

CHAPTER 1 - INTRODUCTION

About the Training

The training material for the Conciliation training program is based on material originally created by the Massachusetts Office of Dispute Resolution (MODR) for the Trial Court Standing Committee on Dispute Resolution. Rule 8 of the Uniform Rules on Dispute Resolution (SJC Rule 1:18) was promulgated by the Supreme Judicial Court in November of 2003 and became effective on January 1, 2005. Rule 8 mandates qualification standards for all neutrals in court-connected dispute resolution. The training requirements for conciliation are 8 hours of training for attorneys in good standing with the Board of Bar Overseers with more than 3 years in the practice of law in Massachusetts. In addition to Rule 8, the Chief Justice for Administration and Management issued Guidelines for Implementation of Qualification Standards for Neutrals. Together, Rule 8 and the Guidelines set forth the training requirements for court-connected neutrals.

To implement the new training requirements for conciliators, the Trial Court created uniform conciliation training materials. First in 2004, MODR created a "train the trainers" manual and program sponsored by the Trial Court. The free training was offered to all approved conciliation programs to assist the training of their conciliators. The training was held for programs to send their own trainers so they could then go back to their program and train its neutrals, thus the "train the trainers" moniker. Attorney Eugene Nigro attended the "train the trainers" program and subsequently trained the conciliators at the Essex Division of the Probate and Family Court Department. Since then, Attorney Nigro has been involved in training numerous bar associations on the qualification standards for conciliators in the District Court and the Probate and Family Court Departments. Over time, Attorney Nigro has expanded and modified the original conciliation training material created by MODR.

The current conciliation training curriculum and related materials are a blend of the original MODR program with updated and adapted material by Attorney Nigro and the ADR Coordinator for the Trial Court. All the materials for the training have been reproduced with the permission of the authors and/or acquired by the Trial Court through other dispute resolution training initiatives.

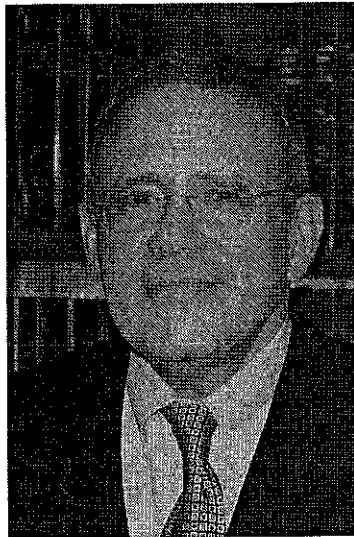
The training is presented in modules, with each module covering an aspect of the basic training curriculum for conciliators, as required by the Guidelines. The goals of the training are to (1) promote a shared understanding of the conciliation process, the role of the conciliator and best practices for conciliators; (2) enhance the knowledge and understanding of conciliation operations, duties and relationship with the court; and (3) build conciliator skills and awareness of strategies for effectively managing the process and to facilitate settlement. The format of the training combines presentations, interactive discussions, small and large group exercises and role plays. The objective of the training is to have active participation of the participants drawing on their experience and expertise to inform the conciliation process.

LEAD TRAINER BACKGROUND INFORMATION

Eugene A. Nigro, Esq., is a member of the law firm of Nigro, Pettepit & Lucas, LLP, in Wakefield, Massachusetts, where he focuses his practice on probate and family law. His domestic relations practice includes litigation, conciliation, mediation, arbitration, antenuptial agreements, divorce, custody and modifications. He is a graduate of Clark University, in Worcester, and a graduate of New England School of Law.

Eugene has been a conciliator with the Essex County Bar Association since 1998 and with the Middlesex County Bar Association since the inception of its Conciliation Program. He serves as Lead Trainer in both Essex and Middlesex Counties. Eugene has worked as a trainer and mentor, helping to establish Conciliation Programs in Barnstable, Bristol, Berkshire and Worcester Counties. Eugene received his qualification as a Conciliation Trainer through the Massachusetts Office of Dispute Resolution (MODR). He is also a trained mediator. He provides conciliation services as a volunteer and mediation and arbitration services on a private pay basis.

Eugene's activities have been recognized by the Middlesex Bar Association. The First District Eastern Middlesex Bar Association has also awarded Eugene their First Annual Robert F. Lucas Award in recognition of his commitment to the legal system, devotion to community service, loyalty to his colleagues and compassion and respect for all. Additionally, Eugene has received the First Pro Bono Judicia Award given by Essex County Bar Association.



Timothy M. Linnehan, Esq., is the Alternative Dispute Resolution (ADR) Coordinator for the Trial Court. He is the former Acting Director of the Support Services Department in the Office of Court Management for the Trial Court. As the Coordinator of ADR Services for the Trial Court, Tim serves on the Trial Court Standing Committee on Dispute Resolution. He has been a mediator since 1992 and a conciliator since 2005. In addition, he was the Coordinator for the Middlesex Community College Face-to-Face Mediation Program from 1993 to 1996. Mr. Linnehan is a former Assistant Attorney General and litigator in private practice. He is a former adjunct faculty member at Northern Essex Community College and Middlesex Community College. Mr. Linnehan holds a B.A. from Merrimack College, as well as a J.D. from Suffolk University Law School.

Rule 8 Conciliator Training Requirements

Rule *8 Qualification Standards for Conciliators:

- Professional Qualifications
- *Training Requirements (8 hours)*
- Mentoring and Evaluation (*Program's discretion*)
- Continuing Education
- Continuing Evaluation
- [Alternative Methods & Limited Exemption]

Trial Court Guidelines for Training Conciliators:

Basic Training Content:

- Uniform Rules on Dispute Resolution
- Conciliation and other ADR Processes
- Role of Conciliator as Neutral
- Ethical Standards for Conciliators
- Conciliator Process Issues
- Strategies for Promoting Settlement
- Conciliator Skills
- Court-Connected Conciliation Program
- [Court Orientation]
 - * draw on group's experience & expertise

Conciliator Skills Checklist:

- Introduces process; discloses contacts; explains report requirements
- Demonstrates knowledge of litigation process
- Investigates facts impartially
- Provides equal opportunity for party presentations
- Shows effective questioning style
- Listens carefully and clarifies interests
- Analyzes issues; assesses strengths and weaknesses
- Explores prospects for settlement
- Provides suggestions on future litigation/trial prep steps
- Explains basis of opinions and suggestions
- Uses neutral language, tone, demeanor
- Maintains neutrality and impartiality
- Manages the interaction of parties effectively
- Administers fair and efficient proceeding
- Demonstrates effective time management

Conciliator Skills Checklist

The following list of observable behaviors is no intended as an exhaustive list but as a reflection of the minimum requirements for basic conciliator competency. The skills evaluation checklist should be used to evaluate conciliators during training and continued evaluation of performance by the program.

Evaluation Date: _____

Evaluator Name: _____

Conciliator Name: _____

Role Play Information: _____

Court Case Information: _____

(Name, docket #, number of parties, case type, etc.)

Outcome: _____

Rate the conciliator's skills using this scale: 1 = poor 2 = fair 3 = good 4 = excellent

Please elaborate as much as possible in your comments.

Skills

1. Introduced and explained conciliation process and conciliator's role to the parties.

Score:

2. Discloses any prior contacts or relationships with parties and/or counsel and any prior knowledge of the facts of the case

Score:

3. Explains any reporting requirements of the court regarding the outcome of the conciliation process

Score:

4. Demonstrates knowledge of litigation process and procedure

Score:

5. Investigates facts impartially

Score:

6. Is evenhanded and allows parties an equal opportunity to present their positions

Score:

7. Shows effective questioning style that draws out information without putting parties on the defensive

Score:

8. Listens carefully and clarifies parties interests

Score:

9. Analyzes and understands the issues involved in the case

Score:

10. Assesses the strengths and weaknesses of each side of the case

Score:

11. Explores prospects for settlement and helps parties generate realistic

Score:

12. Provides suggestions on future steps to take in the litigation of the case and preparation for trial

Score:

13. Explains the basis of his or her opinions and suggestions

Score:

14. Uses neutral and professional language, tone, demeanor and body language

Score:

15. Maintains neutrality and impartiality

Score:

16. Manages the interaction between the parties patiently, respectfully and effectively

Score:

17. Administers and manages a fair and efficient conciliating proceeding

Score:

18. Demonstrates effective time management and prevents unnecessary delays

Score:

Comments (areas where shows skills and needs improvement): _____

CHAPTER 2 - SLIDES

**8-Hour
Conciliation Training**

Training Team

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

(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?

(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

(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

(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

(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

(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

(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

(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

(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

(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)

(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

(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

(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.

(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

(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

(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

(3A) Conciliation

What is Conciliation?

(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.

(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

(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”.

(3E) Conciliation

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

(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

(3G) Conciliation

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

-- Margaret Thatcher

(3H) Conciliation

“In the middle of every difficulty lies opportunity.”

