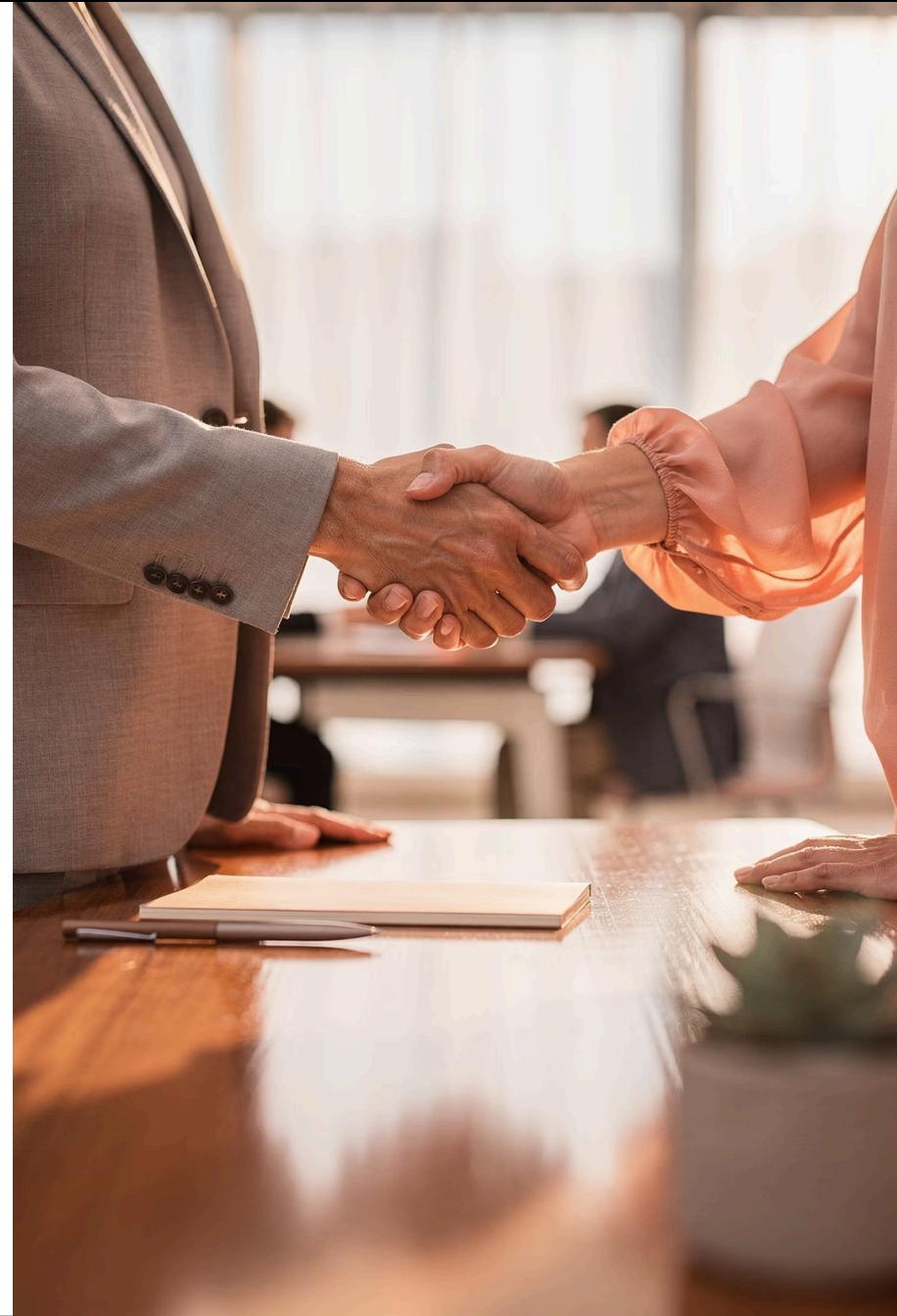


Lecture 10 · Chapter 5C

Mediation Structure

 by Roger Batchelor

A practical guide to how mediation works, from agreement to resolution.



Key Terms



Good Faith

An honest effort toward completing a task – not perfunctory, not at all costs. No intent to secure unfair advantage.

Caucus

A closed meeting in which matters are discussed and decisions may be made – used in mediation for private sessions.

How Many Stages Does Mediation Have?

3–13

Stages Cited

Depending on the source

13

Kovach

4 optional

12

Moore

Stages described

7

Folberg & Taylor

Stages described

Rather than debate which author is correct, we develop our own framework – each approaches the process from a slightly different point of view.



