Published by Wolters Kluwer Law & Business in New York.

Wolters Kluwer Law & Business serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.wolterskluwerlb.com)

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer Law & Business
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

3 4 5 6 7 8 9 0

ISBN 978-1-4548-0219-8

Library of Congress Cataloging-in-Publication Data

Frenkel, Douglas.
The practice of mediation : a video-integrated text / Douglas N. Frenkel, James H. Stark. — 2nd ed.
p. cm. — (Aspen coursebook series)
Includes index.
ISBN 978-1-4548-0219-8
1. Mediation — United States. 2. Dispute resolution (Law) — United States. I. Stark, James H. II. Title.
KF9084.F746 2012
347.73'9 — dc22

2011053423

Abou

Wolters Kluwer
digital solution
educational res
connects legal
timely, specialt
success through

Serving custom
under the Asp
ftwilliam.com a

CCH products
for legal, secu
pension, payro
professionals.

Aspen Publish
sionals and law
ical and practic
intellectual prop
education resou
effective resour

Kluwer Law In
international le
business execut
and electronic
legal practice.

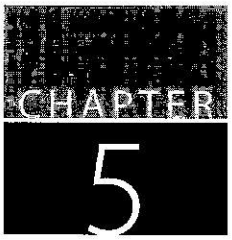
Loislaw is a co
firm practitione
quickly and effi
need it, by facili
treatises.

Best Case Solut
It provides soft
the electronic fi

ftwilliam.com
(retirement, wel
software at high

MediRegs prod
tions for profess
sionals in accou

Wolters Kluwer
York. Wolters K
professionals.



MEDIATION AS A STRUCTURED PROCESS

§5.1 INTRODUCTION

In the chapters that follow, we set out a model structure for conducting a mediation. Before we examine the structure stage by stage, this chapter provides an overview of the whole process. Like a good architectural plan, each stage of a mediation and its sequence in the overall structure is important to understand in functional terms—the goals the mediator seeks to accomplish during that stage, the skills called for to achieve them and how one stage relates to the next.

Why is structure important? A process that is well organized can provide comfort to participants and a sense of assurance that order will triumph over the drama of their dispute. Beyond this, a well-orchestrated, well-timed and well-structured process has important instrumental value in helping the parties achieve resolution.

Mediation is, above all else, a process of change. Albert Einstein once noted that "[t]he significant problems we face today cannot be solved with the same level of thinking we were at when we created them."[1] Success at resolving conflict through mediation necessarily requires shifts in how the participants think and feel about the dispute they are in, as well as the prospects of ending it. Even if the parties are ready to enter the process, movement from being in conflict to giving it up tends to be gradual and difficult, and calls for a methodical and progress-oriented[2] approach to challenging and potentially destructive

1. LYNN C. HOLADAY, *Stage Development Theory: A Natural Framework for Understanding the Mediation Process*, 18 NEGOTIATION J. 191, 205 (2002).
2. This emphasis assumes the goal of assisting the parties in achieving a resolution to the problem. Mediators whose objectives are less settlement-focused—for example, those with a transformative orientation—are likely to deemphasize structure in favor of following the parties' lead. *See generally* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (1994).

discussions. To appreciate these ideas, consider what happened in the following mediation:

A fifty-nine-year-old woman who had worked as a midlevel corporate manager for eleven years was denied a promotion for which she applied. The job went to a more recently hired male employee in his late thirties, on the ground that his "potential" was much greater. The woman felt that she had an excellent work record, and she was hurt and offended. Needing a job, however, she bit her tongue. But when soon thereafter her job was eliminated in an administrative reorganization, she consulted a lawyer and, with his assistance, filed a charge of age and gender discrimination with the U.S. Equal Employment Opportunity Commission (EEOC). The company responded to these allegations with a blanket denial of all charges, claiming that its decisions were lawful and justified by legitimate business considerations. When contacted by the EEOC several months later to see whether this matter might be mediated, both parties accepted the invitation.