-- Albert Einstein

(3I) Conciliation

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

--Moliere

(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

(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

(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

(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

(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

(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

(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

(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

(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

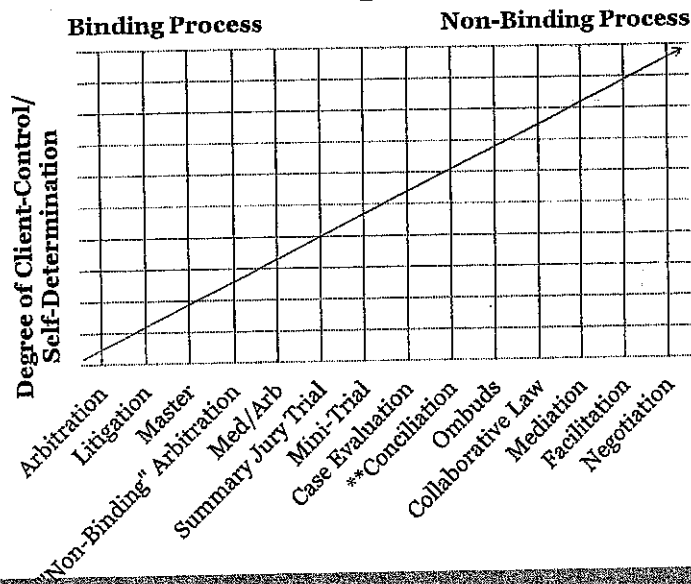
Conciliator Communication Skills

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

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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.

CHAPTER 3 - CONCILIATION PROCESS

GLOSSARY OF ADR PROCESSES¹

"Arbitration" means a process in which a neutral renders a binding or non-binding decision after hearing arguments and reviewing evidence.

"Arb/med" means a process in which an arbitrator/mediator conducts a standard arbitration and makes a written award, but keeps it confidential from the parties. Immediately thereafter, the parties may choose to mediate a settlement. If no settlement is reached, the award is issued and becomes binding and enforceable pursuant to G.L. c. 251.

"Case evaluation" means a process in which the parties present a summary of their cases to an experienced neutral who points out the strength and weakness of each side's case and renders a non-binding written opinion of the settlement value of the case or a non-binding prediction of the likely outcome if the case is adjudicated.

"Conciliation" means 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 is not settled, explores the steps which remain to prepare the case for trial.

"Early intervention" means a compulsory, judicially supervised event, early in the life of a case, with multiple objectives relating to both scheduling of litigation and selection of dispute resolution services.

"Early neutral evaluation" means case evaluation which occurs early in the life of a dispute.

"Mediation" means a process in which a neutral facilitates discussion and negotiation among the parties to a dispute in order to achieve a voluntary resolution of a dispute between two or more parties.

"Med/arb" means a process combining mediation and arbitration in which the parties agree in advance that, if the dispute is not resolved through mediation, they will proceed to arbitration with or without the same neutral serving as arbitrator.

"Mini-trial" means a two-step process to facilitate settlement in which (a) the parties; attorneys present a summary of the evidence and arguments they expect to offer at trial to a neutral in the presence of individuals with decision-making authority for each party, and (b) the individuals with decision-making authority meet with or without the neutral to discuss settlement of the case.

"Screening" means an orientation session in which parties to a case and/or their attorneys receive information about dispute resolution services. The case is reviewed to determine whether referral to a dispute resolution service is appropriate, and, if so, to which one. In a screening, there may also be discussion to narrow the issues in the case, to set discovery parameters, or to address other case management issues.

"Summary jury trial" means a non-binding determination administered by the court in which (a) the parties' attorneys present a summary of the evidence and arguments they expect to offer at trial to a six-person jury chosen from the court's jury pool, (b) the jury deliberates and returns a non-binding decision on the issues in dispute, (c) the attorneys may discuss with the jurors their reaction to the evidence and reasons for the verdict, and (d) the presiding neutral may be available to conduct a mediation with the parties.

¹ Rule 2. Definitions, contained in Supreme Judicial Court Rule 1:18 Uniform Rules on Dispute Resolution, June 1999.

Conciliation Process Issues

- **Managing the Interactions of the Parties**

How do you assist parties who are having difficulty talking to each other but would benefit from direct negotiations?

Work with the parties in a joint session and act as the moderator and referee of the process, intervening as needed to discourage unproductive tactics.

What if the parties are too hostile to talk directly even with your assistance?

Adjourn the joint session and move into private caucuses, transmitting information between the parties to achieve productive communications.

- **Identifying Underlying Issues**

How can you help the parties to surface issues besides legal disagreements that are keeping them apart?

Probe for psychological obstacles (unconscious feelings, misunderstandings, miscommunication of negotiating messages) and missed opportunities for gains such as good past relationship between the parties. Ask explicitly whether such an issue exists. Approach these issues first in private caucus. Consider sounding out lawyers away from their clients. Solicit ideas for addressing problems and exploiting opportunities. Rely on the privacy of caucuses. Consider using "brainstorming" techniques.

How can you help parties who are having difficulty letting go of an emotional issue or bad feeling toward the other party?

Speak with the parties privately and offer them the opportunity to say something directly to each other that will help work through the emotional problem (e.g., by giving an acknowledgement or apology).

- **Altering Party Expectations**

What if the parties have unrealistic views / overly optimistic perceptions about the merits of their cases, which are making it harder to reach settlement?

What if the parties are bluffing about the weaknesses of their case in order to bolster their bargaining positions?

Reality Test: question the litigants about key issues; draw out and dramatize the monetary and non-monetary costs of continuing to litigate; lead the disputants

through a systematic analysis of the strengths and weaknesses of their case; offer a prediction of the likely outcome in adjudication.

There is a tension inherent in reality testing between being pointed enough to force the players to confront the problems with their legal options and not pushing them into stubbornness or hostility. Thus, conciliators should begin with open-ended questions, gradually focusing more specifically on weak points and making confrontational comments only if necessary; ask merits questions in private and withhold personal opinions about the merits until conciliator has established a good relationship with the participants and is convinced that evaluation will be necessary to break an impasse.

What if one or more of parties remains wedded to an unrealistic view of the merits or needs help in justifying settlement to a superior?

Refer to case evaluation or nonbonding arbitration.

- **Presenting an Evaluation of the Case on the Merits**

What if presenting your evaluation to the parties in a joint session is not going to be received well by one of the parties, who will find it hard to maintain an open mind or show receptivity toward unwelcome news in the presence of an adversary?

Deliver the evaluation to the party's separately in caucus. But be careful because it may be important to maintaining the conciliator's neutrality for that he/she deliver the same evaluation to everyone in the same way at the same time.

- **Facilitating Negotiations and Breaking Impasse**

How can you assist parties who have become locked into their positions and are having difficulty extricating themselves?

What to do when the parties' negotiations have deteriorated and the parties feel that they are being pressured to make more than their fair share of compromises?

Ask for movement to restart the process, then coach the negotiators about later steps. Explain opponents' perspectives; package concessions; reduce suspicion and frustration by verifying that the other side is making an effort and is felling pain too; encourage the players to think about new options; move parties from positional bargaining to principled or interest-based negotiation. Help parties base their positions on objective principles and facts, explaining the reasons for each offer or demand made. Do not limit inquiry to legal issues and remedies. Seek to identify and explore both sides' underlying needs and interests, identify and address emotional issues and personal problems that are impeding agreement; willing to discuss matters irrelevant to the dispute and to involve

clients actively in the negotiations; look for settlement packages that will advance their own interests with the least possible harm to the other side or will satisfy both sides' goals simultaneously; find resolution that is best possible fit between the parties' needs.

- **Getting Closure on Settlement**

What can conciliators do to help parties close the final settlement gap?

Is it appropriate for conciliators to propose a settlement package?

First strongly push the parties to develop a final offer themselves. Offer a package designed to be acceptable to all parties, given the history of the bargaining and their current attitudes toward settlement; ask one side to agree on the condition that the other does so as well. Alternatively, label the package a "conciliator's proposal" and present it to both parties simultaneously. Offer the package on a "What If?" basis, with disclosure of each disputant's consent contingent on the other side's acceptance of the terms.

Conciliation Process Overview

Below are elements of the conciliation process. These are not always separate stages and they may blend together. Whether the conciliation process incorporates case assessment, settlement discussions and/or trial preparation may vary among programs and depend on the goals established by the court for its particular program.

