

# CHAPTER 2 - SLIDES

**8-Hour  
Conciliation Training**

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**Training Team**

- Tim Linnehan
- Judge Mark Mason
- Eugene Nigro
- Israela Brill-Cass

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**(1A) Group Norms**

- Be flexible and open to learning
- Encourage participation of all
- Give permission to make mistakes
- Be willing to give constructive feedback
- Support learning opportunities and productive conversations
- Others you would like to add?

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## (1B) Conciliator Training

- **Purpose of this Training:** to comply with Rule 8(e) Training Requirements for 8-hour Conciliator Training
- **Desired Outcomes:**
  1. Shared understanding of conciliation process, role of conciliator and best practices for conciliators
  2. Better understanding of conciliation program, goals and relationship to court
  3. Enhancement of conciliator skills & strategies
  4. Establishment of peer support & practice network

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## (1C) Training Agenda

- Uniform Rules on Dispute Resolution
  - Conciliation Process & Role of Conciliator
  - Ethical Standards
  - Communication & Conflict Skills
  - Conciliator Challenges & Strategies
  - Conciliator Skills (Role Play)
- Format: interactive presentations & discussions, role plays & exercises*
- \* draw on group's experience & expertise

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## (1D) Conciliator Training

- **Rule 8(e) of SJC Uniform Rules on Dispute Resolution sets forth Qualification Standards for Conciliators:**
  - Professional Qualifications
  - *Training Requirements (8 hours)*
  - Mentoring and Evaluation (*Program's discretion*)
  - Continuing Education
  - Continuing Evaluation
  - [Alternative Methods]
- **Trial Court Guidelines for Training Conciliators:**
  - Basic Training Curriculum
  - Skills Checklist

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**(1E) Conciliator Training**

**“The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.”**

*– Sandra Day O’Connor*

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**(1F) Conciliator Training**

**“Tell me and I’ll forget. Show me, and I may not remember. Involve me, and I’ll understand.”**

*– Native American Proverb*

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**(2A) Uniform Rules on Dispute Resolution (SJC Rule 1:18)**

- Developed by the Standing Committee on Dispute Resolution
- Adopted by Supreme Judicial Court May 1, 1998
- Purpose:
  - Consistent, Statewide Standards applicable to Courts and ADR Programs
  - Uniform System for Court Referrals to ADR
  - Code of Conduct & Competency Criteria for ADR Neutrals

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**(2B) Uniform Rules on Dispute Resolution**

- Rule 1. Guiding Principles
- Rule 6. Duties of Courts re ADR Services
- Rule 7. Duties of Approved Programs
- Rule 8. Qualification Standards
- Rule 9. Ethical Standards

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**(2C) Rule 1(b) Guiding Principles**

- **Quality** – Court responsible for assuring high quality ADR Services for public
- **Integrity** – ADR services in accordance with ethical standards and best interests of parties
- **Accessibility** – ADR services for all members of public regardless of ability to pay
- **Informed Choice of Process and Provider** – whenever possible; information to base choice

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**(2D) Rule 1(b) Guiding Principles (Continued)**

- **Self-determination** – parties decide issues for discussion and terms of their agreement
- **Timely Services** – ADR services early in court of dispute
- **Diversity** – policies and providers reflect diverse needs & backgrounds of public
- **Qualification of Neutrals** – ADR services by qualified neutrals (competency = education, training, experience, performance)

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**(2E) Rule 6. Duties of Courts**

- **Referrals:** can refer only to approved ADR Programs (programs must apply for approval)
- **Choice:** can require attendance at screenings but not participation in ADR services (except Dispute Intervention in Probate/Housing Courts)
- **Space:** can provide for space for ADR if sufficiently private and reasonably accessible

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**(2F) Rule 6. Duties of Courts**

- **Communication:** must provide ADR program with info needed to process case; programs can only report back on screening or ADR outcome or if parties need more time for ADR
- **Conciliation:** program/neutral can report to court on unresolved issues & neutral's assessment that case will go to trial or settle, provided parties are informed at outset

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**(2G) Rule 6. Duties of Courts**

- **Inappropriate Pressure to Settle:** must inform parties that they are not required to settle in ADR; cannot impose sanctions for no settlement.
- **Sanctions for Failure to Attend:** may impose sanctions if failure to attend is without good cause.

