

Lecture 11

 by Roger Batchelor

Mediation in Action

Case Studies exploring how mediation works – from a broken antique cabinet to courtroom alternatives, confidentiality obligations, and the limits of a mediator's role.

LEGAL STUDIES

ALTERNATIVE DISPUTE RESOLUTION



Key Term: Stipulate

Stipulate

When attorneys for opposing parties **agree to accept some statement as true**, such that the matter need not be further discussed or demonstrated in proceedings.

Stipulations save time and focus the dispute on genuinely contested issues – a critical tool in both mediation and litigation.



Meet the Parties: Conrad & Nancy

Conrad

First-generation American, self-taught antique restorer. Building a reputation in his town after two years in business.

Nancy

Owns a small antique store. Sources inventory from tag sales and attics. Has relied on Conrad's restoration work for a year.



The Legume Cabinets

On **March 16**, Nancy brought Conrad a pair of **French 18th-century corner cabinets with marble tops** – attributed to the famous artisan Monsieur Legume.

- Properly restored, Nancy estimated the cabinets could fetch **over \$40,000** at auction
- Conrad agreed to complete the restoration for **\$5,000**
- Deadline: **June 15** auction

The Stakes

A high-value, time-sensitive job between two business partners – setting the stage for a costly dispute.

Disaster Strikes

Weeks after Nancy delivered the cabinets, a new assistant **smashed them to pieces**. The employee was fired immediately. Conrad's insurance covered vandal damage – but **not employee damage**. Conrad avoided telling Nancy until June 14th, when he could no longer ignore her angry messages.



Conflict Escalates



Why Not Small Claims Court?

Small Claims Court

Maximum limit: **\$5,000** in Nancy's jurisdiction. The \$40,000 claim far exceeds this threshold – making regular civil court mandatory.

Civil Court Reality

The case would **not be heard for several months**. Facing this delay, Joe suggests mediation while the lawsuit is stayed – and an exhausted Nancy agrees.

Joe's Mediation Proposal

"In the interest of fairness and to save your client the public embarrassment which would surely result if we go through with the trial, my client has agreed to enter into mediation... Costs of mediation will be shared by both parties. The suit will be stayed pending the outcome of mediation but will not be dropped unless and until a settlement is reached."

– Joe Joseph, August 8th email to Rock Robertson

The offer to mediate expired **August 10th**. Mediator costs: **\$1,500–\$3,000/day**, split equally. Conrad's share estimated at approximately **\$1,000** plus attorney fees.

What Is Mediation? Rock Explains

Not Like Mom Mediating

Unlike a parent who knows both sides, an ideal mediator is **impartial** – no preconceived notions about who is right.

Lawsuit on "Pause"

The suit is **stayed** during mediation. Settlement = case dropped. No settlement = back on the path to trial.

Non-Binding

Neither party is forced to accept any outcome. Both must agree voluntarily for a settlement to be reached.

The Mediation Agreement

"Conrad and Nancy hereby agree to enter into **non-binding mediation** in order to make a good faith effort to resolve the dispute... any facts revealed or discovered in connection with this mediation shall remain **confidential** and shall not be disclosed for any purpose, except insofar as may be required by law."

Costs Split Equally

Conrad Chooses
Mediator

Nancy May Reject for
Cause

Session in September

Choosing the Mediator: Lon L. Lesser

Why Lesser?

- In-house counsel for a manufacturer – likely to understand **employee management challenges**
- Undergraduate degree in **psychology** – useful in an emotionally charged case
- One of the **less expensive** mediators, given Conrad's financial situation

Rock's Strategy

Rock hopes Lesser's background will lead him to "**cut Conrad a bit of slack**" – an example of how attorneys think strategically even in mediator selection.

Who Attends the Mediation?



Parties & Attorneys

Conrad, Nancy, Rock Robertson, and Joe Joseph – the core participants in all sessions.



Conrad's Mother, Anna

Permitted to attend but **may not speak** during sessions. Free to consult with Conrad during breaks. Lesser has authority to eject her if she violates the agreement.



Legal Teams

Co-counsel, legal assistants, and other team members may attend within reason – space permitting.