I. Introduction

- Steps:**
1. Introduce yourself and identify parties present
 2. Explain the purpose of the conciliation session
 2. Explain your role as conciliator
 3. If applicable, explain that a conciliation report will be filed with the court and/or program
 5. Explain how confidentiality of settlement explorations will be preserved
 6. Determine whether the parties have settlement authority
- Goals:**
- * To convey information/set expectations
 - * To establish control of the session and set ground rules
 - * To build trust and establish neutrality
 - * To set tone for putting the parties at ease

II. Party Presentations

- Steps:**
1. Ask each party to make a brief presentation about the facts and issues in the case
 2. Ask questions to clarify and understand facts and reasons for positions taken
 3. Identify areas of agreement and disagreement
 4. Ask about the procedural status of the case
 5. Ask the parties what outcome they would like to see from the case conference
 6. Summarize and reframe what you have heard
- Goals:**
- * To learn each party's view of the case
 - * To clarify issues in dispute
 - * To identify underlying issues that are driving the dispute
 - * To determine initial ideas for resolution

III. Case Assessment

- Steps:**
1. Assess the strengths and weaknesses of the parties' arguments and evidence
 2. Offer your opinion of the facts and legal issues in dispute
 3. Explore possible scenarios if the case were to be tried
 4. Offer your prediction of trial outcome

- Goals:**
- * To offer the parties to re-evaluate their own case and the other party's
 - * To help the parties realistically assess the risks of trial
 - * To help the parties understand the value of their best alternative to a negotiated agreement (BATNA)

IV. Exploration of Settlement

- Steps:**
1. Ask about the status of any settlement negotiations to date
 2. Identify areas of agreement/mutual concern
 3. Help the parties to understand what is in their best interests
 4. Help the parties create and explore options for resolution
 5. Discuss ADR options and suitability to their case (refer to ADR/give the parties information about ADR resources)

- Goals:**
- * To offer the parties an opportunity to focus on settlement and develop settlement options that meet their mutual needs and interests
 - * To help the parties to evaluate any settlement proposals against their BATNA (best alternative to a negotiated agreement)
 - * To educate the parties as to available ADR options

IV. Preparation for Trial

- Steps:**
1. Narrow the issues for trial
 2. Review status of discovery and make a plan for its completion
 3. Address any outstanding motions and/or procedural matters
 4. Identify witnesses and exhibits for trial
 5. Develop stipulations for trial
 6. Identify any evidentiary questions for the judge
 7. Discuss next steps and timing for a trial date

- Goals:**
- * To expedite preparation of the case for trial
 - * To save judicial time and resources
 - * To narrow the issues that need to be resolved by the judge

V. Conclusion

- Steps:**
1. If the case settles, explain that the parties can seek a 30-day nisi order from the Clerk's Office
 2. Determine whether the parties want to file a stipulation of dismissal or an agreement for judgment with the court
 3. If the parties agree and it would be helpful, schedule another conciliation session for a later date

4. If the case does not settle, direct the parties to schedule a trial date with Clerk's Office (even if they are not ready)
5. Encourage the parties to work together to try to settle
6. If applicable, fill out the conciliation report form with the parties
7. Have the parties complete the session evaluation form
8. Direct the parties to report back to the Clerk's Office to get trial date, report settlement or confirm new conciliation date

Goals:

- * To close the conciliation with the case in a better posture to proceed to trial or resolution than before the session
- * To focus the parties on next steps
- * To obtain the parties input on the conciliation process
- * To report back to the court on the status of the case

CONCILIATION

Description

Conciliation is the process in which a third party brings the disputing parties together so that they can begin to discuss the issues. It involves the adjustment and settlement of a dispute in a friendly, unantagonistic manner.

Conciliation is used in the courts before trial with a view toward avoiding trial, in labor disputes before arbitration and in public agencies to resolve contested administrative matters.

Advantages of Conciliation

- It is relatively inexpensive (typically provided free of charge).
- The proceedings are confidential.
- Conciliation may reduce emotional barriers to communication.
- The parties control the process and decide the outcome.
- Reduces judicial caseload burden so that judicial resources can be reallocated elsewhere.

Disadvantages of Conciliation

- The results are not binding on the parties.
- The success of conciliation depends to a large extent on the skills of the conciliator.
- Success of conciliation requires that both parties have a good faith interest in reaching agreement.

Suitability Factors

Used for all case types.

Conciliation may be particularly appropriate when emotions are running high or when ongoing relationships are involved and a major barrier to resolution is the parties' inability or unwillingness to communicate.

Conciliation may be inappropriate when one party has a clear legal entitlement or where the parties are of unequal bargaining power or sophistication.

Distinguished From Mediation

The term "conciliation" is frequently used interchangeably with "mediation." However, conciliation generally refers to a process less structured than mediation.

A conciliation session takes place at the court and is typically scheduled for an hour. There are usually no additional conciliation sessions, although the parties may be offered that as an

option. Mediation sessions generally take place outside the court and are scheduled for 2-4 hours. It often takes several sessions for a case to settle through mediation.

In some forms of conciliation, a conciliator does not take active part in the process or settlement discussions, while a mediator may actively promote a mutually acceptable settlement. The conciliator's primary role is to reduce the parties' inflammatory rhetoric and tension, open channels of communication, and arrange for formal negotiations.

After the initial joint session, mediators typically meet privately with each party to explore the party's underlying interests and concerns, both legal and nonlegal, and to help them generate and weigh options, and to package settlement proposals. When conciliators assist with settlement discussions, they do not always meet privately with parties.

In another form of conciliation, unlike a mediator, a conciliator is called upon to make a nonbinding recommendation or finding that often concerns the factual or legal issues in dispute, as well as what the conciliator considers the appropriate resolution of the dispute to be. The finding or recommendation is made to the parties jointly by the conciliator. In contrast a mediator's role is to facilitate a resolution of the conflict by the parties, not to suggest solutions.

Mediators are typically trained in communication, negotiation, conflict management theory and techniques. Conciliators are typically experienced trial lawyers, trained in the law, knowledgeable about court processes, and experienced at negotiations.

Client participation/attendance of principals with settlement authority is standard for mediation. Often lawyers appear for conciliation sessions without their clients.

Mediation is suitable to all civil cases. It is especially useful for case in which the parties have an on-going relationship, and complex cases involving multiple parties and interests.

Distinguished From Case Evaluation (and Early Neutral Evaluation)

Conciliators' opinions are typically not presented in writing, whereas in case evaluation and early neutral evaluation (ENE), the parties are provided with a written assessment. The evaluation is of the relative strengths and weaknesses of their positions, the likelihood of liability (noting the central reasons) and the range of damages/judgment value of the case (noting the major elements and calculations).

While a goal of case evaluation or ENE is to help the parties eventually settle their case, evaluators do not typically assist in settlement negotiations during the evaluation process.

Conciliation typically takes place at the pretrial stage whereas early neutral evaluation is held early in the case, sometimes at the time of filing.

ENE focuses on in-depth case planning, such as scheduling motions and/or discovery to put the case in a position for rapid settlement or disposition. The case planning provided by conciliators focuses on preparation for trial.

Evaluators must have subject matter expertise. While it is preferable for conciliators as well, that is not always possible. Conciliators are typically assigned to handle a list of diverse cases

scheduled for a pretrial conference by the court on a particular day as opposed to specific cases within their areas of expertise.

In case evaluation and ENE, unless settled, the case returns to the assigned judge, with no information from the session relayed to the judge or included in the case file. In conciliation, a report on the status of the case for trial, including an estimate of trial time, and sometimes stipulations, lists of witnesses and exhibits is prepared by the conciliator for the judge.

CE and ENE are widely applicable to civil cases of varying types and complexity. ENE is particularly appropriate for cases where the parties differ substantially on legal or factual issues. It can also be appropriate in complex cases where subject matter expertise may be helpful in narrowing issues or simplifying them for trial.

Distinguished From Arbitration

Arbitration is an adjudicatory dispute resolution process in which one or more arbitrators issue a judgment on the merits after an expedited, adversarial hearing. Conciliation typically precedes arbitration as process option.

Typically arbitrators' awards are binding, although the process can also be used to provide a non-binding opinion. When binding, arbitrator decisions are only subject to appeal in very limited circumstances. A conciliator's opinion is non-binding.

Conciliation is typically a free service mandated and scheduled by the court. Arbitration is often written into commercial contracts as the chosen method of dispute resolution. It can therefore be prescribed by the parties or entered into voluntarily. It is usually a fee-for-service process and is scheduled by the arbitrator outside the court.

For legal disputes, arbitration addresses only the disputed legal issues and applies legal standards, whereas, a conciliation process can produce a mutually agreed upon resolution that goes beyond the legal dispute.

An arbitration often involves witness testimony and the presentation of other evidence, even though the rules of evidence are not strictly applied. Conciliation is informal and is typically based on presentations by counsel.

CONCILIATION INTRODUCTION

OPENING REMARKS

Introduce your self, and introduce all present.

Explain the purpose of conciliation: assess strengths/weaknesses of case, explore settlement, if no resolution, prepare/assist parties in getting the case ready for trial.

Explain the Conciliation Report: report the results (settled/not settled), case referred to other ADR processes, conciliation rescheduled, etc... See sample conciliation report.

Explain the process: conciliation is a confidential, voluntary process which brings parties together in order to discuss the issues of the case and come to a mutually acceptable agreement.