Two Categories of Mediation

Classic / Traditional Mediation

Attorneys generally **not** involved. Mediator meets directly with parties to facilitate negotiation. Common in small, court-ordered cases.

Voluntary Settlement Conference

Attorneys **are** present. What most people today simply call "mediation." Standard in commercial litigation and large cases.

STEP 1

Mediation Agreements

Mediation begins with a dispute. Either a party suggests mediation, or a court/statute requires a **good faith effort** before litigation proceeds.

- Written agreement is not required but always advisable
- Most commonly, a mediation clause is embedded in a larger contract
- "Good faith" language deters use of mediation as a stalling tactic



STEP 1 – ENFORCEABILITY

Courts Will Enforce Mediation Clauses

1

3rd Circuit

Harrison v. Nissan Motor Corp., 111 F.3d 343 (1997) – enforces agreements to mediate, mirroring arbitration policy.

2

4th Circuit

U.S. v. Bankers Ins. Co., 245 F.3d 315 (2001) – non-binding proceedings may be futile, but are still enforceable.

3

1st Circuit Caution

Brennan v. King, 139 F.3d 258 (1998) – a "right" to mediate ≠ an agreement to mediate. Drafting language matters.



1. Harrison v. Nissan Motor Corp., 111 F.3d 343 (3rd Cir. 1997)

Facts

A dispute arose involving a contract that required the parties to attempt mediation before pursuing litigation. One party attempted to bypass the mediation requirement and proceed directly with legal action.

Issue

Whether a **contractual clause requiring mediation before litigation** is enforceable.

Decision

The Third Circuit held that **agreements to mediate are enforceable**, similar to arbitration agreements.

Reasoning

The court emphasized that mediation clauses reflect the parties' **contractual intent to resolve disputes outside the courts first**. Courts should respect these agreements in the same way they enforce arbitration provisions, meaning parties may be **required to attempt mediation before proceeding with litigation**.

Key Takeaway

Courts may **enforce mediation clauses as a contractual condition precedent to litigation**.

2. United States v. Bankers Insurance Co., 245 F.3d 315 (4th Cir. 2001)

Facts

A contract required parties to engage in **non-binding dispute resolution procedures** before filing a lawsuit. One party argued that the process was pointless because it would not resolve the dispute.

Issue

Whether a **non-binding ADR process must still be followed even if it may be futile.**

Decision

The Fourth Circuit ruled that the ADR clause was **still enforceable.**

Reasoning

The court explained that the **binding nature of the obligation lies in the agreement to attempt the process**, not in the outcome. Even if mediation or negotiation might not resolve the dispute, the parties are still **contractually obligated to attempt the procedure** before going to court.

Key Takeaway

Even **non-binding ADR processes can be contractually mandatory**, and courts may require parties to participate before litigation.



3. Brennan v. King, 139 F.3d 258 (1st Cir. 1998)

Facts

A dispute arose where a party claimed there was a contractual **right to mediation**, arguing that the other party was obligated to mediate.

Issue

Whether language granting a **“right” to mediation** creates a legally enforceable obligation to mediate.

Decision

The First Circuit held that a **right to mediate is not the same as an agreement requiring mediation.**

Reasoning

The court focused on **contract drafting language**. The provision merely allowed mediation but did not require the parties to participate. Without clear mandatory language, courts cannot compel mediation.

📌 Key Takeaway

Precise drafting matters. Only **clear mandatory mediation clauses** are enforceable; merely stating that parties have a **right to mediate** does not create a binding obligation.

DRAFTING EXAMPLE

Right vs. Requirement: Tenn & Peller

"...either party shall have the **right** to commence mediation..."

✗ Not enforceable under *Brennan* – no actual agreement to mediate.

"...the parties **shall enter into** mediation proceedings prior to seeking resolution in court."

✓ Enforceable – a clear, binding obligation to mediate.

STEP 2

Choosing the Mediator

Once mediation is agreed upon, a **neutral** must be appointed. The contract may specify selection procedures. Strategic considerations matter – shared background, temperament, and subject-matter expertise can all influence outcomes.



STEP 2 – MEDIATOR TYPES

Who Are Mediators?



Attorneys & Ex-Judges

Most mediators are practicing or former attorneys, or retired judges. Sitting judges are precluded by ethics codes.



Subject-Matter Experts

Technical disputes (e.g., engineering, medicine) may call for a mediator with professional expertise in that field.



Counselors

When reconciliation is a goal, a mediator with a counseling background may be most effective.

COURT-ORDERED MEDIATION

When Selection Is Not Discretionary

Courts like the **S.D.N.Y.** order mediation to reduce backlogs. Mediators are often attorneys serving **pro bono** – no cost to parties.