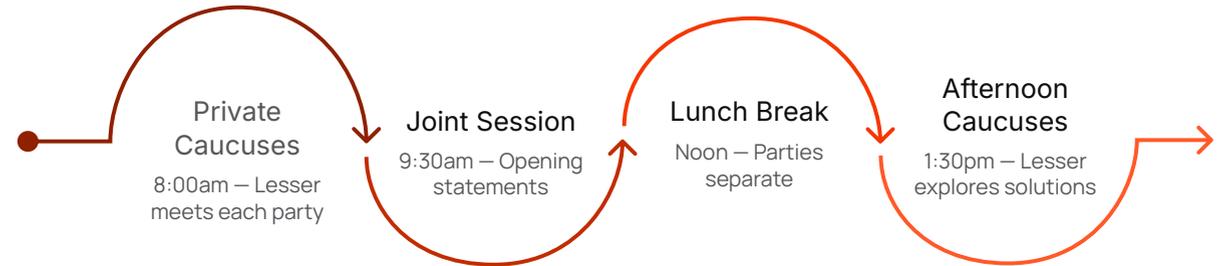


Location

Held at **Joseph, Russo & Pasternack** offices. Three conference rooms: joint session, Nancy's team, Conrad's team.



September 15: Mediation Day



Lesser begins with private meetings – learning each party's goals and limits before bringing everyone together. He confirms confidentiality and his neutral role with each side.

The Joint Session Opens

"The parties have agreed to **stipulate that Conrad bears full liability** for the damage to Nancy's cabinets. There remains significant dispute as to the **value of the cabinets**. Is that correct?"

– Mediator Lon L. Lesser

With liability settled by stipulation, the entire dispute narrows to a single question: **How much were the Legume cabinets worth?** Both sides may introduce evidence or call experts. Without agreement on an actual number – not just a range – no settlement is possible.

The Valuation Deadlock

Nancy's Position

Cannot imagine the cabinets were worth **less than \$30,000**.
Expects full compensation for her anticipated auction proceeds.

Conrad's Position

Cannot see anyone paying **more than \$20,000** for the cabinets.
Has no ability to pay even that amount in cash.

Lesser acknowledges that the **unique nature of the cabinets** makes certainty about market value difficult. He calls a lunch break and plans individual afternoon sessions to explore solutions.

The Afternoon Breakthrough

In private afternoon sessions, two key revelations emerge:

→ Conrad's Financial Reality

Even if he agreed to \$30,000, he could never pay it. A court judgment might force **bankruptcy**, leaving Nancy with as little as \$10,000.

→ Nancy's Hidden Concern

Beyond the money, Nancy mourns the **loss of their business relationship**. She laments: where else will she find such a skilled restorer?



Lesser's Creative Solution

"The solution I'm about to present is something a court would **never do**, as courts are loath to force parties in conflict into a continued relationship. In this situation, however, I get the sense that both of you would actually like to continue to do business together if only you could put this behind you."

– Mediator Lon L. Lesser

Lesser suggests Conrad **work off part of the damages** through future restoration work for Nancy – a creative remedy unavailable in court, and a prime example of mediation's unique power.

Will It Work? The Likely Outcome

Best Case

Both parties want to preserve the relationship. They agree on a work-off arrangement and sign a settlement agreement – the lawsuit is dropped.

Most Likely

The parties are **irrevocably deadlocked**. Unless both genuinely want to continue working together, this last-ditch effort will probably fail – and the case proceeds to trial.

- ❏ Note: A mediator suggesting a solution is **not improper**. Some mediators take active roles; others simply facilitate. Lesser's approach is contrasted with the problematic conduct seen in the Clergy Cases.

CHAPTER 2

The Clergy Cases & Meddlesome Mediators

Approximately **90 plaintiffs** alleging childhood sexual abuse by priests brought claims against the **Los Angeles Archdiocese**. The court appointed a "settlement judge" to act as mediator. The resulting case — *Travelers Casualty & Surety Co. v. Superior Court*, 126 Cal. App. 4th 1131 (2005) — became a landmark on mediator conduct.



Key Term: Bona Fide

Bona Fide

Latin for "**good faith**" – but not interchangeable with "good faith" as used in law. *Bona fide* specifically means something is **genuine or real**.

In the Clergy Cases, insurance company representatives attended mediation because they had a *bona fide* interest in the outcome – they might have to pay any settlement or judgment.

