **Acknowledgement**

- (“I can see why you feel so unhappy about the situation ...” / “I understand how you feel .../ “I hear you ...” / “I feel you ...”)



Recommendations:

7. Help them recognize and address emotional impediments

A helpful approach:

1. **Keep the negotiation environment safe and comfortable for everyone.**
 - Manage the process such as to allow parties to express and receive emotions in dignity.
2. **Assuage the emotion as early as possible so that it does not fester and become an impediment to the negotiation process.**



Recommendations:

7. Help them recognize and address emotional impediments

Questions for a Mediator to assess an emotional situation:

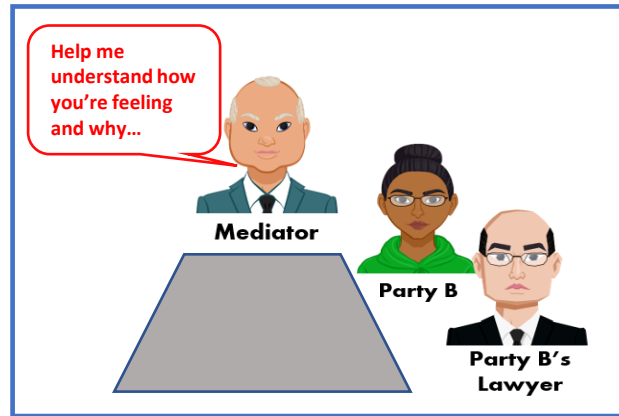
1. What emotion **do I sense** the party to be expressing?
2. What **caused (or is causing)**, the party to feel this way?
3. How is this emotion **affecting the party**?
4. How might this emotion **affect (or how is it affecting)** **the negotiation** between the parties?
5. What is the **appropriate intervention** for me to apply in order to **improve the emotional dynamics** of the mediation?



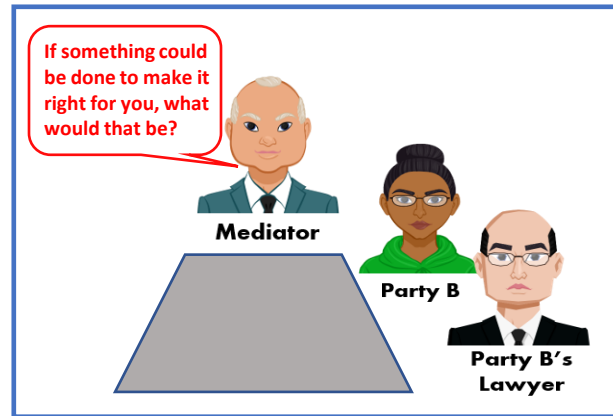
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7. Help them recognize and address emotional impediments

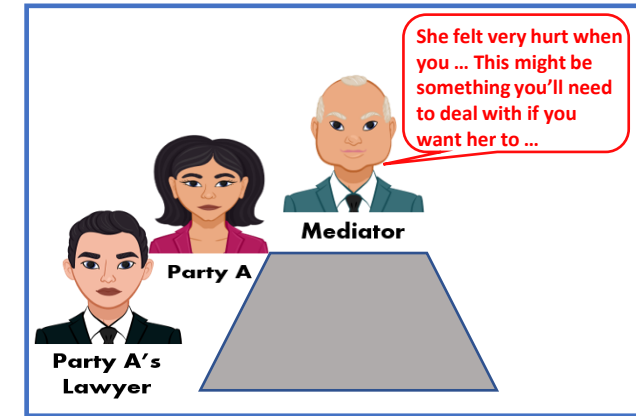
Intervention A – Where the emotions need to be assuaged by the other party:



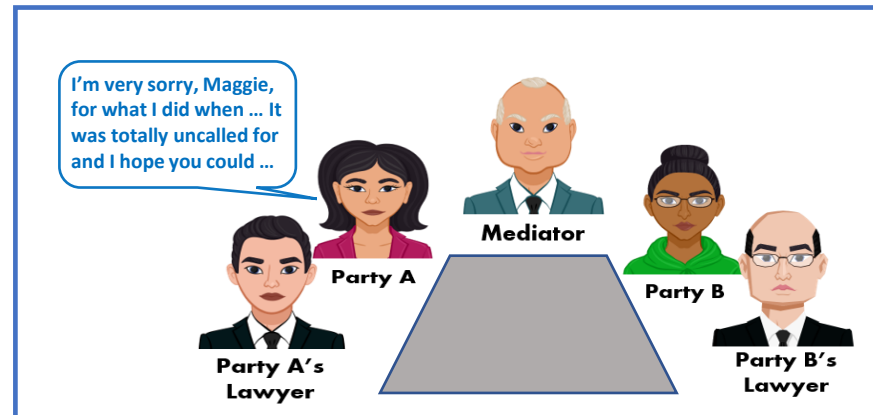
1. Find out about the feeling and its cause.



