

POWER OF MEDIATOR GUIDANCE

A MEDIATION WORK FLOW

By David Levin

A WORK ENVIRONMENT

Mediation can be viewed as a work environment. There is (1) work to be done, (2) a need for productive working relationships, and (3) a need for a productive method for doing the work.

The work to be done is to move a dispute towards resolution. However, this mission is not to drive the conflict to a conclusion and to close the case. Mediation, as a method of dispute resolution, is based upon a core value of self-determination. An over-arching drive to close the case can negate self-determination.

Mediation is more defined by assisting the participants to acquire the ability to resolve their own dispute, and by providing the participants with a safe and supportive environment for doing the work to seek a resolution. Success is more viewed as meaningful progress towards resolution than as achievement of a milestone.

The method of dispute resolution offered by mediation is aimed towards achieving closure. However, the nature of the service is to empower the participants to get there, rather than to force a conclusion upon them. This paradigm highly impacts how the work is to be done.

Productive working relationships need to be developed among the participants. The mediator's interactions with each participant, as discussed in preceding sections of this presentation, are pivotal in developing working relationships which will be conducive for dispute resolution. The focus of this section is how to get the work done.

WORK FLOW

Basic mediation training often describes the mediation process as a sequence of stages. This approach is effective for identifying steps to perform and the related skills. While each author and trainer may differently label the stages, there is fundamental information and practice advice contained in the descriptions of stages. An understanding of mediation stages and the skills to navigate them needs to be fully absorbed by a mediator. These tools need to become second nature to a mediator. The reader is referred to basic mediation materials and trainings for an understanding of stages. This training assumes familiarity with stages and related skills.

The objective here is to step back and to view the overall process. Stages and skills are parts. What is the purpose for the process? What are the big picture goals to be accomplished? Will the view from 40,000 feet help mediators navigate through the weeds found at ground level?

There are three core purposes underlying the stages of mediation:

1. To find out who is in room and what are their issues;
2. To allow the participants to explore what is possible to do about their situation; and
3. To allow the participants to discover what they might agree upon to do next.

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Work flow may be described as a map of what needs to be done, rather than stages which prescribe activities to perform. This perspective provides a sense of purpose for what is being done, a view for what needs to be accomplished. While stages and skills may provide the necessary tools, to understand the underlying purposes may provide a useful overall map.

One map is described in this section. There are other ways to map the process. The objective is to encourage mediators to step back and to view the overall process, to see how the pieces might fit together to achieve a purpose, and to discover a map of their own which works for them. If you can draw it, then you can understand and use it.

A couple words of caution. This is a map of goals, not an inventory of the skills needed to achieve them. The whole map can look complicated, because there are many moving parts. However, after viewing the whole map, specific sections will be enlarged and discussed. The focus on purpose is simpler: who is in the room, what can be done, and what agreements are possible.

