

Anatomy of  
a Personal  
Injury  
Mediation  
from the  
Mediator's  
Perspective



Ray Niblock  
Niblock Mediation Services  
ADR Commission Certified  
Civil and Probate Mediator  
CRT 2025-10  
479-346-7719

Up.

over.

# Buckle UP.

We have a lot to get through!



*on what you can use in your next mediation.*

# Objectives



Understand how we do tort mediation in Arkansas



Learn what effective mediation looks like vs. trial advocacy



Improve preparation



How to interview and select a mediator for your case

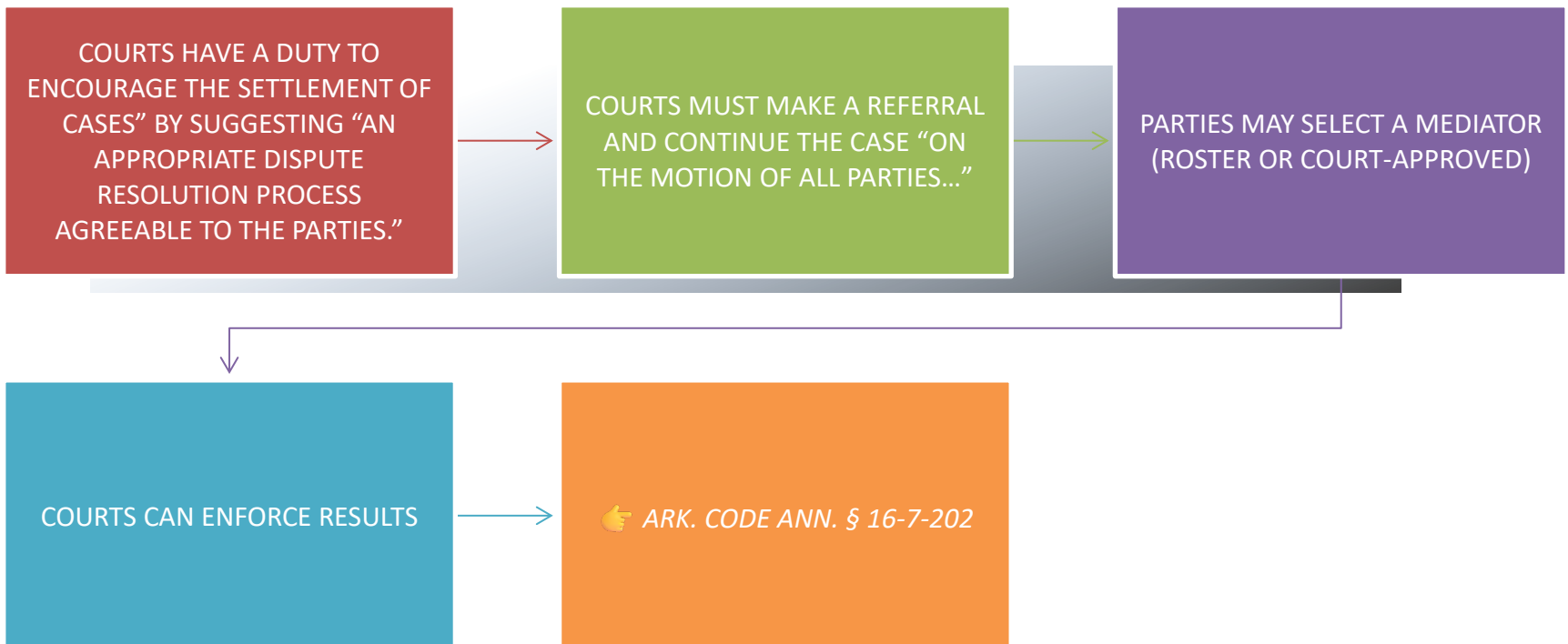
# Arkansas Favors Dispute Resolution

- Encourages resolution outside of trial
- Applies to almost all disputes
- Promotes efficiency, agency, and fairness
- The legislature encourages lawyers to “advise . . . client[s] about the dispute resolution process...” - § 16-7-204

👉 *Ark. Code Ann. § 16-7-201 et seq.*

***“Mediation is embedded in Arkansas law.”***

# Courts Can Order Mediation



# Party Protection

👉 *Ark. Code Ann. § 16-7-206*

Communications in mediation are confidential per statute and per ARE 408, subject to limited exception

Exception: *§ 16-7-206(c)* provides for court-ordered disclosure after in camera review to “other legal requirements”

*“What happens in mediation stays in mediation.”*

# Mediator Protection

👉 *Ark. Code Ann. § 16-7-207*

Mediators are immune from civil liability

Exception: misconduct

*“The system protects neutrality—so the mediator can do the job and the parties can participate fully.”*