The claimant was fearful of going to trial. She wanted and needed to work and was concerned about the possible harm to her prospects of finding a new position if viewed by others as litigious. At a pre-mediation conference, her lawyer, after briefly describing mediation, advised her that her case had possible legal weaknesses. On considering this, she informed him that, while she wanted the best deal he could get her, what she really wanted (assuming the company would not rehire her) was some fairly quick money. She was beginning to deplete her savings to pay for health insurance now that her month's severance pay and her unemployment benefits had run out. Most important, she wanted the case to end as soon as possible, because, despite entering therapy to deal with her problems, it was affecting her sleep, impeding her job search and hampering her personal life. Her bottom line: she would accept any offer that would net her $60,000 after deduction of her lawyer's one-third contingency fee if it would end things immediately.

The first session of the mediation was attended by the claimant, her lawyer, the company human resources director and its outside lawyer. It began with the mediator welcoming the parties to *"this effort aimed at reaching a settlement in this matter"* but dispensing with a lengthy description of the process *"since the lawyers have already done that."* On being invited to state her side of the case, the claimant's lawyer laid out a ten-minute summary of the facts and the law that supported her claim and damages, demanding *"$450,000 to resolve this."* Asked by the mediator if she had anything to add, the claimant began to provide an emotional account of her employment history, weeping openly while recounting the early days of the job and how gratifying it had been. At this point, the company's attorney apologetically interrupted her, telling the mediator that *"We, of course, could offer a different view of all of this. But perhaps we can make some progress if we try to deal with the money issues instead of rehashing contested allegations."* The mediator, acknowledging that *"these matters are tough,"* asked the claimant to *"try to put aside excessive emotion."* *"I think I'll let my lawyer do my talking from now on,"* she replied. After the company briefly repeated its denial of any unlawful conduct and summarized the justifications for its decisions, the mediator asked the claimant and her attorney to leave the room so that he could meet alone with the company's representatives. As the claimant rose from her chair, she was fuming.

The forty-minute session with the company representatives was marked by its defense of its actions and by the mediator's efforts to underscore the company's legal risks in face of the claimant's credibility and the sympathy she might evoke at trial. This produced a settlement offer of $35,000, an amount the company estimated as its legal costs to defend the case during the EEOC investigation and, if needed, to seek to have any court case dismissed. On next meeting privately with the claimant, the mediator's announcement of *"encouraging progress"* was met with a barrage of lawyerly argument reiterating the claimant's claims, as well as a lengthy, tearful outburst from the claimant about her work record, how poorly the company had treated her and how unemployment felt. The mediator raised questions about some of the potential weaknesses in her claim and pressed for an expression of flexibility. In response, claimant's counsel "reluctantly" lowered his demand to $320,000, citing his concession of a "25 percent risk" of not winning at trial.

Another one-hour private meeting with the company produced an increase in their offer to $100,000. When the mediator relayed this offer to the claimant, she immediately rejected it, calling it *"another insult from those bastards."* When pressed for a counteroffer, her lawyer, after thirty minutes of resisting, replied "$285,000."

The mediator then reconvened all of the participants and announced, *"We've been at it for nearly three hours and you're miles apart. Anyone got any ideas?"* Greeted with a lengthy silence, he terminated the mediation.

§ 5.2 THE NEED FOR STRUCTURE: LESSONS FROM A STORY

Recall that the claimant told her attorney before the mediation began that she would settle her case for $60,000 after payment of her attorney's fees. But when the company offered $100,000—a figure that would net her $6,000 more than that, she turned it down instantly. Something happened here that turned a resolvable dispute into an apparent impasse. What lessons might we draw from this case?

Lesson One: Successful De-Escalation of Conflict Requires Time. For conflict to ripen into a dispute can take considerable time. But *de-escalating* a conflict, especially after it has gotten to the point of threatened or actual coercion through litigation, is more complex and time-consuming than the buildup that led to it. Nikita Khrushchev, the Cold War Soviet leader, described this through the metaphor of two men tugging on a tangled rope, creating a knot. Untying the knot requires changing tactics completely and moving to a cooperative effort that is much more complicated than merely stopping pulling.[3] This notion has also been captured this way: One can do harm faster than good.[4]

This phenomenon is common in mediation. After a period of conflict escalation, the time it takes to produce a peace through talking tends to be substantial—for several reasons. First, the process is likely to start off on a note of mistrust and suspicion, given the buildup that produced the dispute. Even if the parties have

3. CHARLES F. HERMANN ed., International Crises: Insights From Behavioral Research 215 (1972).
4. *See* HO-WON JEONG ed., Conflict Resolution: Dynamics, Process and Structure 45 (1999).

agreed to a cease-fire and to attempt a resolution through mediation, this may be viewed more as a self-serving move to "stop the bleeding" than as an affirmative act of cooperation. (And where parties are *required* to mediate, there isn't even this level of pre-mediation agreement for a mediator to build on.) Once mediation talks begin, it may become clear that the words or actions that led to the conflict have inflicted deep wounds that may be very difficult to heal. Good mediation takes time. And the astute mediator structures the talks with this in mind.