"The entire mediation process is confidential...The identity of the Mediator is not to be disclosed to the court."

Bernard v. Galen Group, 901 F. Supp. 778
(S.D.N.Y. 1995)



STEP 3

Pre-Mediation

→ Housekeeping Decisions

Who attends, scope of informal discovery, time and location of sessions, mediator conflicts of interest.

→ Submissions to the Mediator

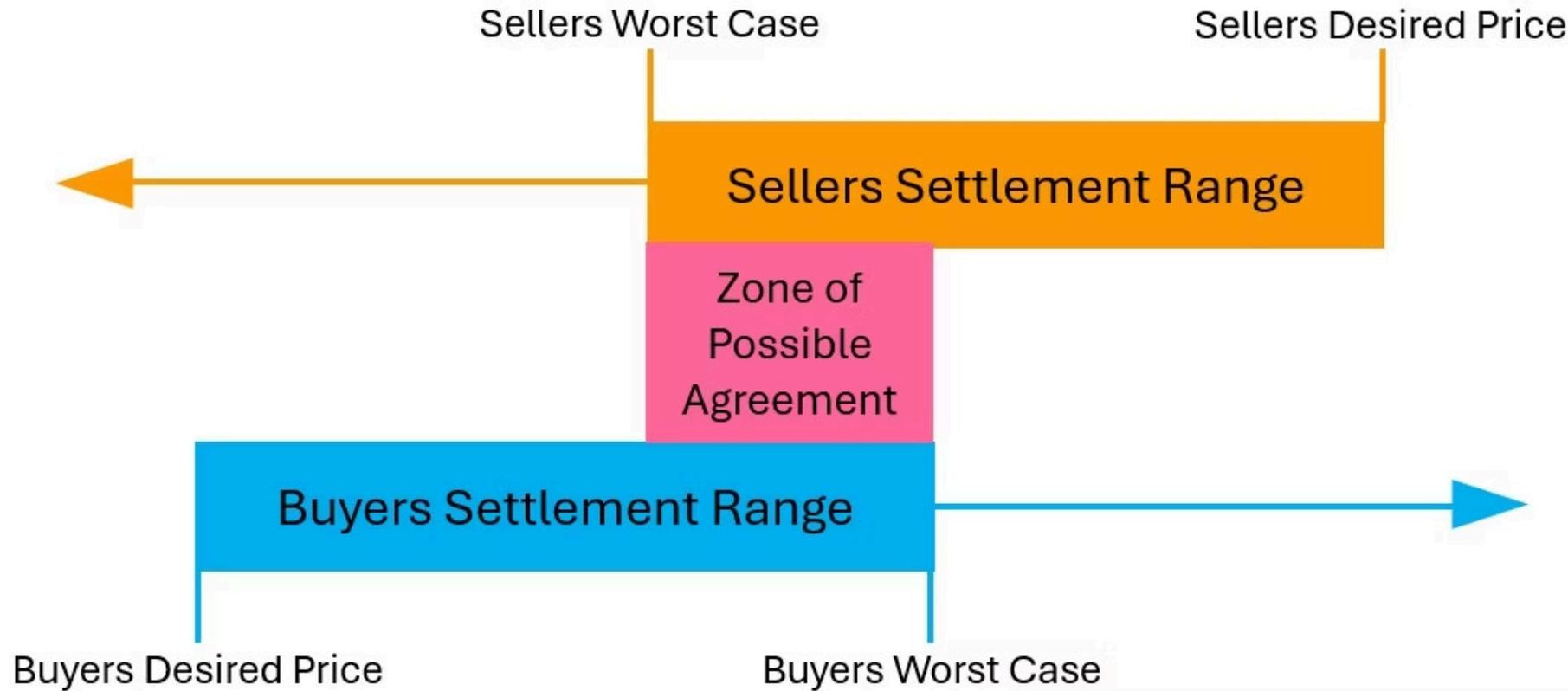
Unlike court pleadings, a party's summary may **never be seen by the other side** – the mediator has no decision-making power.