# Why Mediator Certification Matters

- Arkansas ADR Commission roster
- Training required
- Continuing education required
- Subject to discipline/removal

👉 *Arkansas ADR Commission  
Requirements  
(Court-Approved Roster)*

***“Certification—it’s accountability.”***

# Mediator's Role as Neutral

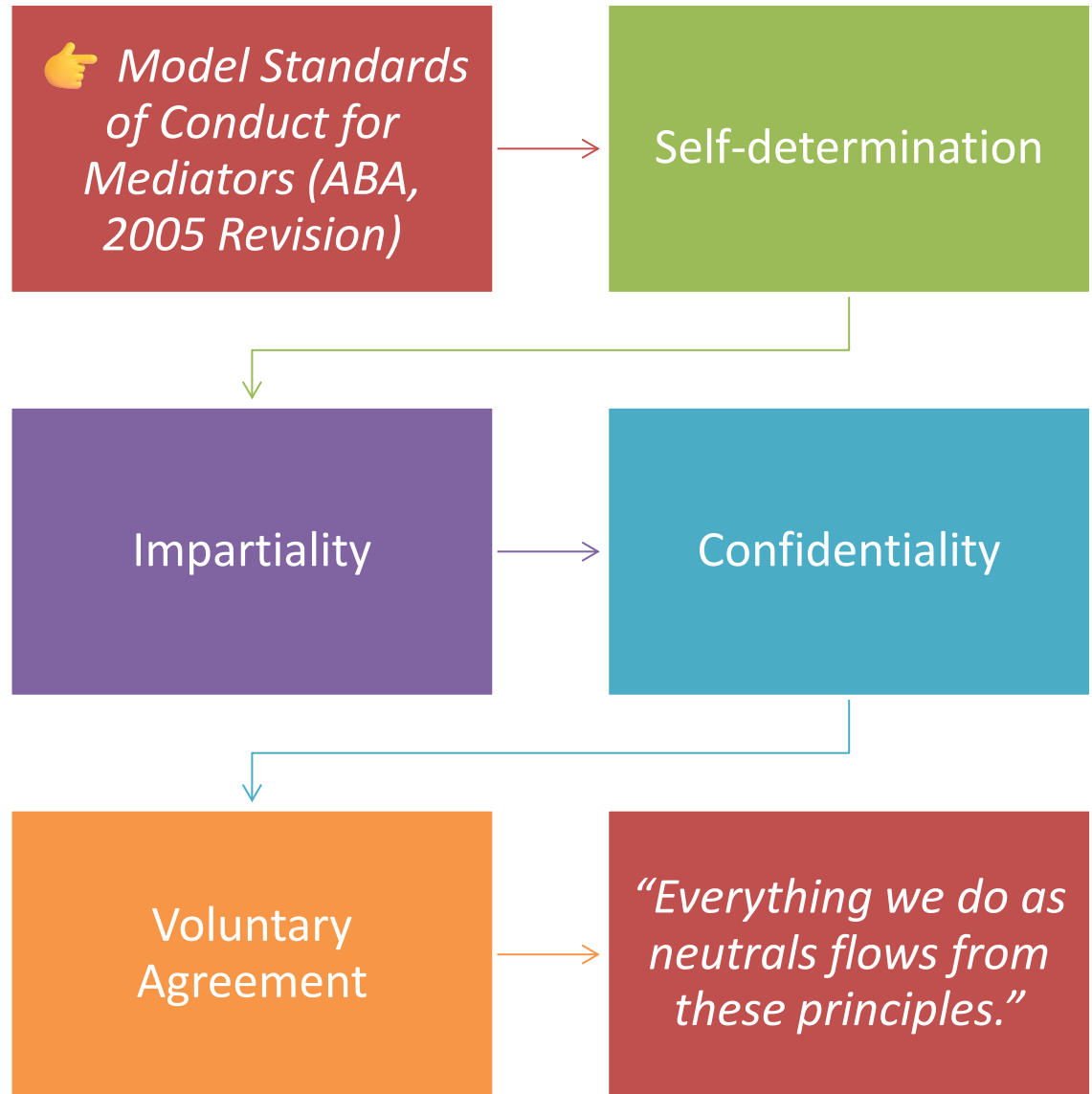
- Facilitate Communication
- Encourage participation and autonomy
- Clarify and reality test issues
- Reduce obstacles to decision-making
- Evaluate options
- Informed and voluntary agreement

