

“ADVOCATES AS ALLIES” Training for Experienced Mediators

By: Christopher J. Webb, J. D.

The training materials that follow consist of a series of fifteen vignettes between fictional attorneys and mediators. Put yourself in the role of the mediator for each vignette and then consider how you would deal with the exchange. Write your thoughts and comments on the worksheet for each vignette individually and then share your contribution with your team, if assigned, and later with the other participants of the training. For some vignettes the thoughts behind an advocate’s statement are not disclosed. For these vignette you should also consider and jot down what you think the thought process might have been that resulted in the actual remarks made by the attorney in the vignette. After each vignette we will consider the proposed suggested mediator response and, when not otherwise disclosed in the vignette, the attorney thought processes contained in a separate handout that will be provided at the time of the presentation of these materials.

You should keep in mind that the vignettes are illustrative only and in no manner exhaustive of the myriad number of issues that arise in an actual mediation with parties and their counsel. The purpose is to highlight a few scenarios that will foster reflection on the part of each mediator in this training experience to anticipate real-life parties and their respective attorneys in litigation. Do feel free to critique the thought process and remarks of either the attorney or the mediator and remember that there are no right or wrong answers -- just an opportunity to learn. We trust that you will find the upcoming training a rewarding experience that will benefit you in your future mediations and those in conflict.

LAW AND ADR OFFICES OF
CHRISTOPHER J. WEBB, J. D.

Emphasis in the Practice of Conflict Resolution
Through Preventive Law Training, Mediation, Arbitration & Facilitation

The “Stonewalling” Advocate

	ATTORNEY THOUGHT PROCESS & REMARKS [UNSTATED IN ITALICS] [STATED IN BLUE]	MEDIATOR THOUGHT PROCESS [UNSTATED IN ITALICS] AND POTENTIAL RESPONSE(S) STATED IN BLUE AT APPENDIX “A”
1.	[Unstated] <i>“I am going to play along with this only because the Court forced me to attend this mediation process.”</i> [Stated] “I am here today only because we have been ordered by the Court to mediate.”	<i>“The attorney looks like he wants to leave before the mediation even starts. This isn’t fair to anyone here or the mediation process.”</i>

YOUR REMARKS AS MEDIATOR FOR #1 ABOVE (IF ANY):

The “Attorney” Advocate

	ATTORNEY	MEDIATOR
2.	“You aren’t a lawyer or judge, correct?”	<i>“I’ll bet the attorney thinks that since I am not a litigator or judge, I won’t be able to act as a good mediator.”</i>
	YOUR REMARKS AS MEDIATOR FOR #2 ABOVE (IF ANY):	

The “Professor” Advocate

	ATTORNEY	MEDIATOR
3.	“I look forward to provide you with a full explanation of the law that vindicates our side of this case. You should also understand that currently there is pending before the Court our motion for summary disposition that once granted will win the case for my client.”	<i>“How can I handle a case like this if I don’t know all the substance of the law or lack background in cases like this one.”</i>
	YOUR REMARKS AS MEDIATOR FOR #3 ABOVE (IF ANY):	

The “Confused” Advocate

	ATTORNEY	MEDIATOR
4.	<p><i>“I thought I went through evaluation once already. Why do I have to do it another time?”</i></p> <p>“How many times do we have to go through another Court evaluation program?”</p>	<p><i>“This attorney jumps from being asleep to angry in a matter of seconds. He keeps talking about ‘evaluation’ and not ‘mediation.’ I wonder if he realizes the difference.”</i></p>
	<p>YOUR REMARKS AS MEDIATOR FOR #4 ABOVE (IF ANY):</p>	

The “Kissinger” Advocate

	ATTORNEY	MEDIATOR
5.	“Are we going to caucus most of the time?”	<i>“I’ll bet this attorney is used to the ‘old style’ or should I say ‘old boy’ kind of mediation of shuttle diplomacy. That’s not my strength and it may not work.”</i>
	YOUR REMARKS AS MEDIATOR FOR #5 ABOVE (IF ANY):	

The “Negotiator” Advocate

	ATTORNEY	MEDIATOR
6.	<p>“[Upon hearing about the facilitative mediation process] Why am I here wasting my precious time?”</p> <p>“So, if the mediator isn’t going to decide this case, what can you do for me?”</p>	<p>“Again, here is someone who doesn’t get the process. I am not going to decide this case. I am starting not to like this attorney and his remarks.”</p>
	<p>YOUR REMARKS AS MEDIATOR FOR #6 ABOVE (IF ANY):</p>	