→ Private vs. Joint Sessions

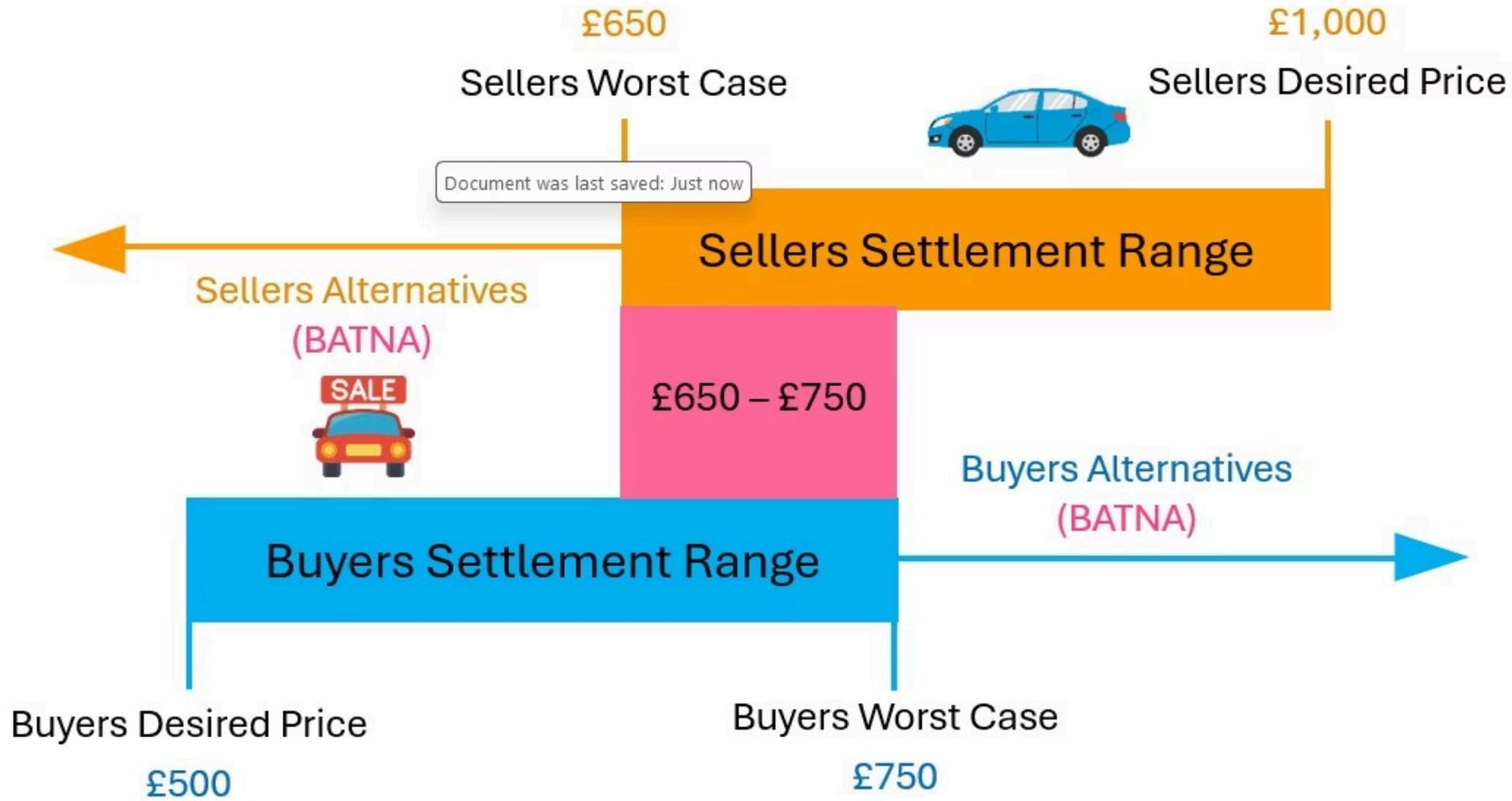
Mediator may meet each party privately, jointly, or both. Private mediators often engage in more extensive pre-mediation preparation.



Preparation



Graphic Created by Sara Flaumenhaft



Graphic Created by Sara Flaumenhaft

STEP 4

The Mediation Session(s)

Cost

Mediators charge **\$1,000–\$4,000/day**. Multi-day mediations are common. Parties seek to maximize value from every session.

Session Formats

- Individual meetings before joint session
- Joint session first, then individual
- All communication filtered through mediator if parties are at strong odds