2. Find out how the feeling can be assuaged.



3. Work with the other party on a solution.

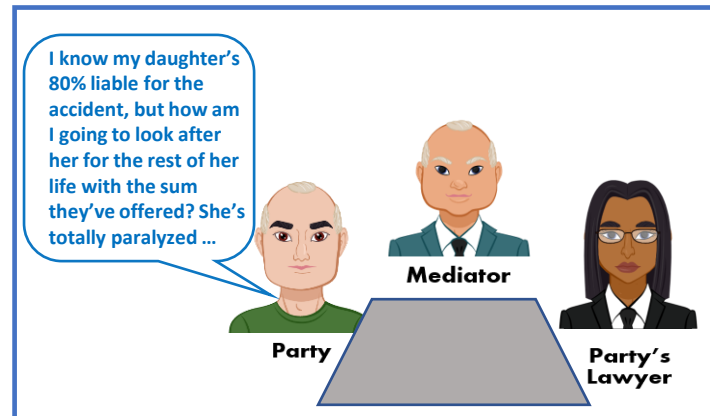


4. Organize for the other party to carry out the solution.

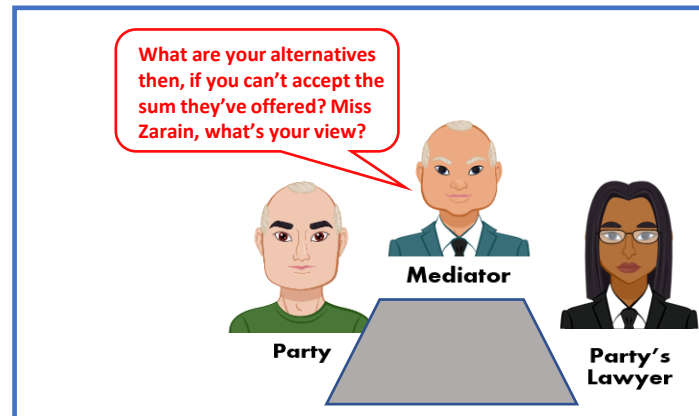
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7. Help them recognize and address emotional impediments

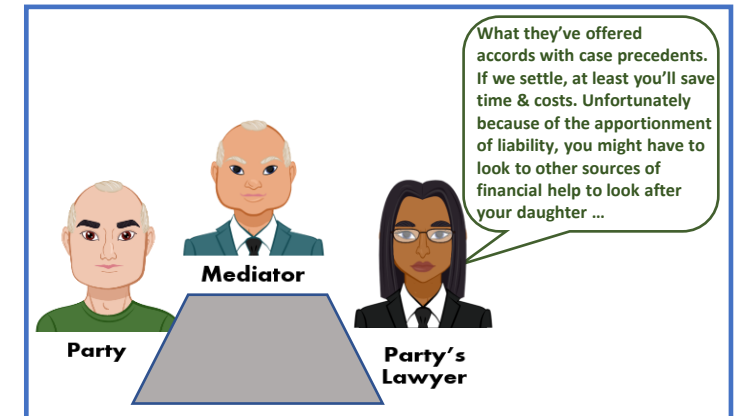
Intervention B – Where the party has to come to terms with the emotion.



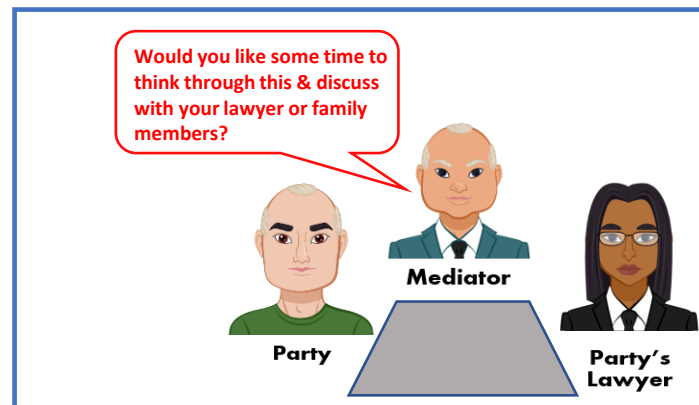
1. Let them ventilate the feeling.