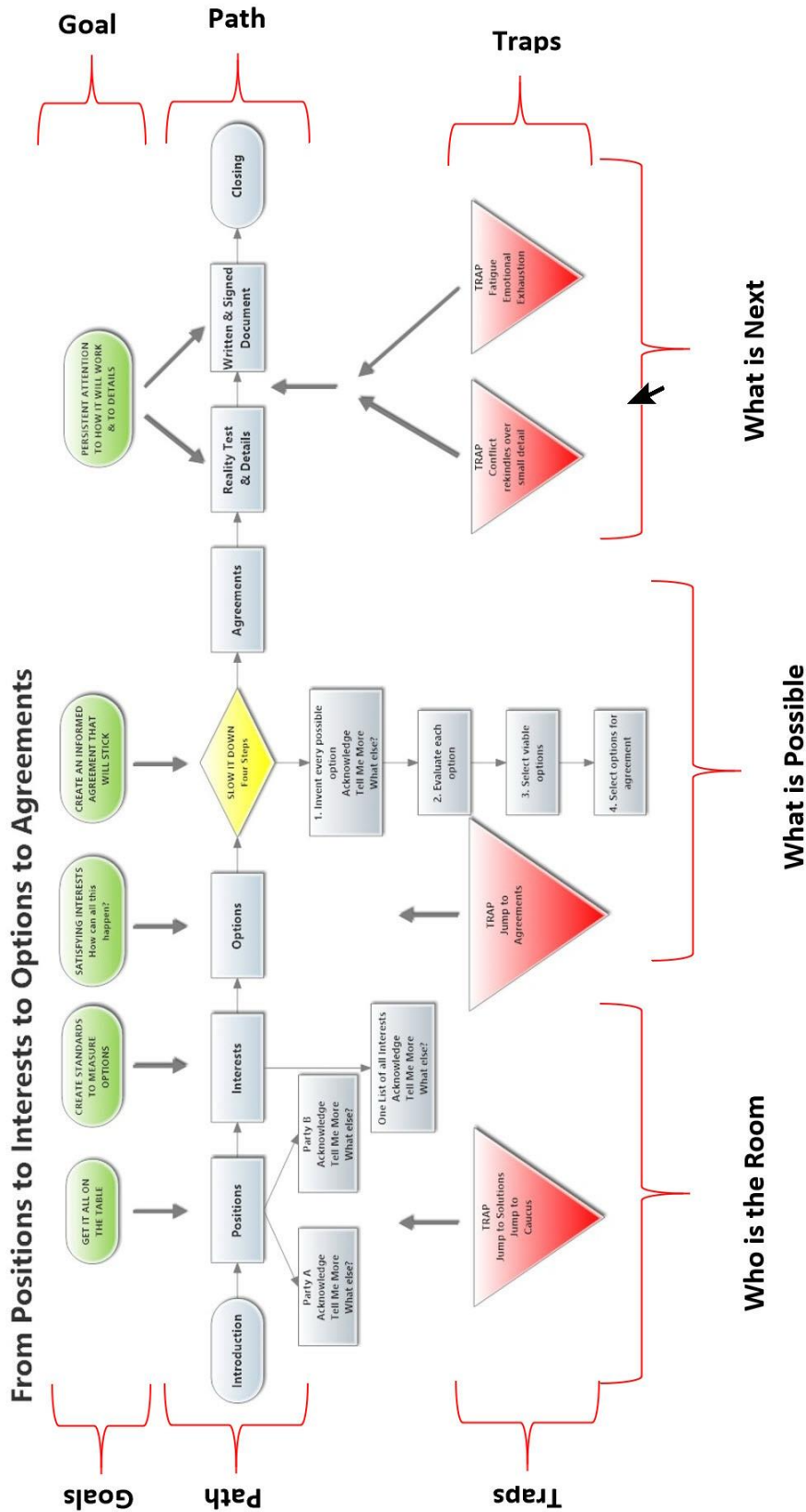
THE BIG PICTURE

“Path” represents the main work flow for the mediation process. The path is shown by a horizontal line of rectangles across the middle of the diagram. There are eight way stations along the path: Introduction, Positions, Interests, Options, Agreements, Reality Test & Details, Written & Signed Documents, and Closing. There is an objective to be achieved at each way station. However, as will be seen, progress along the path is not always linear. Work on an objective can happen at any time.

“Goals” along the path are the ovals on the top. The goals are what is hoped to be accomplished by performing the tasks.

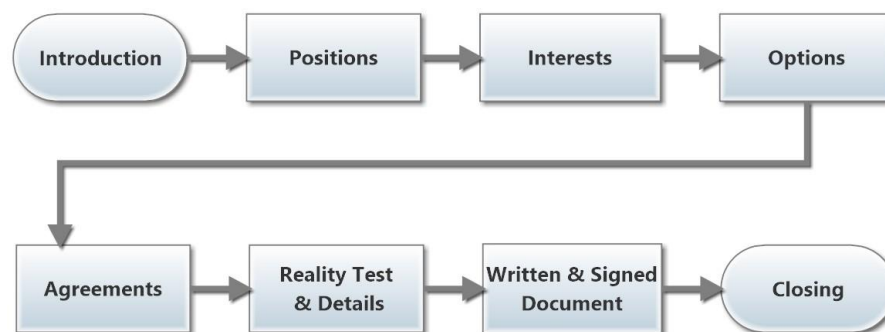
“Traps” along the path are the large triangles on the bottom. The traps identify common rabbit holes a mediator may fall in along the way.

