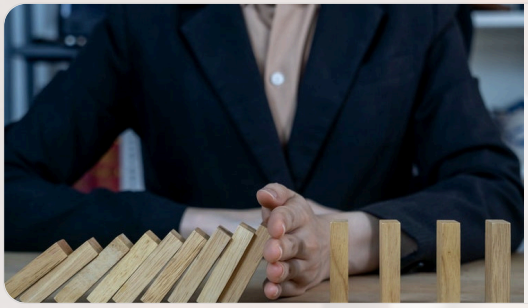
LECTURE 10 · CHAPTER 5C

Mediation Structure

A practical guide to how mediation works, from agreement to resolution. This lecture covers the key stages of the mediation process, foundational terminology, landmark case law on enforceability, and strategic considerations for selecting and working with a mediator.

By Roger Batchelor

Professor of Dispute Resolution. This lecture develops a practical five-stage framework for understanding mediation structure, drawing on leading academic models and real case law.



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ADR Lecture 10 Mediation Part 2 – Kahoot! Course

This is to supplement the courseware for Crestpoint University – Alternative Dispute Resolution

KEY TERMS

Foundational Concepts

Good Faith

An honest effort toward completing a task — not perfunctory, not at all costs. No intent to secure an unfair advantage. "Good faith" language in mediation clauses deters parties from using the process merely as a stalling tactic before litigation.

Caucus

A closed meeting in which matters are discussed and decisions may be made. In mediation, a caucus refers to a private session between the mediator and one party — allowing candid communication away from the opposing side.

How Many Stages Does Mediation Have?

Scholars disagree significantly on the number of stages in mediation — citations range from **3 to 13**. Rather than debate which author is correct, this course develops its own framework, recognizing that each scholar approaches the process from a slightly different point of view.

13	12	7	3–13
Kovach	Moore	Folberg & Taylor	Range Cited
4 optional stages included	Stages described	Stages described	Depending on the source

Two Categories of Mediation

Classic / Traditional Mediation

Attorneys generally **not** involved. The mediator meets directly with the 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 or statute requires a **good faith effort** before litigation proceeds. A written agreement is not required but is always advisable. Most commonly, a mediation clause is embedded in a larger contract, and "good faith" language deters use of mediation as a stalling tactic.

Enforceability: Courts Will Enforce Mediation Clauses

1	2	3
3rd Circuit — *Harrison v. Nissan Motor Corp.*, 111 F.3d 343 (1997)	4th Circuit — *U.S. v. Bankers Ins. Co.*, 245 F.3d 315 (2001)	1st Circuit Caution — *Brennan v. King*, 139 F.3d 258 (1998)
A party attempted to bypass a contractual mediation requirement and proceed directly to litigation. The Third Circuit held that **agreements to mediate are enforceable**, mirroring arbitration policy. Courts must respect these clauses as a condition precedent to litigation.	One party argued that a non-binding ADR process was pointless. The Fourth Circuit ruled the clause was **still enforceable**: the binding obligation lies in the agreement to *attempt* the process, not in the outcome. Even non-binding ADR can be contractually mandatory.	A party claimed a contractual "right" to mediation created an obligation to mediate. The First Circuit held that a **right to mediate ≠ an agreement to mediate**. Without clear mandatory language, courts cannot compel participation. **Precise drafting matters.**

Drafting Example: Right vs. Requirement

The distinction from *Brennan v. King* has direct practical implications. Consider the Tenn & Peller drafting example:

× Not Enforceable

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

Merely allows mediation — does not require it. Not enforceable under *Brennan*.

✓ Enforceable

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

Clear, binding obligation. Courts will enforce this language.

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 significantly for your client.

Who Are Mediators?

Attorneys & Ex-Judges

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

Subject-Matter Experts

Technical disputes — such as those involving engineering or medicine — may call for a mediator with professional expertise in that specific field.

Counselors

When reconciliation is a goal, a mediator with a counseling background may be the most effective choice for facilitating productive dialogue.

