

# Mediation: Conflict, Negotiation and Dispute Resolution for Lawyers

Dina Feldman-Scarr, Esq.  
California Western School of Law

Copyright 2007, Dina Feldman-Scarr

# MEDIATION: The Four Stages

I. Introduction: Setting the Stage (Med's Opening Stmt)

II. Define the Issues and Develop the Agenda

III. Process the Issues

IV. Brainstorm and Resolve the Issues



# MEDIATION: The PURPOSE of the 4 Stages

## *Purpose of Stage IV: Brainstorming*

- ❖ Start with the *easiest* issues
- ❖ Brainstorm as many *ideas or alternatives* as possible (don't brainstorm for “workable options” at this point)
- ❖ Mediator writes down the ideas *on a notepad*, *not* on a markerboard, chalkboard or easel.

## MEDIATION: How To Do Stage IV

1. Explain brainstorming as a way of generating as many *ideas or alternatives* as possible (don't brainstorm for "workable options").
2. To encourage habits of agreement, start with the *easiest* issues or items.
3. Mediator writes down the ideas *on a notepad*, *not* on a markerboard, chalkboard or easel.

## MEDIATION: How To Do Stage IV: Brainstorming & Resolve the Issues

4. Start brainstorming with the *easiest issue* (*Human factor/emotional issues first, then substantive/legal issues. Remember: \$\$ issues LAST!*).
5. Mediator plays “scribe” to list the ideas or alternatives generated.

# MEDIATION:

## The PURPOSE of the Four Stages

### Stage IV: Brainstorming

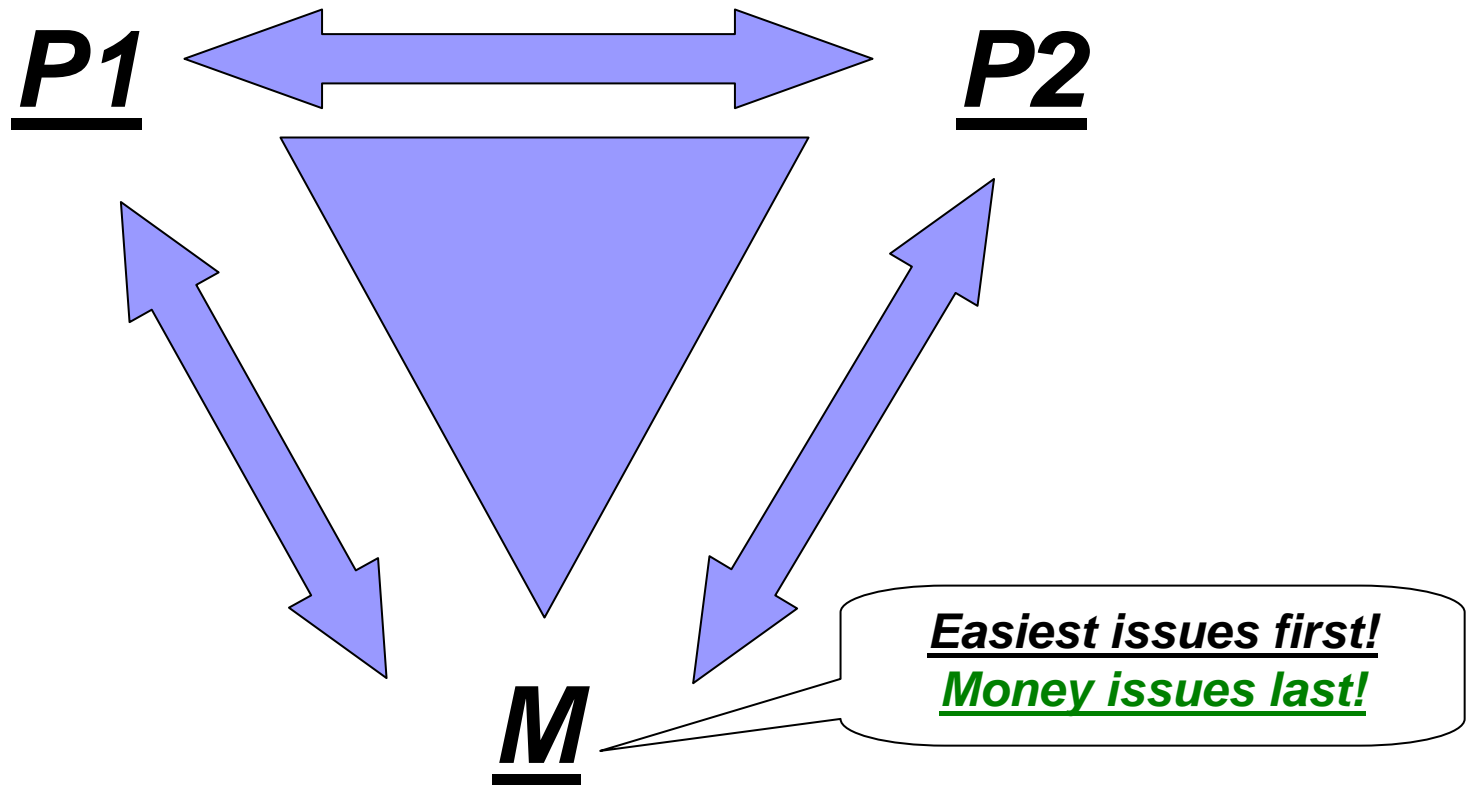
**KEY:** “HABIT\$ of Agreement” = **start with small/easy** issues and work “up.” Money issue is **ALWAYS** discussed **LA\$T!**