EXPLAIN THE DIFFERENT CONCILIATION ROLES:

Process convener - forum for communication

Case conferencer - engage parties about status of case and legal issues involved

Evaluator - discuss strengths and weaknesses of the case in private sessions with each party

Facilitator/Negotiator - manage expectations, explore settlement

Screenener - offer referral to other ADR options like mediation or case evaluation, if appropriate

Attorney - expedite trial preparation

Case manager - move case to disposition

EXPLAIN HOW CONCILIATION WORKS:

1st, we talk to everyone together

2nd, we meet with you one at a time

3rd, we come together to formulate an agreement or plan for trial

EXPLAIN ABOUT CONFIDENTIALITY:

Will not tell anyone what we hear in conciliation

Will not repeat any information told to us in a private session, unless you say it's okay

Conciliator will, however, file a conciliation report with the court, if the case does not settle

EXPLAIN THE GROUND RULES:

Please listen, do not interrupt, speak respectfully, and keep an open mind

EXPLAIN THE ADVANTAGES OF CONCILIATION:

The parties can focus on the resolution of their dispute

The parties control the outcome of conciliation

Conciliation is a voluntary, confidential process

Conciliation allows both parties to fully explain their case

Conciliation is a successful way of resolving disputes without on going litigation

Conciliation agreements last because they are based on the best interests of the parties

If the conciliation is unsuccessful, the parties may continue to litigate

ADR Spectrum

Arbitration: private adjudication

Litigation: public adjudication

Master: quasi-judicial extension of the court

“Non-Binding” Arbitration: private determination of rights that is (arguably) advisory (no Award)

Med/Arb: hybrid process attempting to resolve dispute via facilitated communication (mediation) but if unsuccessful, becomes private adjudication (arbitration)

Summary Jury Trial: mock trial where the jury issues a verdict and the parties resume settlement efforts after hearing how the jury would decide

Mini-Trial: panel of “executives” (made up of one neutral and one representing each party) issue an opinion on facts and law based on highly summarized presentations of the case

Case Evaluation: neutral non-binding evaluation of merits and values of case

CONCILIATION: neutral facilitated negotiation guiding parties towards resolution (this is an important distinction)

Ombuds: neutral investigation of facts and mediation

Collaborative Law: attorney-assisted negotiations (4-way meetings)

Mediation: neutral facilitated negotiation

Facilitation: helping groups identify common objectives and achieve goals

Negotiation: “A process to get what you want.” “A means to an end.” (Fisher and Ury)

TEN STEPS TO SETTLEMENT

By: Celeste R. Niarchos, Esq.

1. Chart of Marital Assets/Debts
2. Who wants what, when
3. Alimony (Amount, duration, waiver)
4. Child Support (Guidelines, extracurriculars and college)
5. Other Financial Issues and ability to pay
6. Discounts
7. Give Backs/Take Aways
8. Discovering the "Hidden Agenda"
9. Creative vs. Standard Agreements
10. Getting to "Yes"

Rule 6(f) Communication with Program or Neutral.

(i) The court shall give a program which is providing court-connected dispute resolution services sufficient information to process the case effectively.

(ii) The program shall give the court's administrative staff sufficient case-specific and aggregate information to permit monitoring and evaluation of the services.

(iii) Communication with the court during the dispute resolution process shall be conducted only by the parties or with their consent. The parties may agree, as part of the dispute resolution process, as to the scope of the information which they, the program, or the neutral will provide to the court. Absent an agreement of the parties and subject to the provisions of Rule 9 regarding confidentiality and subparagraph (iv) below, the program or neutral may provide only the following information to the court: a request by the parties for additional time to complete dispute resolution, the neutral's assessment that the case is inappropriate for dispute resolution, and the fact that the dispute resolution process has concluded without parties' having reached agreement.

(iv) At the conclusion of **CONCILIATION** or dispute intervention, the program or neutral may communicate to the court recommendations, a list of those issues which are and are not resolved, and the program's or neutral's assessment that the case will go to trial or settle, provided that the parties are informed at the initiation of the process that such communication may occur.

CHAPTER 4 - ETHICAL STANDARDS

SUMMARY OF ETHICAL STANDARDS

Introduction. There are eight (8) Ethical Standards for neutrals providing court-connected dispute resolution services. They are intended to promote high quality service and public confidence. They apply to all neutrals providing dispute resolution services for the Trial Court and the appellate courts, including state and other public employees. The full text of the Ethical Standards appears as Rule 9 of the Supreme Judicial Court Rules on Dispute Resolution.

1. Impartiality.

- Impartiality means freedom from favoritism or bias in conduct and appearance.
- A neutral must provide dispute resolution services only in disputes in which she or he can be impartial with respect to the parties and the subject matter.
- If the neutral is unable to be impartial, she or he must withdraw even if the parties express no objection to the neutral's provision of services.
- A neutral must not solicit or accept any gifts or compensation other than the court-established dispute resolution fee.

2. Informed Consent.

- A neutral must make every reasonable effort to ensure that each party understands and consents to the dispute resolution process (including such characteristics as private conversations with the neutral); and any agreement reached.
- If the neutral believes that a party is unable to understand or participate effectively in the process, the neutral must either limit the scope of the process or terminate it. In taking these actions, the neutral should safeguard the confidentiality and interests of the person in need of assistance and maintain impartiality.
- A neutral should inform an unrepresented party if the neutral believes that the party needs expert information or advice in order to protect the party's rights or reach an informed agreement.
- A neutral may provide information to the parties but must not provide legal advice, counseling or other professional services in connection with the dispute resolution process.
- The neutral must inform the parties of their right to redraw from the process at any time and for any reason, except as provided by law or court order.
- In dispute resolution processes which depend upon the agreement of the parties, the neutral must not coerce the parties to reach agreement.

3. Fees.

- A neutral must inform each party, before the process begins, of any fees that will be charged, to whom the fee will be paid, and whether the parties may apply for a fee-waiver or reduction of fees.
- A neutral must enter into a written agreement with the parties, before the process begins, stating any fees and the time and manner of payment.
- Fee agreements may not be contingent upon the result of the dispute resolution process or the amount of the settlement.
- A neutral must not accept, provide or promise a fee for giving or receiving a referral of any matter.
- A neutral must not solicit or accept any payment above the court-established fee when providing court-connected dispute resolution services.

4. Conflict of Interest.

- A neutral must disclose to all parties all actual or potential conflicts of interests, including circumstances that could give rise to an appearance of conflict.
- A neutral must not serve as a neutral in a process after he or she knows of a conflict, unless the parties, after being informed, consent to the neutral's service and the neutral determines that the conflict is not so significant as to cast doubt on the integrity of the dispute resolution process and/or the neutral.
- Examples of Conflict:
 - Current or past personal or professional relationship with a party or a party's attorney;
 - Any financial interest in the subject matter of the dispute or financial relationship with the parties, their attorneys or an immediate family member of a party or attorney;
 - Any circumstances that could create an appearance of conflict of interests.
- If a conflict is so significant as to cast doubt on the integrity of the process or the neutral, the neutral must withdraw even if the parties express no objection.
- If a neutral is not significant, the neutral must ask the parties whether they wish for the neutral to proceed, and the neutral may proceed only upon the consent of all parties.
- A neutral must avoid even the appearance of a conflict of interest both during and after the provision of services.

- A neutral must not solicit future service arrangements with a party.
 - A neutral may not act on behalf of a party or represent one party against another in any matter related to the subject of the dispute resolution process for a period of one year, unless the parties all consent to such action or representation.
 - A neutral should avoid conflicts of interest in recommending the services of other professionals.
5. Responsibility to Non-Participating Parties. A neutral should consider and, where appropriate, encourage the parties to consider, the interests of persons – especially children – who are not participating in the process but are affected by actual or potential agreements.
 6. Advertising, Soliciting or Communications by Neutrals. Neutrals must be truthful in advertising, soliciting or other communications regarding the provision of dispute resolution services. Neutrals must not make claims of specific results, benefits, outcomes or promises which imply favor of one side over another.
 7. Confidentiality. A neutral must maintain the confidentiality of all information disclosed during a dispute resolution proceeding except for particular exceptions included in the Standard.

Confidential information includes at least the following: the identity of the parties; the nature and substance of the dispute; the neutral's impressions, opinions and recommendations; the neutral's notes; statements, documents or other physical evidence disclosed by any participant; and the terms of any settlement award or other resolution of the dispute, unless disclosure is required by law or court rule.

- The neutral must inform the parties that the neutral will not voluntarily disclose information unless the disclosure is required by law.
- The neutral must not disclose information obtained in a private discussion with a party unless the party permits disclosure.
- The neutral may, for supervisory and monitoring purposes, discuss confidential information with supervisors, administrative staff and other neutrals in the court-connected dispute resolution program with which the neutral is affiliated.
- The neutral may, with prior permission of the parties and after removing identifying information, use information disclosed by the parties for research, training or statistical purposes.

8. Withdrawal.

- A neutral must withdraw from a dispute resolution process if continuing in the process would violate an Ethical Standard or jeopardize the safety of a party, or if the neutral is unable to provide effective services.
- The neutral must conduct a withdrawal, to the extent possible, so that the parties' safety and are rights are protected.
- A neutral may withdraw if she or he believes one of the following: a party is not acting in good faith; the agreement would be illegal or involve the commission of a crime; continuing the process would give rise to an appearance of impropriety; the process could cause severe harm to a non-participating party or the public; or continued discussions would not be in the best interest of the parties, their minor children, or the dispute resolution program.

Rule 9 – Ethical Standards
Hypothetical Case Scenarios

Scenario #1

The conciliator knows the lawyer for one of the parties; the lawyer was a college classmate of the conciliator, and they see each other yearly at college reunions.

Scenario #2

The parties disagree about the meaning of the settlement agreement they worked out with the conciliator, and counsel for Party A issues a deposition subpoena, ordering the conciliator to testify about the discussion in the conciliation and to bring her notes from the conciliation session. Party B opposes the testifying of the conciliator.

Scenario #3

In a business divorce case, Partner A discloses to the conciliator that he is personally about to receive a substantial contract from one of the partnership's best clients, and that her partner does not know this; Partner B would balk at their 50/50 division of assets if he knew. Partner A insists that the conciliator not disclose this information to her partner or she will quit the conciliation.