Court-Ordered Mediation: When Selection Is Not Discretionary

Courts like the **S.D.N.Y.** order mediation to reduce docket backlogs. In these cases, mediators are often attorneys serving **pro bono** — at no cost to the parties. Critically, the entire process remains confidential and the mediator's identity is not disclosed to the court.

> "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

Before the formal session begins, both parties and the mediator engage in essential preparation. Pre-mediation covers logistical and strategic groundwork that shapes the entire process. Unlike court pleadings, a party's summary submitted to the mediator may **never be seen by the other side** — the mediator has no decision-making power and uses these submissions only to prepare.

Housekeeping Decisions

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

Submissions to the Mediator

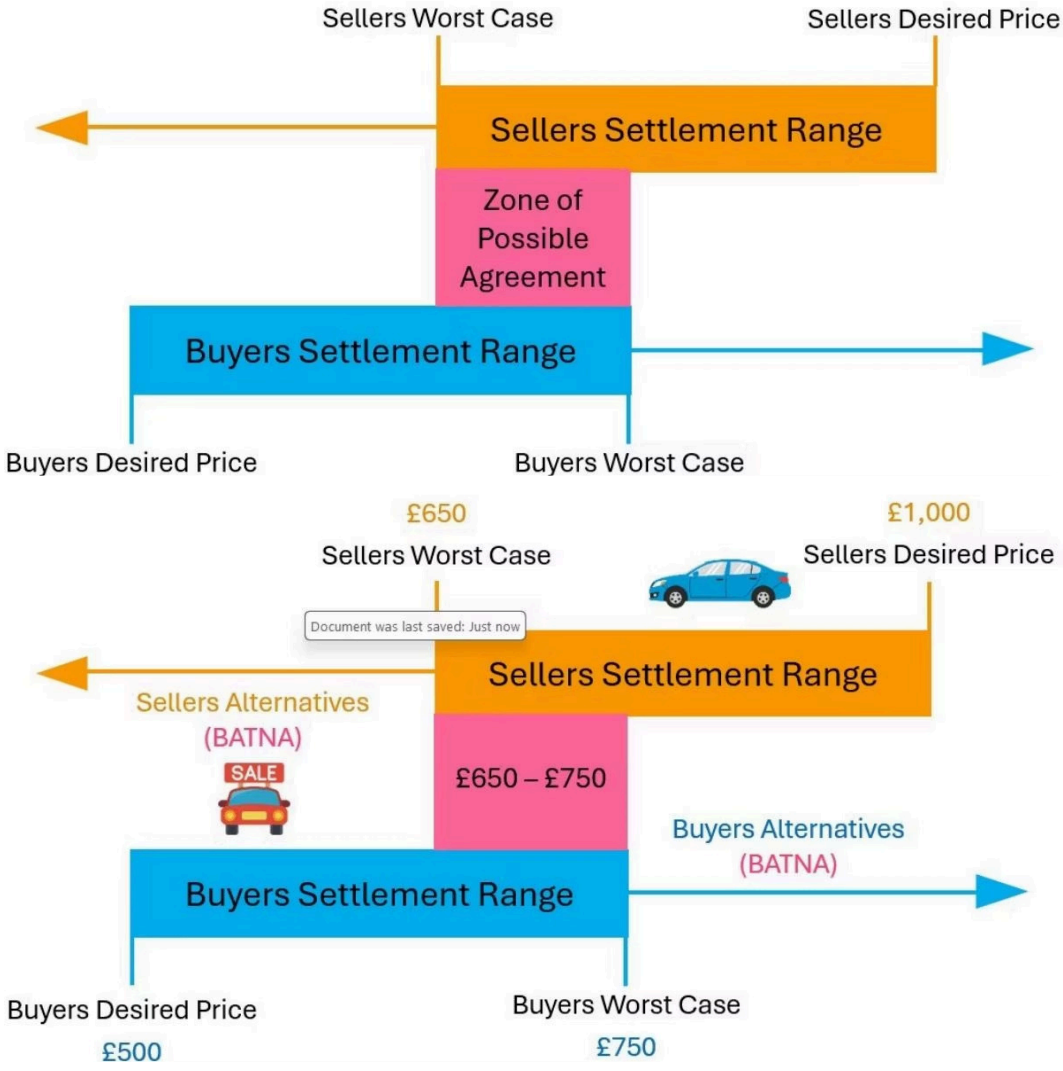
Each party may submit a confidential summary. These may never be shared with the opposing side — the mediator uses them solely for preparation.