Purpose. The relationship between “The Path” and the core purposes of mediation is show by the labels on the bottom: “Who is in the Room,” where information is gathered; “What is Possible,” where possible resolutions are explored; and, “What is Next,” where the participants may decide what to do with their dispute.



THE PATH

There are way stations along the path, each with an individual set of tasks and a different set of objectives. The sequence may be chaotic following the flow of an individual mediation or may follow a more logical progression. Nevertheless, each way station needs to be visited at least once.



Introduction. The purpose is to provide information about what it means to mediate and to seek the willingness of the people in the room to participate. At the beginning of mediation, and throughout the process, a mediator needs to educate, to be transparent, and to enlist engagement about what is happening and what might happen next.

Positions. The objective is to provide an opportunity for a participant to express, and for the other participants to hear, the positions, history, emotions, and goals that brought the person to mediation. This is an essential starting point. If this objective is not adequately addressed, a person may continue to be stuck on their starting position, talking louder and more forcefully in an effort to be heard and acknowledged.

Interests. The objective is to unearth and place on the table, the underlying needs, interests and values which a meaningful resolution would need to address for a participant. Addressing these realities will provide the building blocks for truer and more lasting result.

Options. The objective is to explore whether there are more choices than the starting positions of the participants. This place needs to offer safety - the freedom to non-judgmentally find new options without any pressure to agree to anything. A place where open, flexible and creative thinking is essential, and where the fruits of the preceding work may be found.

Agreements. The objective is to discover whether the participants will arrive at any mutual understandings of what to do next, even if the agreement is to disagree. Regardless of their respective motivations and beliefs, what are the steps which they can agree to take. This is the crucible where options can be measured against (1) the integrity of starting positions and (2) the furthering of needs, interests, and values. What can result is specific agreements, or a knowledge that the moment is not ripe for an agreement.

Reality Test & Details. The objective is to describe what details are required to accomplish the specifics

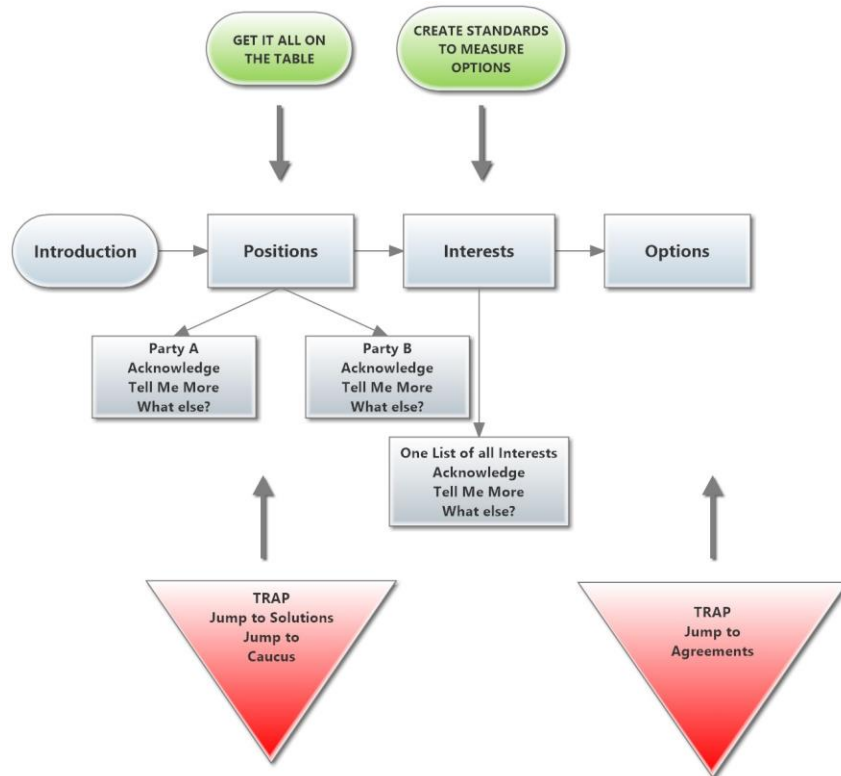
of the possible agreement(s) and whether it is realistic to believe those goals may be accomplished. This is the place to learn whether wishes can become fulfilled promises, or whether the parameters for agreements need to be recast.