👉 *Arkansas ADR Requirements for the Conduct of Mediation and Mediators*

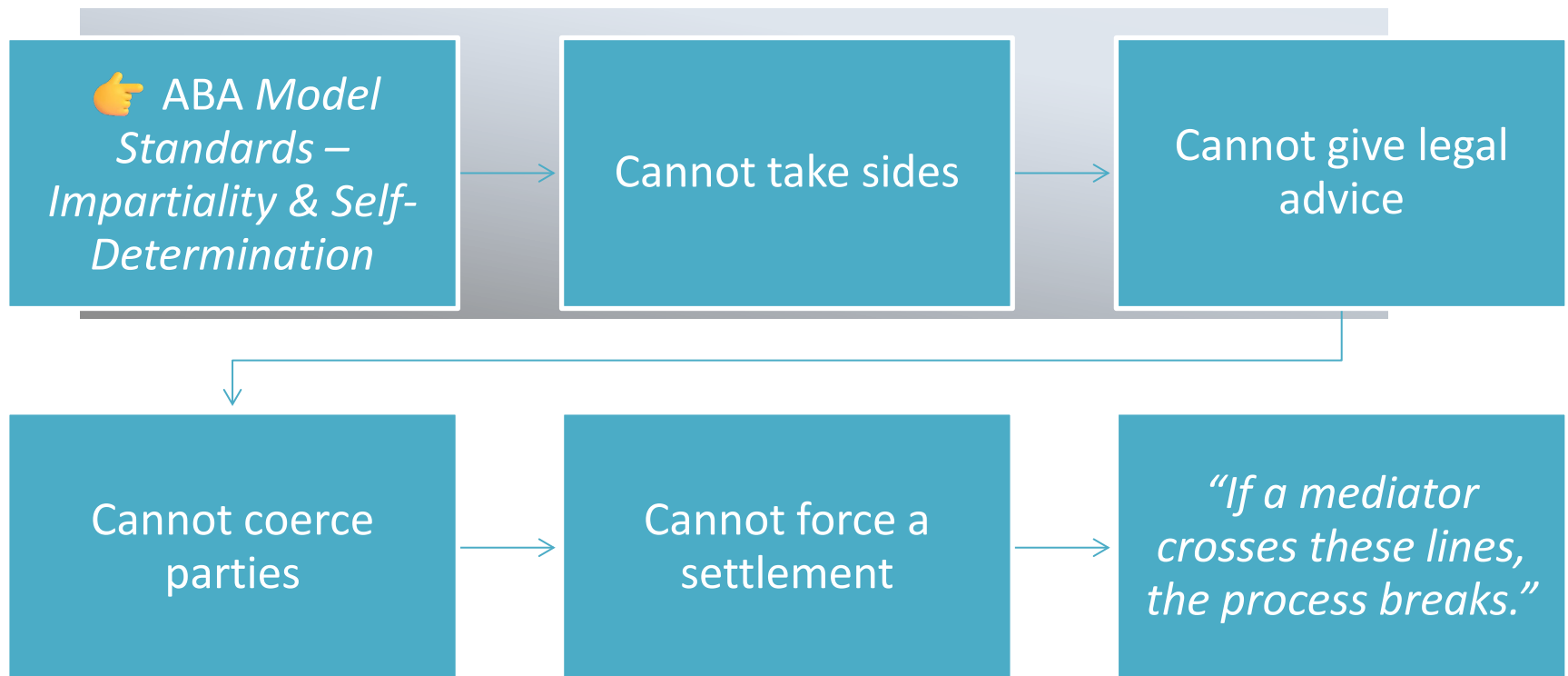
<https://arcourts.gov/administration/adr/rules>

***“The mediator doesn’t decide the case—you do.”***

# Core Principles of Mediation



# What a Mediator Cannot Do



# What Mediation Is (and Is Not)

- It is a structured, confidential negotiation
- It is guided by a neutral
- It is focused on weighing risk and reaching a practical solution
  
- It is not a trial
- It is not therapy
- It is not about being right

👉 Grounded in ABA Model Standards of Conduct

**“Mediation isn’t therapy, but it can be therapeutic.”**

**“Not a trial, but parties can tell their story.”**

# How Mediation Works in Arkansas



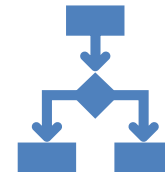
Minimal joint  
session



Caucus-driven



Mediator manages  
information flow



Evaluative (versus  
facilitative)



## Commitment

- Is everyone here to settle today?
- Good Faith + Intent + Authority (today) = Settlement

# First Things First

***No mediation should begin without a written agreement.***

The agreement:

- Mediator is a neutral facilitator, not a judge or a lawyer for a party
- Confidentiality
- Caucuses
- Fees
- Written agreement at the end if a settlement is reached

IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_ COUNTY, ARKANSAS  
CIVIL DIVISION

\_\_\_\_\_ PLAINTIFF

v. Case No. \_\_\_\_\_

\_\_\_\_\_ DEFENDANT

#### AGREEMENT FOR MEDIATION

The parties hereby agree to submit the above-captioned litigation to mediation and covenant and agree as follows:

1. In all respects, the mediation shall be governed by and conducted in accordance with the agreement between the parties, Ark. Code Ann. §16-7-201 et seq., and any applicable Arkansas case law or Administrative Rules.
2. **RAYMOND L. NIBLOCK** has been requested to mediate this case and is authorized to conduct the mediation.
3. The mediator serves as a neutral and impartial facilitator of the negotiations. The mediator is not the legal representative of either party. The mediator will not decide the outcome of the dispute. The mediator will neither dispense professional advice to either party nor act as an advocate for either party. While the mediator may suggest possible options to resolve a dispute, the mediator does not recommend any particular solution, as the parties ultimately make the decision. If

# The Old Way: Opening Statements



Advocacy-heavy



Positions harden



Emotions escalate



Everyone is angry  
before 10:00 a.m.