Scenario #4

Consumer dispute with an insurance company over alleged over-charge; conciliator is currently in a dispute with his insurance company over another issue (underpayment on a loss claim.) Disclose?

Scenario #5

An insurance company asks the conciliator's law firm to handle an unrelated matter after the conciliation is concluded.

Scenario #6

A conciliator learns during the conciliation that Party A's attorney has filed a false affidavit in another (related) case which is now settled; the principles of legal ethics require lawyers to report misconduct by other attorneys, but the conciliator has stated that he will maintain the confidentiality of everything discussed in the conciliation.

Scenario #7

In an unsafe-conditions case, the conciliator learns in a private session that the tenant would be willing to vacate the premises in exchange for a payment of \$1,000, but that is her bottom line; she asks the conciliator to tell the landlord that she wants \$1,500. The conciliator inadvertently discloses to the landlord that the tenant would be willing to leave if paid \$1,000.

Questions:

- a. What ethical standards apply and/or would be helpful in providing guidance for the conciliator in this scenario?
- b. What course of action would you take as the conciliator?
- c. How would you do it? What would you say to the parties? (Role play this in your small group.)

Rule 9 – Ethical Standards
Hypothetical Case Scenarios with Commentary

Scenario #1 (Conflict of Interest)

The conciliator knows the lawyer for one of the parties; the lawyer was a college classmate of the conciliator, and they see each other yearly at college reunions.

Commentary: The Conflict of Interest Rule 9(e)(i) states that “the neutral shall disclose to all parties participating in the process all actual or potential conflicts of interest, including but not limited to the following: (aa) any known current or past personal or professional relationship with any of the parties or their attorneys.” In this case, the issue is whether the relationship described is a “personal or professional” relationship. Among the factors that might be relevant are the following: (a) do the conciliator and the classmate consider each others friends or were they friends in college; (b) has either of them referred business to the other, or do they have any kind of relationship; and (c) have they had contact with each other besides during reunions. Even if, after weighing such factors, disclosure seems unnecessary, the best course may be to err on the side of disclosure, so that the parties have the information they need in order to make an informed decision about whether they are comfortable with the conciliator.

Scenario #2 (Confidentiality)

The parties disagree about the meaning of the settlement agreement they worked out with the conciliator, and counsel for Party A issues a deposition subpoena, order the conciliator to testify about the discussions in the conciliation and to bring her notes from the conciliation session. Party B opposes the testifying of the conciliator.

Commentary: Rule 9(h) states that “A neutral shall maintain the confidentiality of all information disclosed during the courts of dispute resolution proceedings, subject only to the exceptions listed in this section.” One of the exceptions is stated in Rule 9(h)(i): “unless disclosure is required by law or court rule.” In this case, it is counsel for one of the parties, not the court, which has issued the subpoena for the conciliator’s testimony. Therefore there is no ruling from the court as to the propriety of the subpoena. If the attorney had the authority to issue the subpoena, the conciliator still has the right (and possibly, under these Rules, the obligation) to see the guidance of the court in which the case is pending as to whether s/he must comply with the subpoena. (See Commentary to Rule 9(h)(v): “The provisions in this section concerning confidentiality govern the ethical obligation of the neutral but may not bar compelled disclosure of confidential communications, by means of subpoena or other court process.”)

Scenario #3 (Withdrawal)

In a business divorce case, Partner A discloses to the conciliator that he is personally about to receive a substantial contract from one of the partnership’s best clients, and that her partner (Partner B) does not know this; Partner B would balk at their 50/50 division of assets if he knew. Partner A insists that he conciliator not disclose this information to her partner or she will quit the conciliation.

Commentary: The Withdrawal Rule 9(i)(ii) permits, but does not require, the neutral to withdraw when the neutral "believes that (aa) one or more parties is not acting in good faith; ... (cc) continuing the dispute resolution process would give rise to an appearance of impropriety; ... and (ee) continuing discussions would not be in the best interests of the parties" In this case, Partner B will probably be disadvantaged by continuation of the conciliation. In addition, the conciliator's knowledge of the contract could give rise to an appearance of impropriety or be perceived as a failure to act in good faith (especially if the parties have agreed to exchange all relevant financial information.) It is worth noting that if the conciliator decides to withdraw, s/he must do so in a manner that does not breach the confidentiality of the Partner A's communications to the conciliator. (See Rule 9(i)(i); "Withdrawal must be accomplished in a manner which, to the extent possible, does not prejudice the rights or jeopardize the safety of the parties.")

Scenario #4 (Impartiality)

Consumer dispute with an insurance company over alleged over-charge; conciliator is currently in a dispute with his insurance company over another issue (underpayment on a loss claim.) Disclose?

Commentary: Rule 9(b)(i) requires the neutral to be impartial "with respect to all of the parties and the subject matter of the dispute." This duty applies throughout the dispute resolution process. Among the issues in this case are: (a) whether the neutral, in spite of his personal dispute with his own insurance company, feels about to be impartial; (b) whether one of the parties, if s/he have been impartial, thus calling into question the integrity of the process; and (c) whether, even if the neutral concludes that he can be impartial, an objective person would find that decision to be reasonable under the circumstances of that case. The Rules probably do not require the disqualification of the conciliator solely on the grounds that s/he has been involved in a dispute with an insurance company, but such factors as how recent the dispute was, how intense a dispute it was, how long it lasted, and the resulting impact (if any) on the conciliator's views about insurance companies might be relevant to the question of whether the conciliator should make a disclosure of some kind. When in doubt, the best course in such situations may be to err on the side of disclosure, so that the parties have the information they need in order to make an informed decision about whether they are comfortable with the conciliator.

Scenario #5 (Conflict of Interest)

An insurance company asks the conciliator's law firm to handle an unrelated matter after the conciliation is concluded.

Commentary: Rule 9(e)(iv) states that "a neutral must avoid even the appearance of a conflict of interest both during and after the provision of services" (emphasis added.) In this case, there is at least a risk of such an appearance. The Rule goes on to prohibit the neutral (but not the neutral's firm - see Commentary) from handling an unrelated matter for one of the parties for one year, unless the parties consent. (Although the Rule does not say when the year begins, a reasonable assumption might be from the time when the neutral's services ended) Thus, it appears that the Rules do not expressly prohibit the conciliator's firm from taking the new case, as long as (a) the

conciliator does not work on the case, and (b) the firm's taking the case would not create the appearance of impropriety. Among the factors that might be relevant to the question of "impropriety" are: (a) was the insurance company's decision to hire the firm unrelated to the conciliation; (b) is the new matter substantial; and (c) did the insurance company and the firm have a prior relationship.

Scenario #6 (Confidentiality)

A conciliator learns during the conciliation that Party A's attorney has filed a false affidavit in another (related) case which is now settled; the principles of legal ethics require lawyers to report misconduct by other attorneys, but the conciliator has stated that he will maintain the confidentiality of everything discussed in the conciliation.

Commentary: Rule 1(a) of the Uniform Rules on Dispute Resolution states that "To the extent that there is any conflict between these rules and the ... Rules of the Supreme Judicial Court, the Supreme Judicial Court... rules shall control." The lawyer's ethical duty to report misconduct by another member of the bar is contained in the Rules of Professional Conduct adopted by the SJC, and therefore those Rules are arguably controlling. This issue is one on which the conciliator would probably be well advised to obtain independent advice. In doing so, the conciliator should of course refrain from disclosing the identity of the parties to the conciliation or the substance of their communications, to the extent consistent with whatever duty the conciliator may have to report the attorney's actions.

Scenario #7 (Confidentiality)

In an unsafe-conditions case, the conciliator learns in a private session that the tenant would be willing to vacate the premises in exchange for a payment of \$1,000, but that is her bottom line; she asks the conciliator to tell the landlord that she wants \$1,500. The conciliator inadvertently discloses to the landlord that the tenant would be willing to leave if paid \$1,000.

Commentary: The Confidentiality Rule 9 (h) does not provide guidance on the question of curing an inadvertent breach of confidentiality by the neutral. Among the possible course of action are (a) to say to the landlord that the conciliator misspoke when s/he communicated the \$1,000 figure and that the correct figure was \$1,500; (b) to explain to the tenant what happened and find out if there are any terms that the tenant would wish to make part of her proposal if the proposal were to stand at \$1,000; or (c) to discuss the situation with the tenant and explore the options that the tenant may prefer as a way of rectifying the breach. Although not ethically required, an apology on the part of the conciliator would be in order.

Ten Principles of Mediation Ethics

By David A. Hoffman

An important subject for mediators is how to distill from the various codes of mediation ethics the essential principles that these codes have in common. Such codes -- each with somewhat differing provisions -- have been developed by the Society of Professionals in Dispute Resolution, the Academy of Family Mediators, and the American Bar Association, among others. The ten principles outlined below are a compilation of what I believe are commonly accepted principles of mediation ethics.

This list, of necessity, over-simplifies the subject; a brief article cannot capture all of the nuances of ethical principles. Also, this list borrows heavily from many writings in the field -- indeed, the point of such a list is not originality but an attempt to discern the principles on which there is consensus. Finally, this list is a work in process; principles and standards are evolving as the field of mediation matures. For the moment, however, the following seem to be the basic principles of mediation ethics.