Written & Signed Documents. There are companion objectives here. First, to clarify: If an agreement is not clear enough to be clearly stated, then the agreement is not yet complete. Second, to ratify intent: After clearly stating the agreement, to make a commitment to the agreement.

Closing. The objectives, whether achieved with brevity or ceremony, whether agreements were made or not, is to acknowledge what has happened. Closure may help the participants pack up who they are - to come to a place of balance after the usual upheaval of the mediation process.

This progression of tasks may not linear. For example, during "Written & Signed Documents," emotions can erupt, signaling the mediator that underlying issues may need to be revisited. This work may lead to the discovery for more options, and the mediation process may need to cycle back through earlier work. A task may be addressed during a stage of mediation, and unfinished work may surface at any time.

WHO IS IN THE ROOM



The purpose is to learn as much as possible about the participants and their individual circumstances. This is a time for each participant to experience being heard. A time for everyone to better understand who and what is in the room.

Goal: Get it all on the Table. The objective is to go beyond the positions presented by each party at the beginning of mediation. The opening statements may present only two divergent narratives of the situation and may only offer two diametrically opposed outcomes. There is little to work with at this point, only a

stalemate.

There are facts, history, emotions, needs, interests, values, fears, hopes, and more, which underlie a dispute. These elements are not often expressed up front. Yet, these elements are the components which may have created the conflict, and which must be addressed to resolve it. Opening statements may only describe a deadlock and a deep chasm between the parties. There needs to be more to work with for movement towards resolution to occur.

Key Tools: Acknowledgment and “Tell Me More.” These essential communication techniques are discussed in the companion article in the training materials, “Acknowledgement, a Dispute Resolution Basic Skill: From Clenched Fists to an Open Mind.”

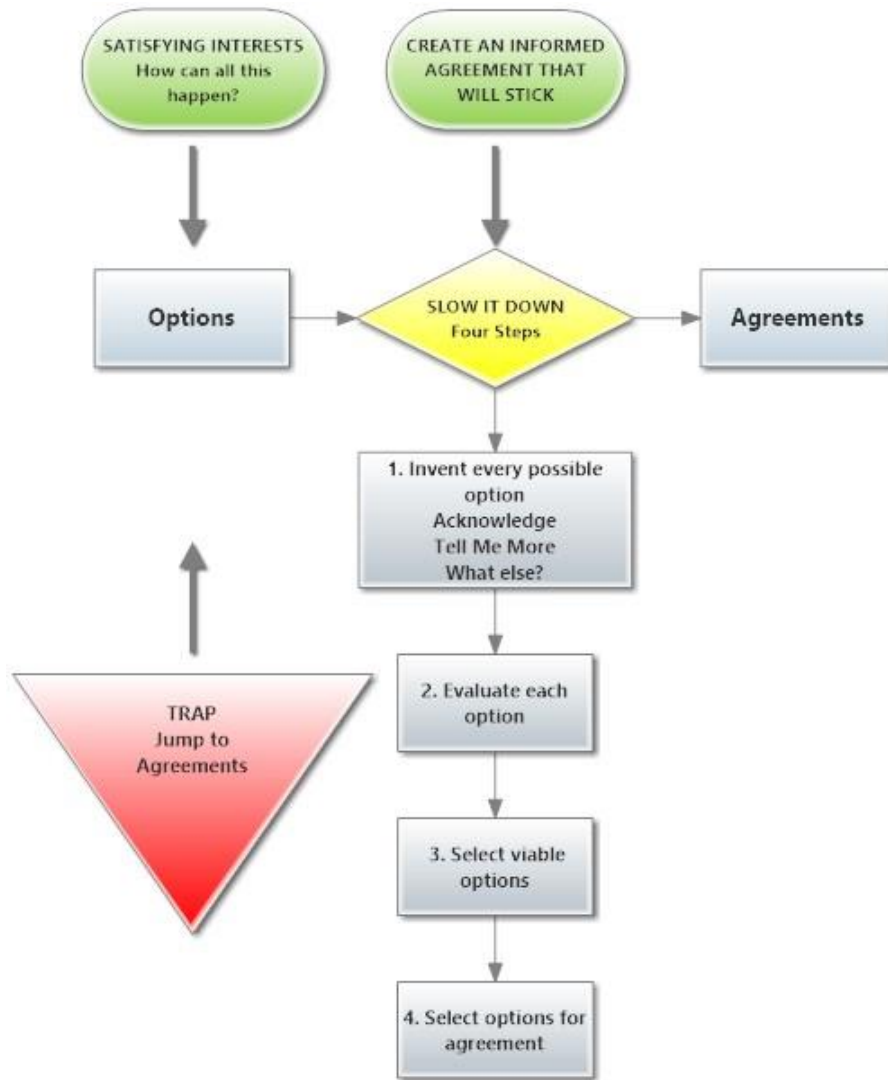
Goal: Create Standards to Measure Options. There is another goal, to create the means to later evaluate options for a possible resolution. The identification of positions and interests establishes key reference points. An option may be evaluated for how the option addresses positions and interests. A settlement package may be viewed for how the resolution balances positions, interests, and a workable agreement between the participants. Discovering the building blocks which created the conflict can also provide the means for achieving a mutually acceptable resolution.