# Why We Don't Do That Anymore



EARLY SEPARATION  
REDUCES THE POTENTIAL  
FOR CONFLICT

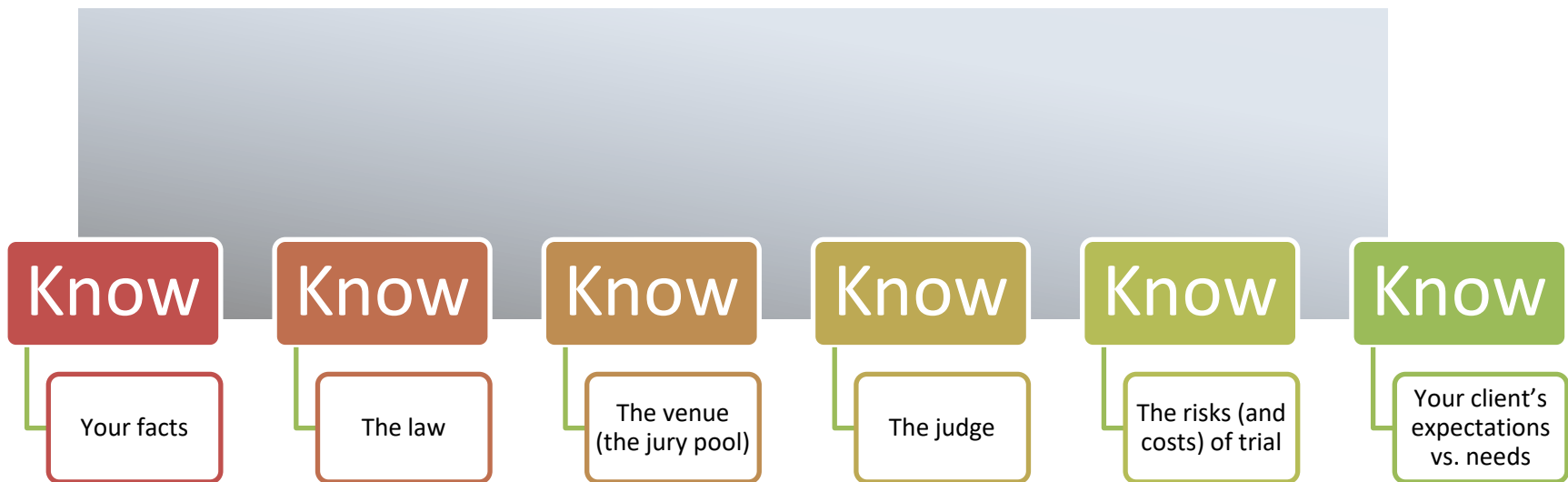


MEDIATOR MANAGES  
PACING



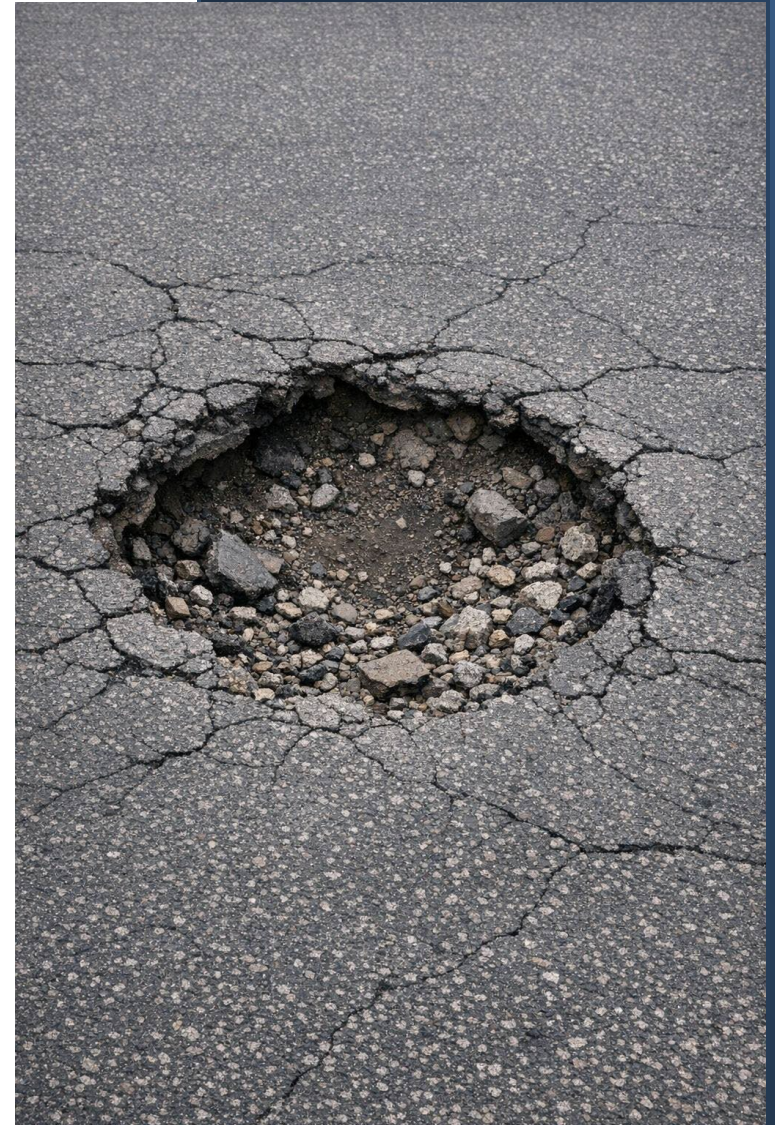
CONTROLLED  
COMMUNICATION WORKS  
BETTER

# Lawyer Preparation is Key



# Know the Potholes

- Venue
- Witness credibility
- Impeachment risk
- Liability weaknesses
- Comparative fault
- Admitted liability
- Causation issues
- Damages proofs
- Motion exposure



# Mediation Statements

- Address *Plaintiff and Defense* legal theories
- What are the proofs likely to be
- Highlight advantages and obstacles for *both sides*
- Identify verdict risks for *both sides*
- Identify potential (or existing) dispositive motions
- Identify liens and acknowledge costs of trial
- If there has been a negotiation history, share it

***“Give an informative and frank case assessment.”***

# Authority Matters

- The decision-maker must be present or accessible on both sides
- Plaintiff needs to come with emotional authority and agency (**willingness and ability** to participate)
- “Helpers” or “Support” should be discouraged
- Defense needs to come with actual authority

*“Is it okay if my Aunt Lucy comes and joins me at mediation? She’s from California, and I trust her.”*

## Plaintiff vs. Defense

- Plaintiff: emotion + fear + expectations often control
- Defense: data + adjuster often control



# Hanging the Meat



- Tort negotiations usually begin with the plaintiff's demand.

***“Don’t hang the meat so high that the dog won’t jump for it.”***

***-- Frank Hamlin, Mediator***

- The response to the first number is normally a shock to the plaintiff.

***“It’s not the first number that matters. Only the last one.”***

***-- A common mediator saying***

*“Now we get into how cases actually move.”*

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# Hard Number Trading

- Direct movement in real dollars
- Signals seriousness and authority
- Tests the other side's valuation
- Can build momentum

## Works Best When

- Bookending (high/low anchoring)
- Decision-makers are engaged
- There is trust in the process

## Risks

- Early extreme numbers can harden positions
- Reactive moves instead of strategic ones
- “Line in the sand” mentality

## Mediator's Role

- Manage pacing
- Handle emotional reactions
- Keep movement purposeful

***“Movement matters—but how you move matters more.”***

# Brackets

**Conditional movement tied to a response range**

*“If I go here, will you come there?”*

- Define zones of possible agreement
- Test flexibility without full exposure
- Move parties closer without committing

**Example:** Plaintiff: \$500K → \$400K | Defendant: \$100K → \$250K

## When to Use

- Avoid an impasse
- Develop trust
- Re-anchor expectations
- Establish a new negotiating range

## Risks

- Confusing to some parties
- Can take time and slow the process
- Can backfire if perceived as gamesmanship

## Mediator's Role

- Decide the timing
- Use brackets to create movement
- Educate parties
- Ensure both sides understand the signal

***“A bracket is not a number—it's a message.”***

# Midpoints

Everyone calculates them.  
They can be misleading.