The “Litigator” Advocate

	ATTORNEY	MEDIATOR
7.	<p>[In caucus with the mediator]</p> <p><i>“My client thinks I am one of the top trial lawyers in town. I have to go on the offensive.”</i></p> <p>“Mediation is for wimps. Give me a settlement conference with the judge.”</p>	<p><i>“I am going to lose this mediation and it will be my fault because I can’t convince this lawyer to use the mediation process.”</i></p>
	<p>YOUR REMARKS AS MEDIATOR FOR #7 ABOVE (IF ANY):</p>	

The “Poker” Advocate

	ATTORNEY	MEDIATOR
8.	“I am not going to offer anything that is material to the representation of my client in this matter.”	<i>“If no facts come out, how is this mediation going to result in a settlement? I thought in training we learned that the goal is to create an atmosphere in which the parties feel that they can move from positions to interests and finally to needs in reaching a mutually-acceptable result.”</i>
	YOUR REMARKS AS MEDIATOR FOR #8 ABOVE (IF ANY):	

The “Insecure” Advocate

	ATTORNEY	MEDIATOR
9.	<p><i>“If I cooperate in this process, my client will not think I am a weak advocate and I’ll get less in fees.”</i></p> <p>“It’s getting late. Either we get this thing done or we’re out of here. So much for your ‘empowerment’ speech, Mr. Mediator.”</p>	<p><i>“I looks as if this attorney is really trying to put on a ‘show’ for his client and not participate in the mediation on a basis of good faith.”</i></p>
	<p>YOUR REMARKS AS MEDIATOR FOR #9 ABOVE (IF ANY):</p>	

The “Timekeeper” Advocate

	ATTORNEY	MEDIATOR
10.	“Can someone tell me why we are paying for this mediation?”	<i>“This is getting iffy. We have spent an hour or so and are not making any progress. Should I suggest caucusing? What if we go to impasse?”</i>
	YOUR REMARKS AS MEDIATOR FOR #10 ABOVE (IF ANY):	

The “Settlement” Advocate

	ATTORNEY	MEDIATOR
11.	<p><i>“If I offer a realistic amount to settle this case, where does it get me except less money for my client and me?”</i></p> <p>“An old attorney taught me a long time ago that settlement is never made in ‘big moves’ by one side.”</p>	<p><i>“The parties are so far apart in terms of dollars. How can we ever find common ground? I am failing as the mediator.”</i></p>
	<p>YOUR REMARKS AS MEDIATOR FOR #11 ABOVE (IF ANY):</p>	

The “Bargaining” Advocate

	ATTORNEY	MEDIATOR
12.	<p><i>“There is no way I am going to be candid in this process. They are just trying to soften us up instead of deal in good faith.”</i></p> <p>“Hey, I am tired of being the only one at the table bargaining. Isn’t time the other side did something?”</p>	<p><i>“I know that the other attorney is hiding something to protect his client. If he isn’t honest, how can we make any progress? I don’t want to favor one side over the other but this is getting difficult.”</i></p>
<p>YOUR REMARKS AS MEDIATOR FOR #12 ABOVE (IF ANY):</p>		

The “Good Faith” Advocate

	ATTORNEY	MEDIATOR
13.	<p><i>“I am here with authority to settle but I bet the other side isn’t.”</i></p> <p>“I am here with my client and we have been participating today in good faith. We are not going to negotiate against ourselves any longer.”</p>	<p><i>“Why didn’t I realize this sooner? One side is here with authority and the other is not. I thought I made that clear in my opening remarks. Why did it go this far?”</i></p>
	<p>YOUR REMARKS AS MEDIATOR FOR #13 ABOVE (IF ANY):</p>	

The “Trial” Advocate

	ATTORNEY	MEDIATOR
14.	“You know, from everything I have heard so far in this mediation, it is clear that the other side is not ready to go to trial.”	<i>“Okay, now, why is the attorney making this announcement out of the blue? Are we hitting a sensitive point, should I say something, what will the other side do? Listening is the best tool but I am curious and want to intervene since it could throw off the mediation. Less is more.”</i>
	YOUR REMARKS AS MEDIATOR FOR #14 ABOVE (IF ANY):	

The “Client” Advocate

	ATTORNEY	MEDIATOR
15.	[Turning to his client] “Do you need a break?”	<i>“The body language of the attorney and his client shows some real problems. I wonder if there is a disagreement going on that will derail our progress. Should I say something or am I crossing the line and losing my neutrality?”</i>
YOUR REMARKS AS MEDIATOR FOR #15 ABOVE (IF ANY):		