Private vs. Joint Sessions

The mediator may meet each party privately, jointly, or both. Private mediators often engage in more extensive pre-mediation preparation than court-assigned ones.

Understanding the Zone of Possible Agreement

A key part of preparation is understanding each party's settlement range — from their desired outcome to their worst-case scenario. The overlap between the two parties' ranges defines the **Zone of Possible Agreement (ZOPA)**, which is where a deal can realistically be made. Knowing your client's BATNA (Best Alternative to a Negotiated Agreement) is essential before entering any session.



Graphics created by Sara Flaumenhaft

STEP 4

The Mediation Session(s)

The mediation session is where the substantive work happens. Mediators typically charge **$1,000–$4,000 per day**, and multi-day mediations are common. Parties seek to maximize value from every session, making preparation and strategic session design critical.

Individual Before Joint

The mediator meets privately with each party before bringing them together. Useful for building rapport and surfacing hidden interests before joint dialogue.

Joint Session First

Parties begin together, then break into individual meetings. Allows each side to hear the other's opening position directly before private caucusing begins.

All Communication Through Mediator

When parties are at strong odds, all communication may be filtered through the mediator. Maximizes mediator effectiveness (Folberg, p. 225).

Uninterrupted Direct Dialogue

Some parties prefer continuous, direct discussion with the opposition — particularly when the relationship between parties is ongoing and preserving it matters.

How Mediation Ends

Mediation concludes in one of two ways: the parties reach a settlement and draft a binding agreement, or mediation ends without resolution and court proceedings resume. In some complex 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.

1

No Settlement

Mediation ends. Court proceedings resume. The parties return to litigation without a binding resolution.

2

Settlement Reached

Parties draft a binding agreement. The dispute is resolved outside of court, often faster and at lower cost than full litigation.

SUMMARY

The Five Stages at a Glance

While scholars cite anywhere from 3 to 13 stages, this course organizes the mediation process into five practical stages. Each stage builds on the last, from the initial agreement through to resolution or impasse.

01

Mediation Agreement

Written or implied; court-ordered or voluntary; good faith required. Drafting language determines enforceability.

02

Choosing the Mediator

Strategic selection; expertise and temperament matter; sometimes court-assigned pro bono.

03

Pre-Mediation

Housekeeping, confidential submissions, conflict checks, BATNA analysis, and session planning.

04

Mediation Session(s)

Joint and/or private caucuses; $1K–$4K/day; flexible format tailored to the parties' dynamics.

05

Resolution or Impasse

Settlement agreement drafted and signed — or parties return to court to resume litigation.

Key Takeaways

Structure Varies — Fundamentals Don't

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

Drafting Language Is Critical

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

Mediator Selection Is Strategic

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

SIMULATION

A Full Simulated Mediation

The following video series presents a complete mediation role play in four stages, demonstrated by **Adv. Alan Nelson** from *Mediation in Motion*. Each stage illustrates a distinct phase of the process — from the opening joint session through private caucusing and negotiation to final resolution.

Stage 1 — Joint Session

The first part of a mediation: a joint session. Mediation demonstration by Adv. Alan Nelson from Mediation in Motion. *Duration: 08:55*

Stage 2 — Private Caucus Begins

Mediation role play presented by Adv. Alan Nelson from Mediation in Motion. *Duration: 08:51*

Stage 3 — Negotiation

Mediation role play presented by Adv. Alan Nelson from Mediation in Motion. *Duration: 30:25*

Stage 4 — Resolution

Mediation role play presented by Adv. Alan Nelson from Mediation in Motion. *Duration: 08:22*

All four video segments are produced by **Mediation in Motion** and are intended to illustrate the practical application of the five-stage framework covered in this lecture.