## What they can show

- A rough sense of the gap
- Direction of movement

## What they don't show

- True valuation
- Settlement intent
- Final outcome

## Why they can mislead

- Early numbers are often aspirational

## Where they can help

- Inside a **bracket**, a midpoint can signal a landing zone

*"Don't rely on midpoints.  
Negotiate the case."*



*“And when  
none of  
that works,  
there is one  
more tool.”*

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# Mediator's Proposal

**A confidential, take-it-or-leave-it number from the mediator**

*Delivered to both sides at the same time*

**How it works:**

- Each side responds yes or no
- Settlement only if both sides say yes

**What makes it different:**

- No one “moves” in front of the other side
- No loss of face
- No further negotiation

**Why It Works:** Removes ego | Forces a decision point | Saves face

## When to Use It

- Impasse
- The gap is narrow
- Parties are fatigued or entrenched
- Risk is understood

## Risks

- Can compromise party confidence in mediator neutrality
- May undermine party self-determination if mishandled

## Mediator's Role

- Use sparingly
- Only after trust is built
- Only when the number is grounded in the case
- Leverages mediator credibility

***“When movement stops but a decision is still possible.”***

# Valuation Problem



**Different data sets**



**Different pressures or legal obligations**



**Different perspectives**



**Different access to information**

Proprietary insurance data  
Jury verdict research  
Lawyer's experience with similar cases  
Clients use Google and ChatGPT (be ready!)

# Value Band Method

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How many juries in ten?

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Zero / Top / Middle

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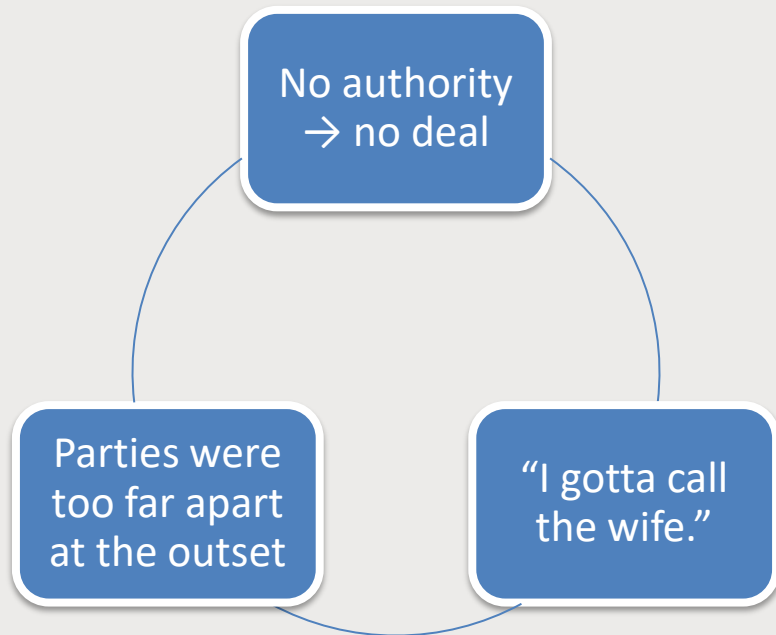
Help the parties appreciate potential values