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### **(2H) Rule 7. Program Duties**

- **Program Administration:** written policies on operations, evaluation, communication with court, data collection, pressure to settle and intake and selection
- **Diversity:** to be designed with sensitivity to communities served; cannot discriminate; must strive for diversity of staff, neutrals & volunteers.
- **Rosters:** assemble and maintain in conformity with URDR; distribute referrals, qualify and remove fairly in accordance with written policies

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### **(2I) Rule 7. Program Duties**

- **Fees:** can charge but not for screening; must offer fee waivers or reductions for indigent/low income parties
- **Sessions:** to be scheduled at parties' convenience with adequate time to reach settlement
- **Written Agreement:** to be in writing and signed by parties; may be prepared by neutral
- **Orientation & Supervision of Neutrals:** must ensure that neutrals are familiar with policies & operations of court/program, and are supervised

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### **(2J) Rule 8. Qualification Standards**

- **Qualification of Neutrals:** programs must ensure neutrals meeting training, evaluation and mentoring requirements under Standard or Alternative Methods
- **Certification to Court:** submit with application, list of qualified neutrals and method used
- **Documentation:** on qualification of each neutral during tenure w/program and 3 years thereafter

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**(3A) Conciliation**

**What is Conciliation?**

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**(3B) Conciliation**

- A *triage process* in which a neutral, in a brief informal session, must diagnose the problems that are preventing the parties from resolving the case themselves and employ strategies to help the parties overcome these barriers and move the case closer to resolution.
- During conciliation, the conciliator may take on a variety of roles depending on the type of problem encountered and intervention used.

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**(3C) Conciliation**

- Neutral; Attorney (sometimes Subject Expertise)
- Assists Disputing Parties to Communicate
- Clarifies Issues in Dispute
- Assesses Strengths & Weaknesses
- Explores Settlement
- Prepares for Trial (Pre-trial Stage; Post-discovery)
- Confidential, Non-Binding; Often Mandatory
- Court-Based; Report to Judge

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### **(3D) Conciliation**

Conciliation is defined in the Uniform Rules as  
“a process in which a neutral assists parties to  
settle a case by clarifying the issues and  
assessing the strengths and weaknesses of each  
side of the case, and, if the case does not settle,  
explores the steps which remain to prepare the  
case for trial”.

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### **(3E) Conciliation**

**What is the Role of the  
Conciliator?**

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### **(3F) Conciliator Role(s)**

- **Process Convener:** provides neutral forum for communication between parties
- **Judge:** engages parties in productive discussion about status of case and legal issues
- **Case Evaluator:** provides opinion on merits and likely outcome if tried
- **Reality Checker:** manages parties' expectations
- **Mediator:** explores settlement potential; assists parties with negotiations
- **Screeners:** assesses and refers cases to ADR
- **Trial Attorney:** expedites trial preparations
- **Case Manager:** moves case toward disposition

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**(3G) Conciliation**

**“Standing in the middle of the road is very dangerous; you get knocked down by the traffic from both sides.”**

*-- Margaret Thatcher*

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**(3H) Conciliation**

**“In the middle of every difficulty lies opportunity.”**

*-- Albert Einstein*

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**(3I) Conciliation**

**“True, Heaven prohibits certain pleasures; but one can generally negotiate a compromise.”**

*--Moliere*

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### **(4A) Mediation**

- Neutral (Process Expertise; sometimes Subject Expertise)
- Facilitates Communication & Negotiation
- Helps Understand & Address Underlying Interests
- Helps Parties Create Own Options for Resolution
- Expands Discussion Beyond Legal Remedies
- Confidential, Non-Binding; At Court & Outside Court
- Voluntary

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### **(4B) Case Evaluation & Early Neutral Evaluation**

- Neutral; Attorney (Subject Expertise)
- Assists Parties in Evaluating Legal Issues and Evidence
- Presents Written Case Assessment
- Predicts Trial Outcome; Judgment Value; Settlement Value
- ENE- In-Depth Case Planning (Pre-discovery)
- Confidential, Non-Binding; Often Mandatory
- At Court & Outside Court

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### **(4C) Arbitration**

- Neutral or Panel (Process & Subject Expertise)
- Hears Arguments and Evidence
- Renders Written Final and Binding (or Non-binding) Decision
- Entered into by Agreement or Prescribed in Contract
- Less Formal; Relaxed Rules of Evidence; Outside Court
- Limited Judicial Review

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### **(4D) Adjudication**

- Neutral (Judge or Jury)
- Listens to Evidence and Renders Decision Based on Facts and Law
- Outcome is Determined (Legal Remedy)
- Formal (Rule-based Procedures)
- Mandatory
- Public; Binding
- Litigation/Trial Time-Consuming & Costly

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### **(5A) Rule 9. Ethical Standards**

#### **1. IMPARTIALITY**

- Freedom from favoritism or bias in conduct and appearance
- Impartiality regarding parties & subject matter
- Withdrawal by neutral (even if no objection)
- No gifts, no compensation beyond court-established ADR fees

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### **(5B) Rule 9. Ethical Standards**

#### **1. INFORMED CONSENT**

- Effort to ensure party consent to process & agreement
- If unable to understand, limit scope or terminate process
- Flag unrepresented party if needed for expert info or advice
- Inform parties of right to withdraw at anytime
- No coercion by neutral

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### **(5C) Rule 9. Ethical Standards**

#### **1. CONFLICT OF INTEREST**

- Disclose all actual or potential conflicts of interest
- Examples: personal, professional, financial relationship; financial interest in subject of dispute; appearances
- When to proceed, if not significant & parties consent
- When to withdraw, if significant, regardless of consent
- Post-ADR process considerations; representation on related and unrelated matters

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### **(5D) Rule 9. Ethical Standards**