Trap: Jump to Solutions. The deadlock and explosive potential of the conflict may appear intimidating after the opening statements. Rather than to work to bring information onto the table, a mediator may bailout. There is a temptation to suggest solutions for the dispute, to avoid a fight by solving the problem. While jumping to solutions may appear to provide a way out, the true benefits of mediation to achieve “an informed agreement that will stick” through self-determination may be lost.

Trap: Jump to Caucus. Another temptation to avoid an explosion between the parties is to jump to individual sessions. A caucus can be a powerful and helpful tool. However, a caucus as a conflict avoidance technique may prevent the real work from being done.

Key Tools: Working with Heat. The ability of a mediator to sit with the heat of conflict is essential. For a discussion of how and when to work with Heat, see the companion article in the training materials, “Working with Heat: From Conflict Avoidance to Constructive Conflict”

WHAT IS POSSIBLE



The purpose is to explore whether there are more choices than the starting positions of the participants, and whether mutually acceptable outcomes are possible. There is a need for an attitude that there are no bad ideas. One idea may lead to another. The discussion may lead to new creative ideas and combinations of options which were never thought of before. Frequently, the options which form a lasting agreement will have been totally unanticipated by the participants and the mediator.

Goal: Satisfying Interests, how can all of this happen? This challenge is the core question. The capability to mediate with an open, flexible, and creative mind, which is discussed in earlier sections of this presentation, is indispensable. Free range over every conceivable option is needed. The participants, before coming to mediation, may not have thought about their underlying aspirations, let alone what resolutions may be agreeable to everyone involved. The mediator may need to bluntly frame the task as “what do you want to do with this mess” or “how can you solve this puzzle?”

Goal: Create an informed agreement that will stick. Buyer’s remorse can be real. Participants need to fully explore what an option will mean for them. Participants also need to experience knowing all the available choices. There is no substitute for taking the time to carefully understand the options and to thoughtfully select which ones might work.