# Close. But No Cigar.



***“Close only counts with  
hand-grenades and in the  
back-seats of cars, but not  
in mediation.”***



***Consider a recess, not an  
adjournment, and circle back.***

# Keeping Communication Open



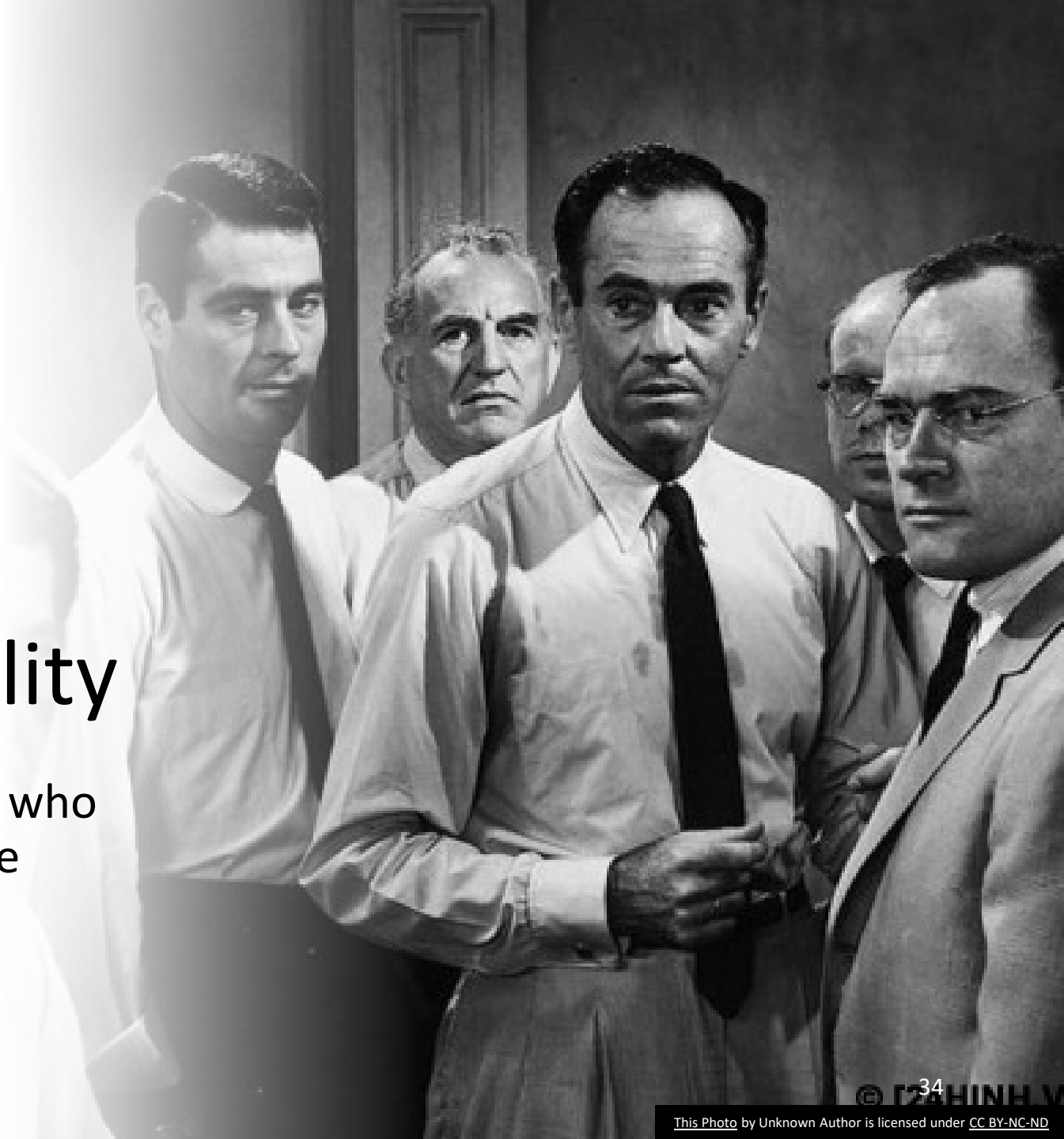
Even if a case does not settle on the day of mediation, it may settle after.



Parties should expect the mediator to keep the channels of communication open, even if the case didn't settle on the day.

# Jury Reality

A dozen people who don't want to be there.



# Risks (and costs) of Trial

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Delay

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Investigators

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Experts

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Depositions

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Travel

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Trial Exhibits

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Risk of Zero

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Risk of Appeal



# The Net

- Fees
- Costs
- Liens and Subrogation
- Time-Value of Money
  - Trial Date?
  - Appeal?
- Injury – not taxed
- Income – may be taxed
- Structured Settlement?
- What does the client take home?



# Negotiating Position vs Client Need

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Debt

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Replacement

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Stability

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Understand the why

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***“No amount of money is worth going through this again.”***

# Candlestick Story

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- Plaintiff needed a win
- Non-monetary term
- Settlement achieved



Everything  
Depends on  
Trust

Trust precedes  
movement

No trust → no  
movement

# Listening

- Listen first
- Build trust
- Reframe

**“Listening always precedes persuasion.”**

# Lawyer Fires Client Story

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- Plaintiff not heard
- Plaintiff ignores the lawyer
- Frustration boiled over
- Breakdown of trust
- Process collapsed – loss of control over the process



# “Using the Mediator vs. ‘Working’ the Mediator”



Deliver hard messages  
(don't shoot the messenger)