1. Conflict of interest. Mediators must avoid serving in cases where they have a direct personal, professional, or financial interest in the outcome of the dispute. This duty becomes more complicated where the mediator's interest is indirect -- e.g., she works in a firm with someone who has an interest in the outcome, or she is related to someone who has such an interest. In those cases, the question is *how* indirect is the interest? Is it simply a matter of disclosure or does it preclude serving in the case? Mediators should also avoid an appearance of a conflict -- Prof. Frank Sander talks about applying the "headline test": how would you feel about the potential conflict appearing on the front page of the newspaper? Mediators should err on the side of disclosure. If the disclosure is made well in advance of the mediation, so that the parties have the opportunity to choose another mediator, their acceptance of the mediator -- after full disclosure -- generally resolves the potential conflict. In some cases, however, the mediator should decline the case if the conflict is so severe that even waiver does not cure it, or the appearance of impropriety is so strong that it cannot be resolved by full disclosure.

2. Competence/professional role boundaries. Mediators have a duty to know the limits of their ability; to avoid taking on assignments they are not equipped to handle; and to communicate candidly with the parties about their background and experience. Sometimes the parties want a mediator with subject matter expertise (such as divorce), or a particular set of process skills (such as multiparty public policy negotiations). We must defer to their judgment about these matters by disclosing our degree of competence and letting them decide. Sometimes we get chosen to handle an assignment where we may lack competence; it is our duty to turn it down, even if the parties, having heard our

protestations, want us anyway. Observing professional role boundaries is the corollary of this duty. As mediators, we must avoid providing other types of professional service, even if we are licensed to provide it. Mediators who are engineers, therapists, lawyers or what have you, should leave the parties' engineering, therapy and law-related needs to others. Even though we may be competent to provide those services, we compromise our effectiveness as mediators when we wear two hats.

3. Impartiality. Mediation requires engagement, and it is difficult to engage the parties without developing some feelings about them. The duty to remain impartial throughout the mediation – from beginning to end -- does not require us to withdraw from the case if we become aware of such feelings, but instead to act in such a way that those feelings (whatever they may be) are kept to ourselves. Our words, manner, affect, body language, and process management must reflect an even-handed approach. If our feelings about the parties are such that we can no longer be even-handed in our dealings with them, we must withdraw from the case.

4. Voluntariness. Although some parties come to mediation because they are required to do so (e.g., ordered by a judge, or compelled to mediate under a dispute resolution clause in a contract), they must have the right at a certain point to walk away from the table. In other words, even in a mandatory mediation setting, the parties' duty is to participate in good faith and make an effort to negotiate a resolution. However, mediators should remind the parties that any agreement they reach must be a product of their own free will, and therefore they may withdraw from the process if it is not moving in the direction of an agreement that they prefer to the alternative – i.e., continuation of the dispute or resolution of it in some other manner.

5. Confidentiality. There are two aspects of the duty of confidentiality. First, mediators must safeguard the privacy and confidentiality of the mediation process vis-a-vis third parties – i.e., those outside the mediation. Second, when a mediator meets separately with one of the parties, she must maintain the confidentiality of anything said in that private session which that party does not want the other party or parties to know. In addition, mediators have a duty to inform the parties of any relevant limits of confidentiality, such as mandated reporting of child abuse or the planned commission of a crime.

6. Do no harm. This familiar principle (borrowed from the Hippocratic Oath) requires mediators to avoid conducting the process in a manner that harms the participants or worsens the dispute. Some people suffer from emotional disturbances that make mediation potentially damaging psychologically; some people come to mediation at a stage when they are not ready to be there. Some people are willing and able to participate, but the mediator handles the process in a way that inflames the parties' antagonism toward each other rather than resolving

it. We should modify the process (e.g., meet separately with the parties, or meet only with counsel) where necessary, and withdraw from the mediation if it becomes apparent that, even as modified, mediation is inappropriate or harmful. In a word, we must avoid adding fuel to the fire. To be sure, there are circumstances in mediation (as in medicine) where the problem may have to get worse before it can get better; venting emotions can be a painful process. Before employing this technique, however, the mediator must be confident that she has the skill and experience to avoid making matters worse.

7. Self-determination. Party autonomy is one of the guiding principles of mediation. Supporting and encouraging the parties in a mediation to make their own decisions (both individually and collectively) about the resolution of the dispute, rather than imposing the ideas of the mediator or others, is fundamental to the process. Mediators are frequently asked by the parties: What would you do? What do you think is fair? What do the courts usually do in cases of this kind? Our job is to help the parties find their own answers – i.e., arrive at a resolution that meets their tests of fairness rather than our own. Mediators should also prevent one party from dominating the other parties in the mediation in a manner that prevents them from being able to make their own decisions.

8. Informed consent. A voluntary, self-determined resolution of a dispute will serve the parties' interests only if it is an informed choice. Although the mediator need not be (and usually should not be) the source of the parties' information, mediators should make sure that the parties have enough data to assess their options for settlement and their alternatives to settlement. If the parties lack this information, the mediator should talk to them about how they might obtain it.

9. Duties to third parties. Just as the mediator should do no harm to the parties, she should also consider whether a proposed settlement might harm others who are not participating in the mediation. This is particularly important when the third parties affected by a mediated settlement are children or other vulnerable people (such as the elderly or infirm). In some cases, the affected third parties might be the general public – e.g., in a case involving allegations of faulty construction of a public project, such as a bridge or highway. Since third parties are not directly involved in the process, the mediator may have a duty in some cases to ask the parties for information about the impact of the settlement on others and encourage them to bring the interests of one or more third parties to bear on the discussions in the mediation.

10. Honesty. For mediators, the duty of honesty means, among other things, full and fair disclosure of (a) their qualifications and prior experience, (b) any fees that the parties will be charged for the mediation, and (c) any other aspect of the mediation which may affect their willingness to participate in the process. Honesty also means telling the truth when meeting separately with the parties. For

example, if Party A confidentially discloses his "bottom line," and Party B asks the mediator if she knows the opponent's bottom line, saying "no" would be dishonest. (Instead, the mediator might say that she has discussed a number of things with the Party A on a confidential basis and therefore is not at liberty to respond to the question, just as she would be precluded from disclosing certain things she learned from Party B.) When mediating separately and confidentially with the parties in a series of private sessions, the mediator is in a unique and privileged position; she must not abuse the trust the parties place in her even if she believes that bending the truth will further the cause of settlement.

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**CONFIDENTIALITY OF MEDIATION IN MASSACHUSETTS
UNDER STATUTE AND COURT RULE**

Massachusetts General Laws Chapter 233, section 23C

§ 23C, Work product of mediator confidential; confidential communications; exception; mediator defined.

All memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.

For the purposes of this section a "mediator" shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body.

Supreme Judicial Court Uniform Rules on Dispute Resolution

Rule 9. Ethical Standards, Section (h)

A neutral shall maintain the confidentiality of all information disclosed during the course of dispute resolution proceedings, subject only to the exceptions listed in this section.

(i) The information disclosed in dispute resolution proceedings that shall be kept confidential by the neutral includes, but is not limited to: the identity of the parties; the nature of the substance of the dispute; the neutrals impressions, opinions, and recommendations; notes made by the neutral; statements, documents, or other physical evidence disclosed by any participant in the dispute resolution process; and the terms of any settlement, award, or other resolution of the dispute, unless disclosure is required by law or court rule.

(ii) Confidentiality vis a vis nonparties. The neutral shall inform the participants in the dispute resolution process that he or she will not voluntarily disclose to any person not participating in the mediation any of the information obtained through the process, unless such disclosure is required by law.

(iii) Confidentiality within the mediation. A neutral shall respect the confidentiality of information received in a private session or discussion with one or more of the parties in a dispute resolution process, and shall not reveal this information to any other party in the mediation without prior permission for the party from the information was received.

(iv) Neutrals who are part of a court connected dispute resolution program may, for the purposes of supervising the program, supervising neutrals and monitoring of agreements, discuss confidential information with other neutrals and administrative staff in the program. This permission to discuss confidential information does not extend to individuals outside the program.

(v) Neutrals may, with prior permission from the parties, use information disclosed by the parties in dispute resolution proceedings for research, training, or statistical purposes, provided the materials are adapted so as to remove any identifying information.

CHAPTER 5 - SKILLS & COMMUNICATION

Cognitive Barriers To Success In Mediation: Irrational Attachments to Positions and Other Errors of Perception That Impact Settlement Decisions¹

Definition: "Cognitive Barriers" are assessments that are unconsciously influenced by limitations in our five senses AND the way information is processed.

Type	Description	Effect/Behavior	Example
Cognitive Dissonance	When it is psychologically uncomfortable to consider information that contradicts one's viewpoint.	Tend to justify own conduct, blame others, deny, downplay, or ignore conflicting data.	
Advocacy Bias	Self-serving judgments about the likelihood of success on the merits in litigation resulting from (1) selective perception and (2) substantial time spent identifying strengths while paying insufficient attention to or discrediting weaknesses.	Where one has an interest in the outcome of a dispute, s/he is unable to make a completely objective settlement assessment.	
Assimilation Bias	Tendency of individuals to see or hear only that information that favors their position.	Behave as if adverse information was never presented to them.	
Endowment Effect	Tendency to over-value things in which one has a property interest.		The value of claims in dispute.
Certainty Bias	Overestimation of degree of certainty when assessing the probable outcomes in litigation.		Overestimate degree of certainty regarding trial results.
Egocentric Bias	Tendency to claim for themselves greater responsibility for a joint action than would be given by an outside observer.		
Inattentional Blindness	Tendency to see/hear only that which we are focused on.		Basketball/gorilla suit observation study.