2. Help them realistically review their alternatives.



3. Enlist their lawyer's help to review their alternatives.



4. Give them time to come to terms with the emotion.

Recommendations:

8. Maintain everyone's face throughout

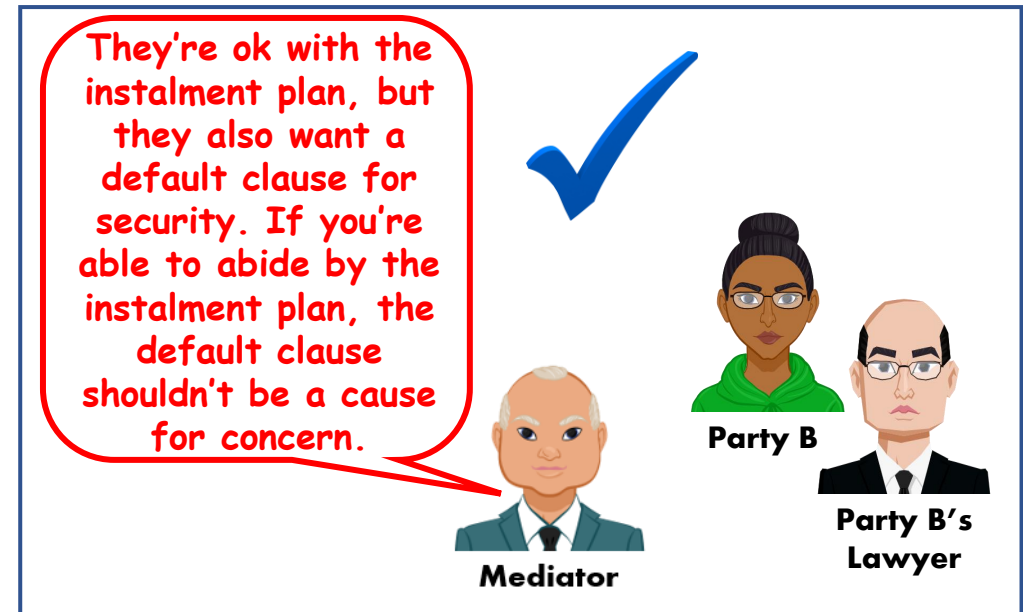
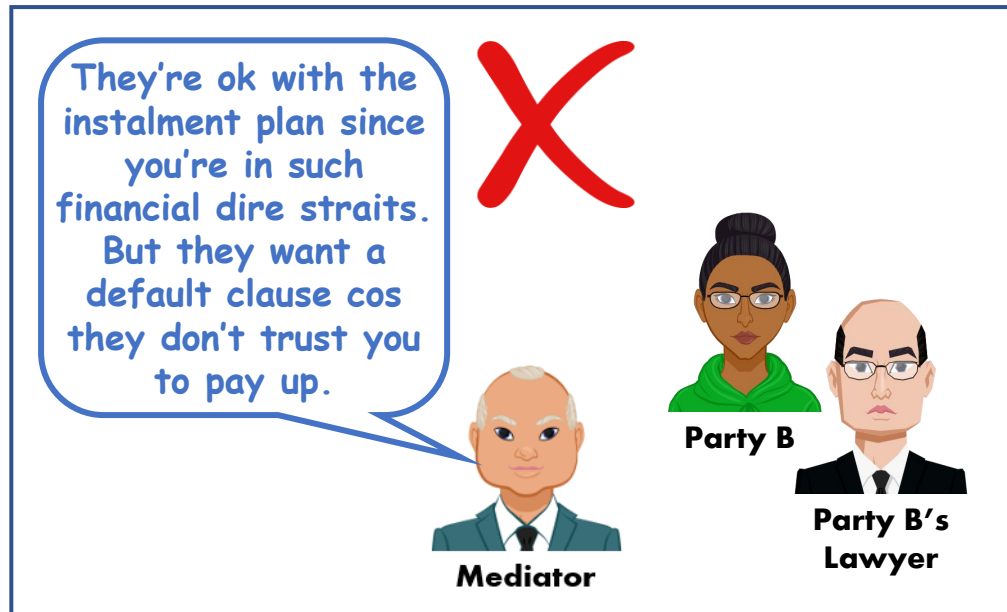
- **Nobody wants or likes to be embarrassed or to lose face in any situation.**
- **The prospect of losing face can cause a party to become defensive, resistant or even antagonistic.**
- **Hence it important for the Mediator to facilitate the negotiations such as to —**
 - **maintain the face of every party; and**
 - **find a gracious way for each party to exit from the dispute.**
- **Interventions like ground rules, paraphrasing, reframing & coaching are helpful.**
- **The Mediator also needs to constantly remind and help each party to maintain the face of the other party.**



Recommendations:

8. Maintain everyone's face throughout (cont'd)

- **Consider:**
 - **Is there / Will there be, a face issue to address?**
 - **How can the message be put across such as to maintain the face of each party?**



Conclusion:

- **A mediation has a much higher chance of success if the parties were able to participate in it fully and constructively.**
- **Where the circumstances require, the Mediator can bring added value to the mediation by proactively guiding the parties —**
 - **in preparing for their negotiation, and**
 - **in the way they negotiate with each other.**
- **In this way, the Mediator could help the parties to —**
 - **maximize their participation; and**
 - **keep the negotiations progressive, constructive & effective throughout the mediation session,****thereby enhancing the chances of success of the mediation.**

END OF PRESENTATION

Thank you

QUESTIONS?

COMMENTS?

PLEASE SHARE YOUR VIEWS & EXPERIENCES.