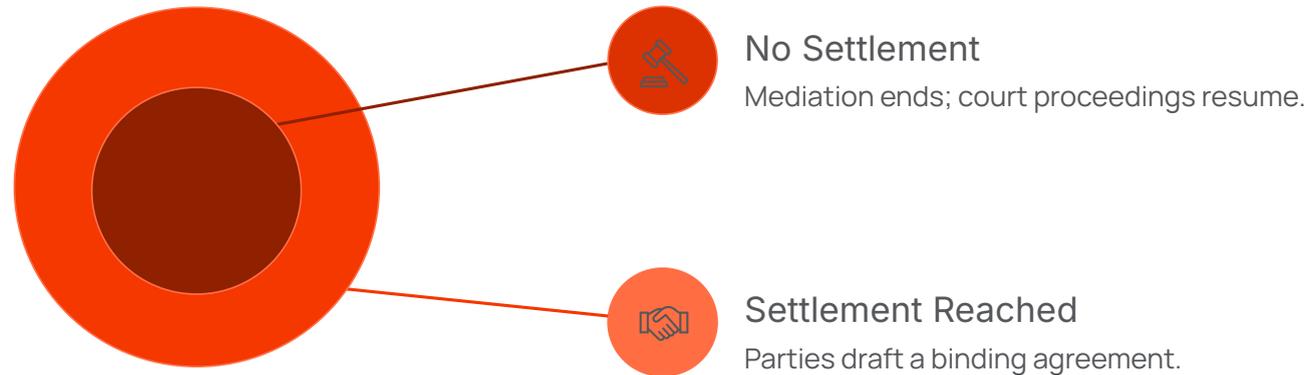
Frequent Private Caucusing

Maximizes mediator effectiveness (Folberg, p. 225)

Uninterrupted Discussion

Some parties prefer direct, continuous dialogue with the opposition

How Mediation Ends



In some cases, mediation can continue for **years** – and even then, settlement may not be reached or may not be enforced by a court. See the upcoming "Clergy Cases" for a complex, lengthy example.

The Five Stages at a Glance

1

Mediation Agreement

Written or implied; court-ordered or voluntary; good faith required

2

Choosing the Mediator

Strategic selection; expertise matters; sometimes court-assigned

3

Pre-Mediation

Housekeeping, submissions, conflict checks, session planning

4

Mediation Session(s)

Joint and/or private; \$1K-\$4K/day; flexible format

5

Resolution or Impasse

Settlement agreement drafted – or return to court

Key Takeaways

Structure Varies — Fundamentals Don't

Authors disagree on the number of stages, but the core process is consistent across frameworks.

Drafting Language Is Critical

A "right" to mediate is not the same as an obligation. Courts enforce agreements — not mere options.

Mediator Selection Is Strategic

Expertise, temperament, and even shared background can shape the outcome for your client.

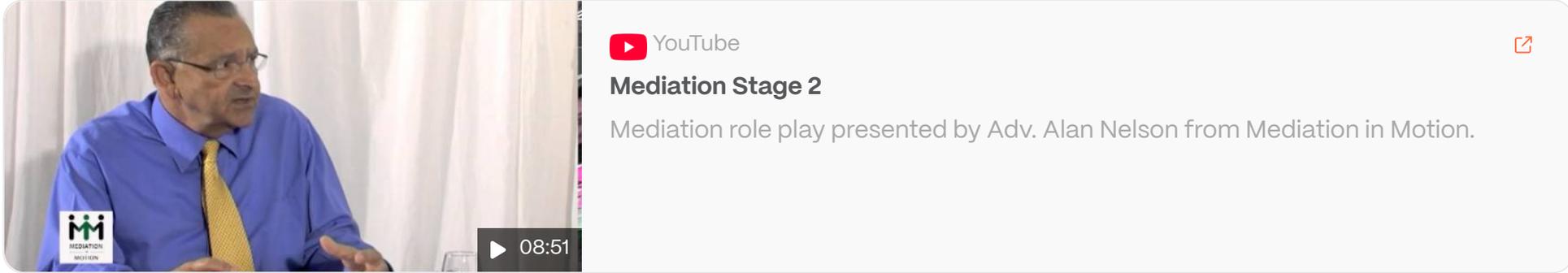
Here is a full simulated Mediation



YouTube

Mediation Stage 1

This is the first part of a mediation, we refer to this as a joint session. Mediation demonstration by Adv. Alan Nelson from Mediation in Motion



The image shows a video player interface. On the left is a video thumbnail of a man in a blue shirt and yellow tie, with a logo for 'Mediation in Motion' in the bottom left corner. The video title is 'Mediation Stage 2' and the description is 'Mediation role play presented by Adv. Alan Nelson from Mediation in Motion.' The video duration is 08:51. There are YouTube and share icons.

YouTube

Mediation Stage 2

Mediation role play presented by Adv. Alan Nelson from Mediation in Motion.

08:51



 YouTube



Mediation Stage 3

Mediation role play presented by Adv. Alan Nelson from Mediation in Motion.



 YouTube



Mediation Stage 4

Mediation role play presented by Adv. Alan Nelson from Mediation in Motion.



 YouTube



Mediation Stage 4

Mediation role play presented by Adv. Alan Nelson from Mediation in Motion.