¹ Picker, Bennett G. and Relyea, Gregg.
http://www.mediate.com//articles/PR_CognitiveBarriers.cfm. January 2011.

Mistaking a Small Part of the Truth for the Whole	Tendency to forcefully assert own arguments (small part) while losing sight of the bigger picture (themes of case).		
Reactive Devaluation	Tendency to minimize the value of an offer or proposal from another party due to concerns about the credibility or competence of its source.		
Competitive Arousal	Tendency to lose sight of the bottom line ("reservation price") due to the drama of the negotiation ("auctioneer's effect"). May also tend to "grandstand" for the other party.		
Change Blindness	Tendency to fail to detect large changes to objects and scenes because of the mind's tendency to fixate on the first image.		
Risk Aversion (Loss Aversion)	Tendency to make different decisions about risk depending on whether they categorize (or "frame") the risk as a gain or a loss.	Generally risk-averse when protecting settlements regarded as current "gains" and risk-seeking when making decisions involving results regarded as current "losses."	
Hindsight Bias	Tendency to overestimate the predictability of past events and failure to recognize that when making predictions, hindsight is twenty-twenty.	Different assessment of conduct before the fact versus after the fact.	

A Sampling of the Great, Wide World of Social, Cognitive, and Memory Biases and Blindnesses That May Inform Our Views of Conflict

- **Selective Perception**
 - A term used to describe a broad range of circumstances in which people perceive some parts of their environment, but filter out or are blind to others.
- **Loss Aversion and the Endowment Effect**
 - Tendency to attach greater value to something we already possess. Tendency to feel that losses are of greater consequence than gains.
- **Reactive Devaluation**
 - The tendency to devalue the proposals because of their source, when they come from an adversary.
- **Lake Wobegon Effect (Superiority Bias)**
 - A strong tendency to view oneself as "above average" in desirable traits.
- **Trait Ascription Bias or Fundamental Attribution Error**
 - Tendency to explain others' behavior as a consequence of personal traits, but one's own behavior as a rational response to circumstance. An example of an *attributional bias*.
- **Introspection Illusion**
 - people tend to use general theories of behavior when evaluating others but use introspection when appraising themselves. People do not believe that others can be trusted to do the same: okay for me but not for thee.
- **Misinformation Effect**
 - A tendency for people to reconstruct their memories after an event to conform with false cues.
- **Omission Bias**
 - The tendency to find bad consequences more acceptable if they result from one's inaction, rather than action.
- **Ambiguity Effect**
 - The preference for the option that appears more certain over one that appears less certain.
- **Planning Fallacy**
 - The tendency to underestimate how long it will take to complete a task. An example of the "Valence Effect" (wishful thinking).
- **Bias Blind Spot**
 - The tendency to recognize cognitive biases in others, but not ourselves.

Decision-making and behavioral biases

- **Anchoring** – the common human tendency to rely too heavily, or "anchor," on one trait or piece of information when making decisions.
- **Attentional Bias** – implicit cognitive bias defined as the tendency of emotionally salient stimuli in one's environment to preferentially draw and hold attention.
- **Bandwagon effect** – the tendency to do (or believe) things because many other people do (or believe) the same. Related to groupthink and herd behavior.
- **Bias blind spot** – the tendency to see oneself as less biased than other people.
- **Choice-supportive bias** – the tendency to remember one's choices as better than they actually were.
- **Confirmation bias** – the tendency to search for or interpret information in a way that confirms one's preconceptions.
- **Congruence bias** – the tendency to test hypotheses exclusively through direct testing, in contrast to tests of possible alternative hypotheses.
- **Contrast effect** – the enhancement or diminishing of a weight or other measurement when compared with a recently observed contrasting object.
- **Denomination effect** – the tendency to spend more money when it is denominated in small amounts (e.g. coins) rather than large amounts (e.g. bills).
- **Distinction bias** – the tendency to view two options as more dissimilar when evaluating them simultaneously than when evaluating them separately.
- **Endowment effect** – "the fact that people often demand much more to give up an object than they would be willing to pay to acquire it".
- **Experimenter's or Expectation bias** – the tendency for experimenters to believe, certify, and publish data that agree with their expectations for the outcome of an experiment, and to disbelieve, discard, or downgrade the corresponding weightings for data that appear to conflict with those expectations.

- **Focusing effect** – the tendency to place too much importance on one aspect of an event; causes error in accurately predicting the utility of a future outcome.
- **Framing effect** – drawing different conclusions from the same information, depending on how that information is presented.
- **Hostile media effect** - the tendency to see a media report as being biased due to one's own strong partisan views.
- **Hyperbolic discounting** – the tendency for people to have a stronger preference for more immediate payoffs relative to later payoffs, where the tendency increases the closer to the present both payoffs are.
- **Illusion of control** – the tendency to overestimate one's degree of influence over other external events.
- **Impact bias** – the tendency to overestimate the length or the intensity of the impact of future feeling states.
- **Information bias** – the tendency to seek information even when it cannot affect action.
- **Irrational escalation** – the phenomenon where people justify increased investment in a decision, based on the cumulative prior investment, despite new evidence suggesting that the decision was probably wrong.
- **Loss aversion** – "the disutility of giving up an object is greater than the utility associated with acquiring it". (see also Sunk cost effects and Endowment effect).
- **Mere exposure effect** – the tendency to express undue liking for things merely because of familiarity with them.
- **Money illusion** – the tendency to concentrate on the nominal (face value) of money rather than its value in terms of purchasing power.
- **Moral credential effect** – the tendency of a track record of non-prejudice to increase subsequent prejudice.
- **Negativity bias** – the tendency to pay more attention and give more weight to negative than positive experiences or other kinds of information.
- **Neglect of probability** – the tendency to completely disregard probability when making a decision under uncertainty.
- **Normalcy bias** – the refusal to plan for, or react to, a disaster which has never happened before.
- **Omission bias** – the tendency to judge harmful actions as worse, or less moral, than equally harmful omissions (inactions).

- **Outcome bias** – the tendency to judge a decision by its eventual outcome instead of based on the quality of the decision at the time it was made.
- **Planning fallacy** – the tendency to underestimate task-completion times.
- **Post-purchase rationalization** – the tendency to persuade oneself through rational argument that a purchase was a good value.
- **Pseudocertainty effect** – the tendency to make risk-averse choices if the expected outcome is positive, but make risk-seeking choices to avoid negative outcomes.
- **Reactance**: – the urge to do the opposite of what someone wants you to do out of a need to resist a perceived attempt to constrain your freedom of choice.
- **Restraint bias** – the tendency to overestimate one's ability to show restraint in the face of temptation.
- **Selective perception** – the tendency for expectations to affect perception.
- **Semmelweis reflex** – the tendency to reject new evidence that contradicts an established paradigm.
- **Social comparison bias** – the tendency, when making hiring decisions, to favour potential candidates who don't compete with one's own particular strengths.
- **Status quo bias** – the tendency to like things to stay relatively the same (see also loss aversion, endowment effect, and system justification).
- **Unit bias** – the tendency to want to finish a given unit of a task or an item. Strong effects on the consumption of food in particular.
- **Wishful thinking** – the formation of beliefs and the making of decisions according to what is pleasing to imagine instead of by appeal to evidence or rationality.
- **Zero-risk bias** – preference for reducing a small risk to zero over a greater reduction in a larger risk.

Biases in probability and belief

- **Ambiguity effect** – the tendency to avoid options for which missing information makes the probability seem "unknown."

- **Anchoring effect** – the tendency to rely too heavily, or "anchor," on a past reference or on one trait or piece of information when making decisions (also called "insufficient adjustment").
- **Attentional bias** – the tendency to neglect relevant data when making judgments of a correlation or association.
- **Availability heuristic** – estimating what is more likely by what is more available in memory, which is biased toward vivid, unusual, or emotionally charged examples.
- **Availability cascade** – a self-reinforcing process in which a collective belief gains more and more plausibility through its increasing repetition in public discourse (or "repeat something long enough and it will become true").
- **Base rate neglect or Base rate fallacy** – the tendency to base judgments on specifics, ignoring general statistical information.
- **Belief bias** – an effect where someone's evaluation of the logical strength of an argument is biased by the believability of the conclusion.
- **Clustering illusion** – the tendency to see patterns where actually none exist.
- **Conjunction fallacy** – the tendency to assume that specific conditions are more probable than general ones. [29]
- **Forward Bias** - the tendency to create models based on past data which are validated only against that past data.
- **Gambler's fallacy** – the tendency to think that future probabilities are altered by past events, when in reality they are unchanged. Results from an erroneous conceptualization of the Law of large numbers. For example, "I've flipped heads with this coin five times consecutively, so the chance of tails coming out on the sixth flip is much greater than heads."
- **Hindsight bias** – sometimes called the "I-knew-it-all-along" effect, the tendency to see past events as being predictable^[30] at the time those events happened.
- **Illusory correlation** – inaccurately perceiving a relationship between two events, either because of prejudice or selective processing of information.
- **Observer-expectancy effect** – when a researcher expects a given result and therefore unconsciously manipulates an experiment or misinterprets data in order to find it (see also subject-expectancy effect).