The employment mediator in the case above, especially in the early stages, seemed to value efficiency over the importance of addressing the claimant's deeply hurt feelings. Sometimes the slow way is the fast way.[5]

Lesson Two: Participants Must Traverse Emotional and Behavioral Stages in Order to Reach Resolution. As we noted in Chapter 2, research tells us that the process of resolving conflict requires most people to pass through discernible stages of emotion and that each such shift is important for them to experience. This has been described in several ways.[6]

Some writers focus on the evolving *feelings* that disputants — both those who feel wronged and those accused of wrongdoing — experience as a successful negotiation progresses. This involves moving from:

- angry denial and a sense of blamelessness; to
- acceptance of the conflict and some sense of shared responsibility; to
- the willingness to sacrifice to end the conflict.[7]

Others focus more on the negotiating *behaviors* associated with these feelings, which can progress from:

- seeking to punish and coerce others out of a sense of being wronged; to
- trying to win by seeking an authority's approval of the strength and rightness of one's position; to
- negotiating in ways that integrate the other person's needs, as well as one's own, into an workable resolution.[8]

While some mediations begin with one or more disputants at an advanced stage of emotional readiness to resolve the dispute, others involve participants who may need to move through the entire cycle of emotion and behavior before resolution is possible. In some situations, time constraints or a disputant's personal limitations may mean that the best that can be hoped for is to move a party up a single rung in the ladder. But the key point is that these stages are developmental: Most people must go through one stage before reaching the next. Related to this, many disputants will need an opportunity to give voice to their emotions — even at

5. *See* JEROME F. WEISS, *Slow Down, You Move Too Fast . . . A Helpful Mediation Hint* (2003) available at *http://www.mediate.com/mediationincl/docs/You%20Move%20Too%20Fast.pdf*. *Cf.* THOMAS JAMES, *The Hare and the Tortoise, in* Aesop's Fables 39, 40 (1848) ("Slow and steady wins the race.").
6. This way of looking at the steps in moving from conflict to resolution are examples of the larger school of stage development theory. For further discussion of stage development theory, see sources cited in HOLADAY, *supra* note 1, at 209, n.2 (2002).
7. *See, e.g.*, GERALD R. WILLIAMS, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1.
8. HOLADAY, *supra* note 1, at 203-204 (discussing the "integrative stage" of conflict resolution).

the risk of escalating the conflict—before being able to move forward.[9] As a consequence, attempts by the mediator to short-circuit the process are very likely to fail. The mediator must structure the talks—their duration and pace, the balance between uninterrupted expression and party interaction as well as between joint sessions and private meetings—to allow for these stages to be played out sequentially and constructively.

There is also an important *diagnostic* benefit to understanding the emotional and behavioral stages of conflict. Understanding how in general disputants' feelings about disputes tend to evolve over time can give the mediator a means of appraising realistically the progress (or lack of progress) of the discussions in a particular case. As a result, even in seemingly hopeless situations, the patient neutral can retain a sense of optimism from the ability to "trust the process," confident that, with enough time and the right conditions for receiving and processing information, even the most contentious disputants may well reach agreement in the end. If communicated to the parties, such optimism can itself be an ingredient in producing further progress.

Our employment mediator seemed oblivious to these emotional stages. He allowed virtually no time for the claimant to express her anger and hurt (loss of identity, grieving the loss of the job, etc.) or to direct it at the person she felt had wronged her. Had he done so, she might have been more open to understanding the employer's perspective and to negotiating toward resolution.

