

**TASK FORCE MEMBERS, FACILITATORS  
RECORDERS & FLIP CHART MARKERS' AGENDA**

**MEDIATOR'S VERSION**

**INSERT TIMES, ASSIGNMENTS OF INDIVIDUALS WHO WILL  
HANDLE VARIOUS PARTS, PLANS FOR REFRESHMENTS, IF ANY**

**In Plenary Introductory Session:**

Welcome and thanks on behalf of the host for the day as well as the ABA Section of Dispute Resolution and Task Force on Improving the Quality of Mediation.

Introduce facilitators.

Emphasize need for frankness. We want to hear both negative and positive things about mediation.

People should feel free to disagree with one another. We are not trying to reach consensus.

Distribute informed consent forms. Ask people to read and sign one copy. Collect the signed copies and tell people to keep a blank copy.

Go over the agenda. Get the folks settled into focus groups.

**In the Small Focus Groups:**

Facilitators and notetakers synchronize watches. Make arrangements for timekeeper or notetaker to signal a few minutes before the end of each topic.

Notetakers should use laptops if at all possible. Notetakers should try to record statements as close to verbatim as possible. You won't be able to record everything, but do your best to capture as much of the essence and words as possible.

## **Instructions for Focus Group Facilitators and Notetakers About Informed Consent Forms and Focus Group Procedures**

All the focus group participants must sign informed consent forms. This should normally be done at the introductory session. If it is not done at the introductory session, be sure that it is done in your focus group. Each participant should get two forms: they must sign and return one form and they get to keep the other form.

Participants are not required to answer any questions that they prefer not to answer. (This should not be a problem as these questions are not personal and our participants are generally not shy about expressing their opinions.)

This protocol provides a general outline of topics and questions. Please generally follow the topics, but feel free to ask follow-up questions even if they are not specifically indicated. Given the time limitations, you may not have time to ask every question listed below. Use your judgment about what is most important.

**Notetakers must not include the names of the participants in your notes.** At the beginning of the notes, please indicate the number of participants attending. If anyone else attends (such as members of the Task Force), you may indicate their names, but do not include them in the number of participants.

If you have any questions, please ask Task Force Co-Chairs Wayne Thorpe (404-974-9828, [wthorpe@jamsatlanta.com](mailto:wthorpe@jamsatlanta.com)) or Rachel Wohl (410-841-2260, [rachel.wohl@mdcourts.gov](mailto:rachel.wohl@mdcourts.gov)) or University of Missouri-Columbia Professor John Lande (573-882-3914, [landej@missouri.edu](mailto:landej@missouri.edu)).

## **FACILITATORS' FOCUS GROUP QUESTIONS**

Facilitators: introduce yourself, the recorder, (and flipcharter and timekeepers, if you have them). Ask participants to quickly say their name and practice areas (or business/title, with business people use “you & your company” instead of “you and your client”).

Thanks very much for coming to our focus group discussion today. We are going to ask you to give your opinions about what makes for a good mediation – or a bad one. We are going to focus only on civil cases, not including family law cases.

As we said in the introduction, there are no “right” answers and the goal is NOT to reach an agreement about any of these questions. Rather, the goal is to get the best understanding we can from various people’s experience.

We have conducted other focus groups in the past year. In this focus group, we are going to ask about several specific things to follow up what we heard in the earlier focus groups. In particular, we are going to ask about selecting mediators, the process of preparing to meet in mediation, and having mediators make suggestions and give their opinions. At the end, we will ask you to give any other comments or suggestions you have and then we will ask you to fill out a questionnaire with some specific questions.

Do you have any questions about this before we begin?

Time for this Topic: \_\_\_\_\_ Minutes Begin and End Time: \_\_\_\_\_

## **1<sup>ST</sup> TOPIC: SELECTING A MEDIATOR**

1. How do the lawyers and parties generally select you as a mediator? (Since lawyers generally hire mediators, we may refer only to lawyers in this part of the discussion.)

If Not Addressed In Discussion, Ask:

Do you have any sense that they have problems finding high-quality mediators?

Are you (and other mediators you know) used by the same people over and over?

Do you have a sense of what factors they use when considering different mediators for different cases? What are those factors?

If a court orders mediation, is the selection process different? If so, how?

2. If all the mediators lawyers know are unacceptable to the other side, and they have to select a mediator they have never used before out of a pool of a few mediators, ***and they could have access to any information they want***, what information would they want about the mediators to make this choice? (Ask “why” if the reason for having a particular piece of information is unclear.)

If Not Addressed In Discussion, Ask:

Do you think that they ever consider a mediator’s gender, race or culture?  
Why?

What, if anything, do you think would make them more likely to seek a mediator who is a minority or a woman?