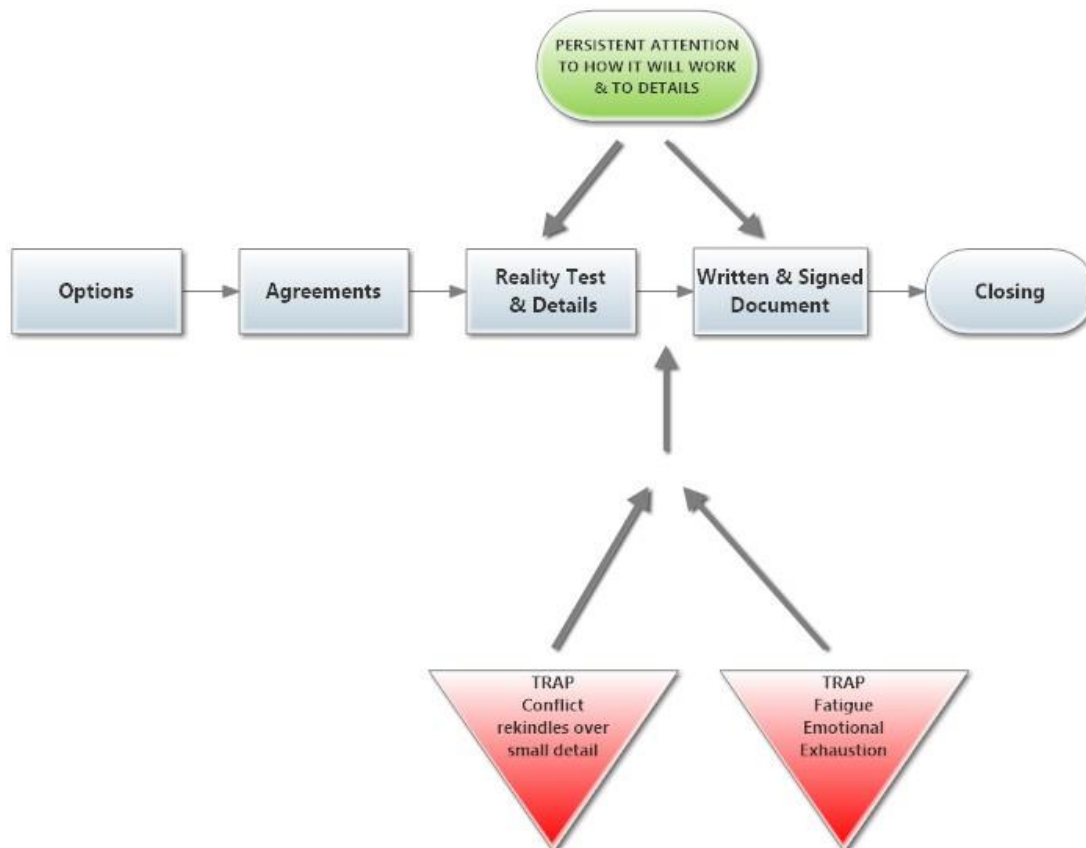
Trap: Jump to agreements. Impatience can lead to uninformed agreements that will not stick. There can be a rush to judgment, a need for immediate relief from the angst of the conflict. There can be a tendency to pounce upon the first ideas that come up. This is a trap to avoid

Key Tools: Slow it down, use a four-step process. In *Getting to Yes* by Roger Fisher and William Ury (Penguin Books 1981) a powerful four-step process is recommended, and may be paraphrased as follows;

1. Invent every possible option;
2. Evaluate every option (do not rush to judgment);
3. Select which options are viable;
4. Selection which option(s) may be agreeable.

Bottom Line: Take the time needed to perform the mediation process well; neither rush nor dally.

WHAT IS NEXT



The purpose is create an informed agreement that will stick. There can be an overwhelming temptation to jump upon a resolution as soon as it is stated. “We are done!” “We can get out of here!” This moment can be a false milestone. Truly, “the devil is in the details.” A failure to detail the of an agreement and

the specifics required for implementation can be a setup for a disaster. Further, the work to detail the agreement and implementation will reveal whether the resolution is workable and desirable. The remaining tasks can make or break a deal.

Goal: Persistent attention to how it will work & to details. This is a time when staying locked on the details can seem petty, irritating, and highly unpopular. Gentle persistence may be required, even for the mediator.

Trap: Fatigue and emotional exhaustion. Mediation is physically, intellectually, and emotionally draining for everyone in the room. The moment of agreement can feel like collapsing after crossing the finishing line of a long marathon, energy exhausted and reserves spent. A mediator must plan for this moment. To warn everyone, and to remember themselves, that this moment will come. A mediator must have stashed energy bars, both literally and figuratively, for completing the process.

Trap: Rekindled conflict. Almost invariably a seemingly trivial item will spark an explosion. Hot emotions will rush back. The initial precipice of disaster will loom one again. And, with fatigue and emotional exhaustion in abundance, the heat may seem fatal. A mediator must plan for this moment as well. Re-acknowledgment of each participant's positions, needs, and interests becomes essential. A revisiting of the heat of the conflict almost becomes a rite of passage. This moment is a true test of the capability of the mediator to support the capability to mediate for both the mediator and the participants.

Bottom Line: Stay the course, trust the process, and have the fortitude to get the job done.