What Is a Mediator's Role? The Travelers Definition

"Mediation is defined as 'a process in which a neutral person facilitates communication between the disputants to assist them in reaching a mutually acceptable agreement'... it is essentially a process where a **neutral third party who has no authoritative decision-making power** intervenes in a dispute to help the disputants voluntarily reach their own mutually acceptable agreement."

– *Travelers* at 1138-1139

When the Mediator Goes Too Far

The settlement judge in the Clergy Cases – an actual California state judge – was found to have **violated his role** as neutral facilitator in several critical ways:

Fact-Finding & Coercion

Violated prohibitions against **fact finding and coercive conduct**. (*Travelers* at 1141)

Binding Determinations

Purported to make **binding factual determinations** – ruling that proceedings constituted an actual trial for coverage purposes.

Threatening the Insurers

"Dangled over the insurers' heads the threat of a bad faith action... leaving the insurers backed into a corner." (*Travelers* at 1142)

The Result & Broader Impact

Court's Ruling

The court **vacated the Valuation Order** based on the settlement judge's improper evaluation of the plaintiffs' likelihood of winning. (*Travelers* at 1146)

Wider Debate

The finding of "coercive" conduct fueled debate over the **ABA's Model Code of Judicial Conduct**, which lacks an explicit prohibition against coercion in ADR. Judge John W. Cooley noted: *"There is a lot of arm-twisting by judges... wide-enough spread that we need to do something about it."*



CHAPTER 3

The Foxgate Case: Good Faith & Confidentiality

Foxgate Homeowners' Association Inc. v. Bramalea California Inc., 26 Cal. 4th 1 (Cal. 2001) – a landmark case on **bad faith conduct** and **confidentiality obligations** in court-ordered mediation.

Stevenson's Bad Faith Conduct

1 Arrived Unprepared

On the first day of a five-day mediation, plaintiff's attorney and **nine experts appeared**. Stevenson was late and brought **no defense experts**. Subsequent sessions were cancelled.

2 Refused to Cooperate

When asked if he'd bring experts to future sessions, Stevenson replied: "*I can't answer that.*" His stated position: "*This is your mediation, you can handle it any way you want.*"

3 Obstructed the Process

The mediator concluded Stevenson's **"real agenda was to delay the mediation process"** – causing cancellation of remaining sessions at substantial cost to all parties.

California's Confidentiality Rule: Evidence Code §1119

California imposes a strict **obligation of confidentiality** on all mediation participants. The key provisions:

Oral Statements

Nothing said during mediation is **admissible or subject to discovery** in any civil or administrative proceeding.

Written Materials

No writing prepared **for the purpose of mediation** may be disclosed or compelled in any proceeding.

All Communications

All communications and settlement discussions by **all participants** – including the mediator – shall remain confidential.

Exceptions & Strategic Considerations

Permitted Disclosures

- A party may **report the other party's conduct** to the court
- Criminal conduct by a party may be reported by the mediator
- Parties may **consent** to limited disclosure in their mediation agreement

Strategic Warning

Confidentiality encourages candor – but remember: **your adversary, not the court, is who you're playing against.** Facts disclosed in mediation may be useless to you if mediation fails and trial begins. Think carefully before showing all your cards.



Consequences of Bad Faith Participation

The ABA Journal (June 2005, "*Meddling in Settling*") cites cases where parties participated in mediation in **bad faith** – with serious consequences:

→ Default Judgment

Lockhart v. Patel, 115 F.R.D. 44 (E.D. Ky. 1987) – bad faith participation can result in a **default judgment** entered against the offending party.

→ Reversal on Appeal

In re Acceptable Insurance Co., 33 S.W.3d 443 (Tex. Ct. App. 2000) – a favorable decision may be **reversed on appeal** if bad faith is established.

Key Takeaways: Mediation Principles



Neutral Facilitation

A mediator has **no decision-making power**. Coercive conduct – even by a judge – violates the mediator's proper role.



Confidentiality

All communications in mediation are **protected**. This encourages candor – but be strategic about what you reveal.



Good Faith Required

Parties must negotiate in **good faith**. Obstructive tactics risk default judgment, reversal on appeal, or other sanctions.



Creative Solutions

Mediation can produce outcomes **no court would order** – like Conrad working off damages through future restoration – making it uniquely powerful.