Time for this Topic: \_\_\_\_\_ Minutes Begin and End Time: \_\_\_\_\_

## **2<sup>ND</sup> TOPIC: PREPARATION FOR MEDIATION**

1. By a show of hands, how many of you, if any, normally prepare in the following ways before meeting in mediation?

[NOTETAKER: RECORD NUMBER OF PEOPLE FOR EACH ITEM]

Reading materials that each side submits to you

Talking with each lawyer separately (without their clients)

Talking with each lawyer and client together

Talking with both lawyers together (without their clients)

Talking with all lawyers and parties

Anything else?

How many of you normally don't talk with each side separately before the first mediation session because court rules prohibit this?

How many of you don't talk with each side separately before the first mediation session because lawyers and mediators you work with generally don't do that?

2. When YOU PREPARE FOR A MEDIATION, what is most important to make it high-quality? Ask what people mean by "high-quality preparation."
3. When LAWYERS PREPARE FOR MEDIATION, what is most important for high-quality preparation?

If Not Addressed In Discussion, Ask:

How much, if any, discovery?

How should lawyers prepare clients?

4. When lawyers PREPARE MATERIALS FOR THE MEDIATOR, what is most important to make the mediation high-quality? Ask what people mean by "high-quality mediation."

5. When YOU TALK WITH LAWYERS BEFORE THE MEETING (SEPARATELY AND/OR WITH BOTH SIDES PRESENT), what is most important to make the mediation high-quality?

If Not Addressed In Discussion, Ask:

When talking with each side before meeting in mediation, what is especially important to discuss?

The substance of the dispute?

How the mediation process should be structured re:

Opening statements or not

Use of caucuses – a lot, a little, or none

Whether you would express your opinions in mediation

Background of the case

Personality dynamics

Whether the mediator should put some pressure on the parties

6. Do you ever communicate directly with the parties (without the lawyers present) before the first mediation session? Why or why not?

Time for this Topic: \_\_\_\_\_ Minutes Begin and End Time: \_\_\_\_\_

### **3<sup>RD</sup> TOPIC: MEDIATORS MAKING SUGGESTIONS OR EXPRESSING OPINIONS**

We are going to ask questions separately about mediators making suggestions and giving opinions. Examples of giving suggestions include “Have you considered offering a structured settlement or annuity?” or “Is offering an apology something you would consider?” “Is continuing to do business with the other side a possibility?” Examples of expression an opinion would be “If you go to court, I think that the verdict would be in the range of \$40,000 to \$60,000.” or “I think that you are going to have a hard time persuading a jury that the pain and suffering was as serious as you are claiming.” or “I think that this is the best result you are likely to get, so I suggest that you accept the offer.”

#### **1. Should mediators make suggestions?**

##### If Not Addressed In Discussion, Ask:

Does a mediator need permission to do this?

If so, from whom? The lawyer or the client? or both? Why?

Does it make a difference if a mediator floats several options at a time, or just floats one option? Why?

If making suggestions is OK:

Where (in group session or in caucus)?

When (anytime, just when stuck, other)?

About What? (relationship issues, financial issues, issues that the parties/lawyers have not raised, possible settlement terms)?

Does making suggestions affect a mediator’s impartiality?

#### **2. Should mediators express their own opinions?**

##### If Not Addressed In Discussion, Ask:

Does a mediator need permission to do this?

If so, from whom? The lawyer or the client? or both? Why?

If expressing opinions is OK:

Where (in group session or in caucus)?

When (anytime, just when stuck, other)?

About What? (strengths & weaknesses of the case, how much money to offer or accept, the probable outcome in court, relationship issues, issues that the parties/lawyers have not raised, the terms

of settlement)?

Does expressing opinions affect a mediator's impartiality?

3. Is there anything else similar to making suggestions or giving opinions that is particularly helpful? What is most helpful for mediators to do?
4. Is it ok for a mediator apply pressure to get a settlement? How do you differentiate between persistence, pressure, and coercion?

If Not Addressed In Discussion, Ask:

Does a mediator need permission to do this?

If so, from whom? The lawyer or the client? or both? Why?  
Is there a threshold between when pressure is ok and when it is not? If so,  
what is the threshold? In other words, how much is too much?

If pressure is OK sometimes:

Where (in group session or in caucus)?

When (anytime, just when stuck, other)?

If a mediator applies pressure, can that affect the mediator's impartiality?

If so, under what circumstances?

Time for this Topic: \_\_\_\_\_ Minutes Begin and End Time: \_\_\_\_\_

#### **4th TOPIC: IMPROVING QUALITY GENERALLY**

1. Are there any factors that have not been identified yet that you believe make a difference in the quality of mediation?
2. Do you have any ideas or thoughts about what might improve the quality of the mediation process or of mediators, or any ideas about what the ABA could do? (Ask and be silent until someone in the group breaks the silence.)

**THANKS VERY MUCH for your participation. It has been VERY helpful.**

We have one more thing to do in these small groups, which is to complete the questionnaires I am passing out now.

[Possibly add: We are just starting to use these questionnaires and would like to see if they are clear or whether we should improve them. So, as you complete the questionnaire, if anything is unclear or confusing or if you have a hard time answering a question for any reason, please ask for clarification and/or make a note on your form. Thanks again.]