Lesson Three: Mediation Must Allow for the Strategic Stages of Competitive Negotiation. A structured mediation process is often necessitated by a third factor: the strategic patterns of competitive negotiation and the barriers to resolution that can be presented by that bargaining approach. Many if not most mediation participants start negotiations in an adversarial fashion—they seek to maximize gain or, at a minimum, to protect themselves from being exploited by an untrustworthy opponent. As a result, certain tactics—for example, extreme positioning or argumentation, guardedness or caginess about information—are to be expected, especially in the early stages.[10] When parties emphatically commit to positions, movement off these positions is generally slow, because an element of face-saving is required. If a positional approach to the bargaining persists, it is often manifested by threats, bluffs and increasingly begrudging concessions as part of a ritualized, competitive "dance" that, if concluded at all, converges somewhere in the middle of the established bargaining zone.

To complicate matters, as noted in Chapter 2, a tough distributive bargaining approach is often exacerbated by cognitive distortions such as loss aversion, reactive devaluation, partisan norms of fairness and overconfidence bias, which may create additional barriers to resolution. While effective mediators can lower these barriers, it is clear that a mediation in which the participants are bargaining competitively must provide a structure that includes adequate time and appropriate

9. BERNARD MAYER, Beyond Neutrality: Confronting the Crisis in Conflict Resolution 181-214 (2004).
10. *See, e.g.*, CHRISTOPHER W. MOORE, The Mediation Process 166-2007 (2003) (discussing the prevalence of emotions and extreme positioning in early-stage negotiations and suggesting tactics for overcoming such factors).

settings (including private consultation periods) to allow these stages to run their course.

Although one cannot know this with certainty, the mediator in the employment case may have lost a potential resolution by failing to appreciate the progress of concessions that had begun, by underestimating (or being insufficiently patient about) the time that each side might need to move toward convergence or by assuming that the requisite movement could be accomplished in a single mediation session. The mediator may have read too much into the fact that no one was willing to "blink" during the final joint session, or may have erred in thinking that, at that stage in the process, a joint session format would yield further gap-narrowing proposals.

Lesson Four: A Structured Approach Can Enhance the Perception of Procedural Justice and Mediator Impartiality. As we have already noted, the kind of process a mediator orchestrates is an important part of the product she delivers. This is not simply a matter of appearing organized or knowledgeable about how to mediate, important as these things are. For mediation consumers to feel that procedural justice has been done, they must feel that they have been treated fairly and their voices truly heard. This underscores the importance of time, focus and attention to participants' needs that only a systematic approach can ensure.

Having an organized structure also enhances the odds of the mediator's acting, and being seen as acting, impartially—an important component of consumer satisfaction. Conducting the talks in stages, with an awareness of the purpose of each step, can heighten the mediator's understanding of the state of each party's emotions and bargaining strategy in that stage, and allow her to put them in proper perspective. This can protect the mediator from feeling overwhelmed when the parties exhibit strong emotions or from forming biases when they engage in aggressive, adversarial conduct. And this, in turn, can lead to levelheaded strategies for dealing with problem behavior while maintaining an impartial stance.

Lesson Five: Structure Is Crucial to Widening and Deepening the Information Flow. *The* major factor in producing change through mediation is improving upon the prior flow of information—reducing communication distortions, uncovering undisclosed interests, expanding upon what has been said previously, adding new perspectives on that information and helping the participants take in such information in a way that will help them shift their perceptions of the situation and of the other side. (This is also important in trying to obtain resolutions that will last. When settlement agreements are violated or ignored, it is often because of insufficient information gathering—the mediation failed to uncover or address an important need of a party or missed an important issue.)

Resolution-enhancing information comes from both the words that are spoken and impressions that those words create. It can come from what the parties say to the mediator and what she says to them. Examples of potentially useful information flowing *from* the parties include

- the parties' complete account of the problem and its history;
- their views on possible solutions—both optimal and acceptable;

- how a party really feels about the dispute and his or her role in creating it;
- the parties' real willingness to compromise from stated positions;
- the parties' true (and perhaps undisclosed) interests and private settlement facts, such as their financial situations, attitudes about risk and alternatives to a negotiated settlement;
- whether they will appear sympathetic and believable as possible future witnesses;
- whether a party will follow through on commitments made or can be trusted in a future relationship.