# MEDIATION: The Four Stages

## Stage IV Methodology

### *Stage IV: Brainstorming*



# MEDIATION: How To Do Stage IV: Brainstorming & Resolve the Issues

GTY: *Invent Options For Mutual Gain;*

*Diagnosis of the Options:*

- Avoid premature judgment
- Search for multiple answers
- Search beyond the “fixed pie: out of the box” (encourage creativity)
- Serve all Parties’ self-interests (solving their problem is also my problem)

# MEDIATION: How To Do Stage IV: Brainstorming & Resolve the Issues

GTY: *Invent Options For Mutual Gain;*

*How to Invent Creative Options:*

- a) Separate inventing options from deciding on choices
- b) Inventing ideas that are unusual is OK
- c) Don't allow criticism of ideas as they are brought up or created

# **MEDIATION: How To Do Stage IV: Brainstorming & Resolve the Issues**

GTY: Insist On Using Objective, Valid and Independent Criteria to Judge an Agreement's Terms:

- Fairness
- Efficiency
- Scientific Merit
- Precedent
- Community Standard or Common Business Practice

## MEDIATION: How To Do a Stage IV Caucus

- When you caucus with one party, you **MUST** caucus with all parties.
- Caucus for a purpose or reason: ***Six Point CAUCUS CHECKLIST***. Before breaking into a caucus, remind the parties that these will be ***private and confidential meetings***.
- At the beginning of each caucus, remind each party that this is a ***private and confidential meeting***.
- Ask the first caucus question (“*Now that we’re in a private meeting, what would you would like to share with me?*”)

## MEDIATION: How To Do A Caucus

- FIRST Caucus QUESTION: “Now that we are in this private meeting, *is there anything that you would like to share with me?*”
- Employ your planned questions or issues from the *Six Point CAUCUS CHECKLIST*.
- Ask you first Open-Ended Question.

# MEDIATION: OPEN-ENDED QUESTIONS

- Tell me about ...
- Describe to us ...
- How did it impact/effect you when ...
- What was the impact/effect of ...
- Explain to us ...
- What about ...
- Share with us ...

# MEDIATION: How To Do Stage IV: Brainstorming & Resolve the Issues

*Caucus with a purpose or reason.*

## ***Six Point CAUCUS CHECKLIST:***

- 1. Any secrets?***
- 2. Hidden agendas?***
- 3. Reduce tensions.***
- 4. Help the P's get past an *impasse*.***
- 5. Help a P *save face*.***
- 6. Confront a “*problem party*.”***

# MEDIATION: How To Do Stage IV: Memorializing the Settlement Terms

- Each clause of the Memorandum of Understanding should include:

**WHO** will

do **WHAT** -

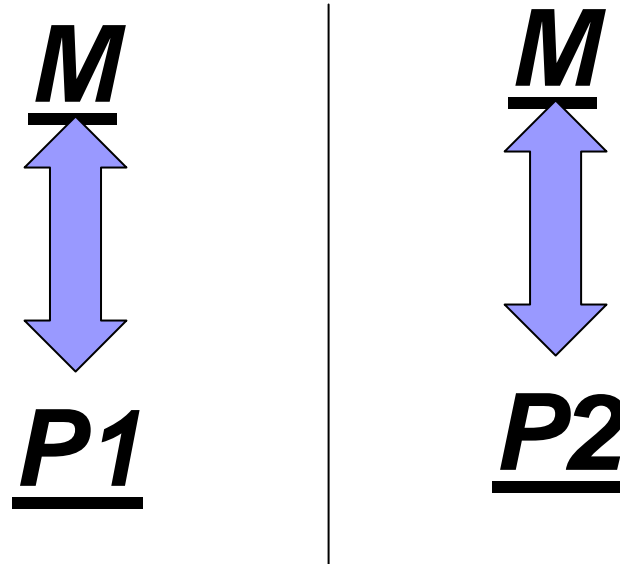
**WHEN** it's to be done or completed -

and **HOW** it's to be accomplished

*(Mediator is the SCRIBE, only. Absolutely NO drafting by attorney-mediators!)*

## MEDIATION: How To Do Stage IV:

The “last” Stage IV Caucus: *BATNAs (or WATNAs) are ONLY generated and discussed in separate Stage IV caucuses.*



GTY: BATNA/WATNA (Best/Worst Alternative to a Negotiated Agreement): **The STANDARD (baseline) against which any proposed agreement should be measured or compared.**

## END of Stage IV: How To Generate a BATNA or WATNA

*ONLY in a caucus, discuss **separately**:*

- What will this party do if no agreement is reached?
- Help this party improve on some of the more promising ideas; help convert them to practical alternatives or choices.
- Have the party tentatively select the *best* alternative as this party's BATNA. (or *worst choice* for a WATNA)
- Consider the *other side's* BATNA (or WATNA).
- Compare ALL options to the BATNA (or WATNA).
- The “better” choice is this P's preferable solution.