#### **1. CONFIDENTIALITY**

- Maintaining confidentiality of ADR Process – what’s included
- Informing parties of confidentiality
- Not disclosing information obtained in private session without party’s consent
- Exceptions to confidentiality – ADR program supervision; research, training, statistics; law

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### **(5E) Rule 9. Ethical Standards**

#### **• WITHDRAWAL**

- When a neutral must withdraw:  
Violation of ethical standard; jeopardizes party safety; neutral unable to be effective
- When a neutral may withdraw:  
party not in good faith; agreement illegal; appearance of impropriety; harm to nonparty or public; not in party’s, children’s or programs best interests
- Protecting parties’ safety and rights when withdrawing

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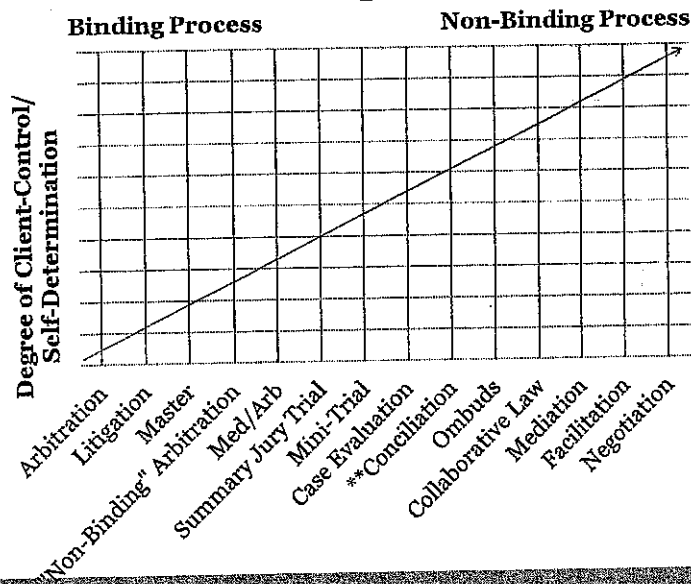
# Conciliator Communication Skills

THE ALTERNATIVE DISPUTE RESOLUTION SPECTRUM AND HOW TO ENCOURAGE RESOLUTION THROUGH EFFECTIVE COMMUNICATION

Prepared By: Israel A. Brill-Gass, Esq.  
Boston Law Collaborative, LLC  
www.bostonlawcollaborative.com

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## ADR Spectrum



## How do you get Parties to reconcile?

By Employing  
Effective Communication

Impartial

Empathic

Focused on the verbal and non-verbal  
communication of the Parties

Respectful

Honest

Based in active listening

## What are the barriers to Effective Communications?

Making assumptions about people or their positions  
– based on prejudice or other factors

Passing judgment or moralizing

Psychoanalyzing

Cross-examining or putting people on the defensive

Dominating or being patronizing or condescending

Being distracted – internally or outwardly – when we  
communicate

BUT Conciliation is still a neutral process so you will use many of the same tools as a Mediator to try to help the Parties settle such as:

Building trust with the Parties – by demonstrating empathy, respect, impartiality etc. (“gaining favor” or “goodwill”)

Structure the flow of communications to keep them positive and control the venting of strong negative feelings

Question overly optimistic assessments “reality test”

Expand settlement options (by focusing on interests)

Focusing the Parties on their interests (vs. their positions)

Eliciting information by asking the “right” kind of questions

Reframing/Rephrasing

## Interests v. Positions

ROGER FISHER AND WILLIAM URY (“GETTING TO YES”) PREMISE EFFECTIVE NEGOTIATIONS ON SEPARATING THE INTEREST FROM THE POSITION (INTEREST-BASED NEGOTIATIONS)

SO IT'S NOT THE DOLLAR FIGURE THAT IS NECESSARILY IMPORTANT BUT THE SECURITY, INDEPENDENCE OR VINDICATION THAT IT REPRESENTS THAT IS IMPORTANT.

IF YOU UNCOVER THE INTEREST UNDERLYING THE POSITION YOU ARE MORE LIKELY TO ACHIEVE SUCCESSFUL NEGOTIATION AND RESOLUTION.

### Why Mediation is Difficult (David Hoffman, Esq.)

Mediation requires the patience to listen to a lengthy discussion of issues and events that may seem totally irrelevant to the issue at hand. And they are irrelevant from the standpoint of a court. But they are highly relevant to the person speaking. And until the person feels heard, s/he will not listen (emphasis in original)

### Reframing/Rephrasing

Helps the parties feel heard

Statements contain a "core truth" about the Parties' interests that you need to maintain while stripping away the negative (threats, posturing, insults etc..)

Is not as easy as it may seem

## Reframe These - 2



From past to future focus:

*I am fed up with waiting around every time we have a meeting scheduled. I have never seen him show up on time for an appointment.*

## Reframe These - 3



From an individual perspective to a shared-problem (e.g. neutral) perspective:

*I don't know if I can go along with the idea of future payments to me instead of a lump sum. I might get hurt by inflation.*