The mediator adds to the communication flow as well. Examples of potentially useful information the mediator provides *to* the parties include

- feedback on how a party's negotiating stance or conduct is affecting the talks;
- statements of optimism about progress made, agreements reached and signals about possible areas of future agreement;
- a detached view on how a party's perspective or position might be viewed by others;
- basic legal information about, or the mediator's evaluation of, the dispute;
- new ideas for resolving the problem.

Not all of this information will come out quickly or be heard easily. Some information — for example, the history of the dispute and the feelings it has generated — may emerge spontaneously but may also trigger emotions that require time-consuming management. Some information will generally be withheld in the early stages for strategic reasons, or until trust in the other side has been established. Some information (e.g., admissions of weakness and interests risky to disclose) may only be provided in private. Some information, such as ideas for resolution, may only be possible once previously withheld information has been revealed. Finally, some information provided by the mediator, such as disinterested feedback or evaluation, will only be accepted by the parties after the mediator has earned their confidence, a process that almost always takes time.

Optimizing the output and impact of information is not a matter of chance. Success depends on creating conditions that are conducive to openness and receptivity — the comfort of the parties, the right balance of plenary and private discussions, the expectations created by the mediator's questioning and the trust in the process that has been built. Establishing such conditions requires a deliberately structured process.

In the employment mediation, limiting the parties' face-to-face contact may have prevented the employer from hearing important information from the claimant that might have induced a change in the company's view of her and her claim. The mediator's immediate focus on persuasion and settlement rather than information expansion may have come at the expense of learning critical information about feelings, motivations and interests.

Lesson Six: The Trappings of Ceremony Can Aid the Settlement Effort. In mediation, as in other areas of life, ceremonies often underscore the importance of events. Beginning a mediation in a fairly formal, ceremonial fashion can cement the parties' investment in the effort about to begin, thus differentiating it from the failed negotiations that may have preceded it.[11] Moving from opening formality to increasing informality as tensions ease and trust develops can graphically signify the progress that has been made. And a final closing stage may benefit from a return to formality that conveys the significance of the agreement reached or of the failure to conclude one.

A closing ceremony that results in settlement may take the form of celebration, especially if the conflict has been protracted and settlement has been hard to achieve. But even failed mediations need not be somber occasions: They can be used to put tense parties at ease or set a constructive tone. For example, the mediator can point to differences that have been aired, partial agreements that have been reached and beneficial learning that has taken place. If conducted in a positive and optimistic manner, closing ceremonies can enhance the possibility of future cooperation.

The mediator in the employment dispute conducted a very stunted opening session by dispensing with any real introduction or description of the process that would follow and depriving the parties of much opportunity to express themselves or to interact. In the final session, he ended the effort without even acknowledging the positive: that in less than three hours, the gap between the parties had narrowed by nearly 60 percent—from $450,000 to less than $200,000. Different approaches at these two junctures in the process might have yielded different attitudes and feelings, if not results.

Lesson Seven: The Structure Itself Can Be a Catalyst Toward Progress. Mediations that end in agreement often have clear turning points. Indeed, deliberate transitions from one stage to the next (e.g., from gathering data to listing topics for negotiation) can themselves signal and encourage a sense of forward momentum. Similarly, changing the setting—such as by moving from joint sessions to private caucuses—can demonstrate the need for greater openness in information or greater flexibility in bargaining.

§5.3 THE PROGRESSIVE STRUCTURE OF A MODEL MEDIATION

Like most good stories, a well-organized mediation moves logically from beginning to middle to ending stages. And like many stories, its emphasis moves from the past (the events that produced the conflict) to the present (organizing the things that need to be discussed) to the future (whether and how the conflict will

11. *See* DWIGHT GOLANN, Mediating Legal Disputes §§2.1.1 and 6.1 (1996) (discussing the need for the creation of "settlement events").

be resolved). Once the parties are seated at the table,[12] effective mediations have four stages:

- **Stage One: Opening the Process, Developing Information.** With all participants present, the mediation begins somewhat ceremoniously. It establishes the mediator's role, the agreed procedure to be followed and, one hopes, universal commitment to the settlement effort. Each party provides an uninterrupted account of the conflict from his or her perspective, after which the participants respond to each other, and the mediator clarifies and summarizes but provides minimum direction.
- **Stage Two: Expanding the Information Base, Identifying Issues, Organizing an Agenda.** The mediator then moves to a more active stance by probing to obtain deeper and more detailed information about the background and context of the dispute and possible barriers to resolution. The mediator probes in both joint and private sessions, to find additional potential subjects for negotiation, uncover the parties' true interests and flesh out details that may assist in any evaluation or persuasion that may be required in later stages. Based on the information developed, the mediator identifies the negotiable issues and, with the parties, organizes them into a comprehensive agenda to be discussed. No attempt is made at this stage to solve the problem.
- **Stage Three: Problem-Solving and Persuasion.** The mediator then attempts to act as the orchestrator of party negotiations and, if necessary, inventor of potential options. This stage is often conducted in both joint sessions and caucus; "shuttle diplomacy" may be used to coach the parties about their negotiating conduct, obtain or transmit offers and encourage open responses. In this stage, mediators engage in problem-solving, persuasion and/or evaluation to try to increase the parties' flexibility and encourage movement.
- **Stage Four: Dealing with Impasse, Closing.** When the psychological timing is right (or the scarcity of time demands it), the mediator attempts to bring closure to the negotiations by helping the parties choose from among the options being considered. If an apparent impasse has been reached, the mediator attempts to diagnose the remaining barriers to settlement and intervenes strategically to deal with them. While joint sessions are preferred if closure can be obtained by face-to-face final bargaining, private sessions are often used in competitive bargaining situations. The mediation concludes with a ceremony in which the agreement (or lack of one) is confirmed. If there is an agreement, it is memorialized, with the mediator attempting to ensure that all important contingencies have been considered. If there is no final agreement, the mediator may confirm or suggest alternative processes for resolving disputed issues that remain.

12. The process of preparing for the mediation, covered in Chapter 4, could be considered the first stage in the overall effort. *See, e.g.*, MOORE, *supra* note 10, at 68-69, Fig. 2.3 (illustrating a twelve-stage process in which the first five stages precede the mediator's meeting with the parties).

Our recommended structure aims to create the conditions — safe face-to-face contact; comfort, sufficient time and, if needed, privacy for good communication and information flow; organized discussions, opportunities and incentives for inventing and evaluating options; and a sense of urgency appropriate to the problem — that are most conducive to participants' voluntarily reappraising their views of the dispute and their role in it. In our model, the mediator becomes progressively more active over time — moving from communication facilitator to developer of information to organizer and moderator of the negotiations, and finally to an advocate for resolution.[13]

§5.4 THE LIMITS OF A MODEL STRUCTURE

Mediations are obviously not as neat as the words on a printed page. Many disputes will not permit an orderly, logical progression from one stage to the next. Emotions may run so high or strategic maneuvering may be so pronounced as to challenge even the best attempts to impose structure on the process. Stages can repeat themselves or require revisiting, such as when previously withheld information surfaces at a later stage of a mediation, requiring additions or changes to the negotiating agenda. One stage may not be finished in the mediator's mind when another is begun by the participants, thus requiring the mediator to multitask and think about the functions of more than one phase at a time. In short, the mediator must react while she orchestrates, and both lead and follow at the same time.

While some mediations are multisession events, taking place over months or years, others must be concluded, if they are going to be concluded, in a matter of hours or even minutes, especially if the duration is constrained by the external demands of courts, participant time limitations and the like. In some settings, certain stages of the mediation must therefore be compressed or skipped over entirely, potentially impeding the development of rapport and the uncovering of important information. In others, participants enter the process closer to resolution than our model suggests, enabling the mediator safely to shorten or even dispense with certain stages of the process.

In short, there are limits to any model, and the effective mediator needs to develop the ability to adapt quickly to the situation in which he or she is working. However, recognizing these realities does not in any way diminish the value of a model and the value of working through as many of its stages, in their optimal duration and sequence, as is possible under the circumstances.

The next six chapters will analyze this staged model in detail.

13. The model of mediation we have set forth reflects our preferred approach to the process, summarized in Chapter 3. The structure of any mediation is likely to be determined in large part by the orientation of its mediator. For example, the time and emphasis devoted to information expansion or the balance of public versus private discussions might vary considerably depending on whether the neutral were a facilitator or an evaluator.