Test risk



Help movement



Encourage patience,  
persistence, and  
participation



Use the mediator to listen,  
not just talk



Be candid in caucus -  
“working” the mediator  
won't help



👉 *Confidentiality  
protections support candid  
caucus discussions*

# Defense Note



The mediator helps communicate risk to the adjuster if the defense lawyer requests it



A mediator can provide backup for the defense lawyer



Mediator can deliver defense messages based on data (the insurance company may have better command over statistics)



# Red Flags

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Unreasonable expectations (not based on case facts)

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Lack of attorney (and client) preparation

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Misaligned viewpoints (defense/plaintiff see two different cases)

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No authority (the decision maker is not there)

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No movement

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Going through the motions (no intent to settle)

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“Informed” Client who has done Google or AI on the case

# Realities



# Mediators Can Help...

Assess Risk – mediator can sensitize both sides to adverse outcomes



Identify Costs – trials are expensive



Gauge Readiness – are the parties ready to settle

# Mediation can be like...

...drinking from a firehose, but it is worth it if you get a settlement inked.



IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_ COUNTY, ARKANSAS  
CIVIL DIVISION

\_\_\_\_\_ PLAINTIFF

v. Case No. \_\_\_\_\_

\_\_\_\_\_ DEFENDANT

## MEDIATION SETTLEMENT AGREEMENT

The parties hereto agree that the above-styled dispute and all related claims and controversies now existing by and between them are hereby compromised and settled in accordance with the following terms and conditions of this Settlement Agreement:

1. The parties acknowledge that bona fide disputes and controversies exist by and between them, both as to liability and any injuries and/or damages resulting therefrom, and because of such conflicts and disagreements, they desire to compromise and settle all claims and causes of action of any nature and kind whatsoever which now exist or which may hereafter occur between them arising out of the underlying facts and circumstances of the captioned dispute and the transactions or occurrences which make up the basis thereof. It is further understood and agreed that this is the compromise of a disputed claim and that nothing contained herein shall be construed as an admission of liability by any party. All such liability is expressly denied.

*If you don't  
know the  
mediator,  
ask:*

### **Experience and Qualifications**

- Are you certified?
- Have you handled cases like this one?
- If the mediator is a lawyer, ask whether they have any active cases.

### **Neutrality**

- Defense or plaintiff side? Does that inform your approach one way or another?
- Know the lawyers involved?

### **Philosophy & Style**

- Do you lean evaluative, facilitative, or a mix?
- Do you use joint sessions or primarily caucus? Why?

### **Process in the Room**

- How do you handle difficult parties or personalities?
- How do you move a case when it stalls?

### **Listening & Communication**

- How do you approach a difficult or emotional plaintiff?
- How do you build trust in the room?

### **Logistics & Fees**

- What are your fees?
- Do you charge for travel time or prep?
- Who is responsible for payment?

### **Follow-Up**

- Do you stay involved if the case does not settle that day?

*“The central question is: do I trust this person?”*

# Co-Mediation

## What It Is

- Two neutrals working together
- Combines different skill sets or perspectives

## Why It Can Help

- Better management of complex or emotional cases
- Complimentary perspectives
- More effective communication
- Efficient - ability to work both rooms simultaneously

## When to Consider It

- High-conflict personalities
- Complex cases
- Multiple parties
- Need for subject-matter expertise

## Practical Reality

- Can improve efficiency when used intentionally

*“The right team can change the dynamic of a mediation.”*

Learn more at:  
[niblockmediationservices.com](http://niblockmediationservices.com)

# Affiliated Neutrals

## The Team

*Yes, we are neutrals. That is our core business.  
We are also a multidisciplinary team solving problems before they become disputes  
—and resolving them when they do.*



*Ray Niblock, BUS, JD  
Independent Neutral, CRT 2025-10  
Trial Lawyer and Certified Civil and  
Probate Mediator*



*Paul Smith, BS, MBA, JD  
Independent Neutral, CRT 2025-11  
Trial Lawyer and Certified Civil,  
Probate, and Domestic Mediator*



*Van Thomas Currell, MA, LPCC, NCC  
Independent Neutral  
Trained Mediator and Licensed  
Counseling Professional*



*Dr. Michelle Hausheer, MD  
Independent Neutral, CRT 2025-15  
Certified Probate and Domestic Mediator*

**<https://www.niblockmediationservices.com/>  
479-346-7719**

# Closing

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Mediation isn't about winning.

It's about making the best decision you can before someone else makes it for you.



# Contact

Niblock Mediation Services  
479-346-7719

Ray Niblock

[ray@niblockmediationservices.com](mailto:ray@niblockmediationservices.com)  
[www.niblockmediationservices.com](http://www.niblockmediationservices.com)