

## Special Chemistry

### Simulation of the Role of Lawyers in Mediation

### Problem-Solving Advocacy and Primarily Joint Sessions Video <sup>1</sup>

Example of a Problem-Solving Approach to Opening Statement for a mediator:

- Set the tone,
- Do expectation management,
- Use neutral language,
- Facilitative non directive approach.

*"Are you comfortable with using **first names**?"*

*From my exchanges with both lawyers as well as the mediation briefs I understand that you come well prepared and that you know what you can expect from mediation.*

*However before we begin, I would like to say a few words about **mediation and my role**. My task is to help you **find a negotiated solution**. I am not here to judge right or wrong or to take sides and I will not impose any solution on you. The goal is to find an **outcome** that is **satisfactory to both of you**. Mediation is **voluntary**; however it requires **commitment** and the ability to look at things from **different perspectives** and to make tough **decisions**. And that is really hard work. I will do whatever I can to help you reach a negotiated outcome and I expect the same commitment from you. Is that Ok?*

*A few more words regarding the **process**:*

*Mediation offers **privacy and confidentiality**, so if your dispute would move outside this room you cannot use any information that you acquired here in subsequent proceedings. At some point it may be useful that we meet separately. And I will keep confidential what we discuss, unless you explicitly permit me to share that information.*

*We agreed to work from a **package deal**: meaning that you are only bound to agreements if we explicitly decide so. This allows you to freely brainstorm and explore alternatives.*

*This has all been laid down in the **mediation agreement** which we signed prior to this meeting.*

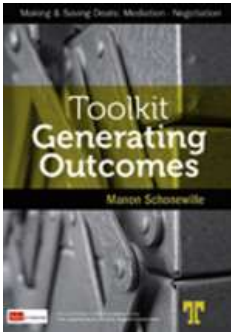
*You have full **authority** to make binding decisions here and we are all **available** until 3 **p.m.** today.*

*Do you have any **questions**?"*

*OK, so I would say that we are ready to begin. Who would like to **start with** their first **opening statement**?"*

This script and accompanying materials like an educational video and the role play instructions can be downloaded from: [www.ACBfoundation.nl](http://www.ACBfoundation.nl)

<sup>1</sup> Script based on a role play written by Manon Schonewille (©2009-2010, all rights reserved) (Result ACB, Toolkit Company & Utrecht University), that served as a mediation problem in the 5<sup>th</sup> ICC International Commercial Mediation Competition. A caucus-style mediation script based on that case was written by Giuseppe de Palo (JAMS International), as part of the EU sponsored project "Lawyers in ADR". The script for this video production was written by Hal Abramson (Touro Law School), Jeremy Lack (Altenburger) and Manon Schonewille. ©2009-2010, all rights reserved.



Checklists from: TOOLKIT GENERATING OUTCOMES, Manon Schonewille, with key contributors for the international edition Prof Laurence Boulle and Prof Jacqueline Nolan-Haley. Den Haag, Sdu uitgevers, 2009. (Dutch version 2nd edition Toolkit Mediation, BJu, 2007). Used with permission, all rights reserved

## 2.3 The approach to the mediation

### Considerations regarding the approach to the mediation

- An initial contact consultation (I-1.1)?
- How to start? Joint session? In a caucus (II-1.6)?
- As a solo mediator or with a co-mediator (two equally competent mediators or one professional mediator with one trainee mediator?) (I-2.5)?
- Shall I prepare written reports on the mediation sessions (I-4)?
  - What do the parties expect and what has been agreed in this respect?
  - Are there any other parties with whom arrangements have to be made (for example the constituency, the principal who commissioned the mediation)?
  - Do I need an assistant to take minutes or is it better to prepare a (summary) report or action list myself?
  - Or should I decide to dispense with written reports?
- How much time should be scheduled for the initial mediation session (II-14.3)?
- Who will attend? What representatives of the parties are required? Are any other parties involved in the dispute (I-2.6)?
- Do I want information in advance? What information?
  - A (brief) written statement or other documents?
  - Do I read the documents submitted by the parties on their own initiative?
  - Or shall I start the mediation without prior information in order to be completely open-minded?
  - Did all parties receive all documents?
  - Will lawyers or other advisors attend the mediation sessions? And if so are the parties present as well? Should I hold a preliminary procedural consultation with the advisors or lawyers in advance (I-2.8)?
  - Shall I send the mediation agreement and make sure it is signed beforehand or would I rather do this at the initial mediation session?
- Where will the mediation take place? (Venue, facilities, ambience, accessibility).
- What are the seating arrangements (I-2.5.6)? Do I need a table and, if so, what shape should it be and who should sit next to whom? Or will I leave it up to the parties to decide where they want to sit?
- Who will make the first opening statement? If lawyers are present, will they make the opening statement?
  - Do I leave this up to the parties? (Say nothing and see what happens, or ask: 'Who will start?')
  - Or do I decide who begins and if so, who will that be, and why?
    - The initiator of the mediation or the respondent?
    - The lawyers or the representatives of the parties themselves?

## 2 Pre-mediation planning

- The party who probably:
  - is better at waiting until the other party has finished speaking;
  - is the least emotional so that the opening statement is relative neutral;
  - has the most interest in initiating the mediation so is likely to disclose relevant information and show commitment?
- The 'weaker party' to give them a psychological advantage and to improve the power balance.
- How long will I allow everybody to speak?

## 3 Checklist opening statement

### Issues a mediator needs to address during his 'opening statement'

- Names of parties involved (check) and of the mediator.
- Whether to call someone by first name or use last names?
- What does mediation involve and how are the roles and tasks divided between the mediator and the parties (insofar as this has not already been covered during the start-up phase (I-1.1) and the initial discussions. (I-2.8)). If necessary, this can be explained by going through the terms of the mediation agreement and ground rules (I-2.8):
  - mediation is voluntary and non-binding;
  - all participants, including the mediator, can discontinue their participation in the mediation at any time (although it is advisable to prearrange an exit discussion to conclude the mediation);
  - commitment of all parties involved;
  - no binding decision or ruling is imposed, self-determination of the parties, a resolution of their own;
  - confidentiality and privacy.
- Neutral attitude and impartiality of the mediator (II-2.1).
- The possibility of holding caucuses (II-16).
- If not addressed during the start-up phase, make logistical arrangements, for example the time required for meetings, procedures for scheduling meetings, possible deadlines of parties, etc. (II-14).
- Postponement, suspension or other management of any pending legal or other proceedings in relation to the dispute.
- Ground rules (I-5).
- Do the clients have any questions?