Optimism bias – the tendency to be over-optimistic about the outcome of planned actions.

Ostrich effect – ignoring an obvious (negative) situation.

Overconfidence effect – excessive confidence in one's own answers to questions. For example, for certain types of questions, answers that people rate as "99% certain" turn out to be wrong 40% of the time.

Positive outcome bias – the tendency of one to overestimate the probability of a favorable outcome coming to pass in a given situation (see also wishful thinking, optimism bias, and valence effect).

Pareidolia – a vague and random stimulus (often an image or sound) is perceived as significant, e.g., seeing images of animals or faces in clouds, the man in the moon, and hearing hidden messages on records played in reverse.

Pessimism bias – the tendency for some people, especially those suffering from depression, to overestimate the likelihood of negative things happening to them.

Primacy effect – the tendency to weigh initial events more than subsequent events.

Recency effect – the tendency to weigh recent events more than earlier events (see also peak-end rule).

Disregard of regression toward the mean – the tendency to expect extreme performance to continue.

Stereotyping – expecting a member of a group to have certain characteristics without having actual information about that individual.

Subadditivity effect – the tendency to judge probability of the whole to be less than the probabilities of the parts.

Subjective validation – perception that something is true if a subject's belief demands it to be true. Also assigns perceived connections between coincidences.

Well travelled road effect – underestimation of the duration taken to traverse off-traveled routes and over-estimate the duration taken to traverse less familiar routes.

Social biases

Most of these biases are labeled as attributional biases.

- **Actor-observer bias** – the tendency for explanations of other individuals' behaviors to overemphasize the influence of their personality and underemphasize the influence of their situation (see also Fundamental attribution error), and for explanations of one's own behaviors to do the opposite (that is, to overemphasize the influence of our situation and underemphasize the influence of our own personality).
- **Dunning-Kruger effect** – a twofold bias. On one hand the lack of metacognitive ability deludes people, who overrate their capabilities. On the other hand, skilled people underrate their abilities, as they assume the others have a similar understanding.
- **Egocentric bias** – occurs when people claim more responsibility for themselves for the results of a joint action than an outside observer would.
- **Forer effect** (aka Barnum effect) – the tendency to give high accuracy ratings to descriptions of their personality that supposedly are tailored specifically for them, but are in fact vague and general enough to apply to a wide range of people. For example, horoscopes.
- **False consensus effect** – the tendency for people to overestimate the degree to which others agree with them.
- **Fundamental attribution error** – the tendency for people to over-emphasize personality-based explanations for behaviors observed in others while under-emphasizing the role and power of situational influences on the same behavior (such as actor-observer bias, group attribution error, positivity effect, and negativity effect).
- **Halo effect** – the tendency for a person's positive or negative traits to "spill over" from one area of their personality to another in others' perceptions of them (see also physical attractiveness stereotype).
- **Illusion of asymmetric insight** – people perceive their knowledge of their peers to surpass their peers' knowledge of them.
- **Illusion of transparency** – people overestimate others' ability to know them, and they also overestimate their ability to know others.
- **Illusory superiority** – overestimating one's desirable qualities, and underestimating undesirable qualities, relative to other people. (Also

- known as "Lake Wobegon effect," "better-than-average effect," or "superiority bias").
- **Ingroup bias** – the tendency for people to give preferential treatment to others they perceive to be members of their own groups.
 - **Just-world phenomenon** – the tendency for people to believe that the world is just and therefore people "get what they deserve."
 - **Moral luck** – the tendency for people to ascribe greater or lesser moral standing based on the outcome of an event rather than the intention
 - **Outgroup homogeneity bias** – individuals see members of their own group as being relatively more varied than members of other groups.
 - **Projection bias** – the tendency to unconsciously assume that others (or one's future selves) share one's current emotional states, thoughts and values.
 - **Self-serving bias** – the tendency to claim more responsibility for successes than failures. It may also manifest itself as a tendency for people to evaluate ambiguous information in a way beneficial to their interests (see also group-serving bias).
 - **System justification** – the tendency to defend and bolster the status quo. Existing social, economic, and political arrangements tend to be preferred, and alternatives disparaged sometimes even at the expense of individual and collective self-interest. (See also status quo bias.)
 - **Trait ascription bias** – the tendency for people to view themselves as relatively variable in terms of personality, behavior and mood while viewing others as much more predictable.
 - **Ultimate attribution error** – similar to the fundamental attribution error, in this error a person is likely to make an internal attribution to an entire group instead of the individuals within the group.

Memory errors

- **Cryptomnesia** – a form of *misattribution* where a memory is mistaken for imagination.
- **Egocentric bias** – recalling the past in a self-serving manner, e.g. remembering one's exam grades as being better than they were, or remembering a caught fish as being bigger than it was.

- **False memory** – confusion of imagination with memory, or the confusion of true memories with false memories.
- **Hindsight bias** – filtering memory of past events through present knowledge, so that those events look more predictable than they actually were; also known as the "I-knew-it-all-along effect."
- **Reminiscence bump** – the effect that people tend to recall more personal events from adolescence and early adulthood than from other lifetime periods.
- **Rosy retrospection** – the tendency to rate past events more positively than they had actually rated them when the event occurred.
- **Self-serving bias** – perceiving oneself responsible for desirable outcomes but not responsible for undesirable ones.
- **Suggestibility** – a form of *misattribution* where ideas suggested by a questioner are mistaken for memory.
- **Telescoping effect** – the effect that recent events appear to have occurred more remotely and remote events appear to have occurred more recently.
- **Von Restorff effect** – the tendency for an item that "stands out like a sore thumb" to be more likely to be remembered than other items.

Windows on Diversity: Lawyers, Culture, and Mediation Practice¹

“Culture is what everyone in a group knows that those outside the group do not know; it relates to the symbolic aspects of our lives, those places where we are constantly making meaning and composing our identities.”

INTRODUCTION

Mediation fulfills its potential when it is adaptable and flexible enough to function well for people from a range of cultural backgrounds.

Three important factors to pass this “diversity test”:

Mediation processes themselves must reflect a range of values about how disputes are named, understood, and addressed.

Mediators need to be trained in and apply cultural competence to their work.

The influence of legal culture on mediation processes and mediator behavior should be investigated since its pervasive influence affects process design, mediator behavior, and the inclusiveness of mediation processes.

Culture is complex and multidimensional; mediation training and process design initiatives that incorporate broad understandings of culture help participants develop cultural competence and contribute to a more accessible dispute resolution field.

CONNECTIONS BETWEEN CULTURE AND DISPUTING

Culture shapes what we *call* disputes, how we *think of and relate to* them, whether and how we *address* them, and the *range* of acceptable *outcomes*.

Culture informs the framing of and responses to disputes. For example, fewer disputants may be identified by people from more individualist settings (that value autonomy and independence) whereas people from more collectivist settings may define parties more widely.

CULTURAL COMPETENCE

“Cultural Competence” means familiarity with culture as a powerful underground river that shapes expectations, understandings, and actions in mediation.

Mediators can begin the process of developing cultural competence by surveying and acknowledging the influence of their own “starting points” and “currencies.”

¹ LeBaron, Michelle and Zumeta, Zena D. Conflict Resolution Quarterly, vol. 20, no. 4, Summer 2003.

	Starting Points	Currencies
Definition	Those places where it feels natural to begin.	Those things that are valued.
Example		

CULTURAL COMPETENCE AND TRAINING

Cultural competence development is an ongoing process.

Steps to develop cultural competence:

Ask yourself questions that consider the effect of identity differences on your mediation work, such as:

“How do my various identities (race, gender class, etc.) affect the way I interpret the experiences of people who are like me and not like me?”

“How can I make myself aware of the ways in which these various identities affect my understanding of my role?”

“What, if anything should/could I do to limit these effects (or expand my awareness so that I am not limited by them)?”

Uncover assumptions and consider a range of cultural contexts and how these unnamed assumptions might function to promote a sense of comfort or discomfort for parties.

Develop responses that address the range of meanings you and the disputants attach to elements of the mediation process.

Consider how flexibility, comfort with ambiguity, and creativity can contribute to culturally competent mediation practices.

LEGAL CULTURE AND MEDIATOR AWARENESS

Mediation is heavily influenced by the orientations and assumptions of legal culture. Exploring legal culture is a “door” into examining the impact of other types of cultures on mediation.

Legal Culture is an important influence on mediation in 4 ways:

1. Many mediators are lawyers and their cultural mode of being and behaving is shaped in multiple ways by their training in law and their association with other legal professionals.

2. Most mediation is conducted in the shadow of the law, whether or not it is carried out in a court-attached program; law remains an important touchstone and yardstick for shaping issues and communication during mediation as well as for measuring options and outcomes.
3. Mediation as a practice arose in part from dissatisfaction with complicated legal processes and the aspects of law associated with depersonalization.
4. Mediators are frequently lawyers or familiar with legal culture and their clients are often not; legal culture may operate to exclude or alienate people in ways outside mediators' awareness.

Legal culture "starting points" and "currencies": Lawyers are taught as law students to place value in: logical analysis, the importance of rules, written words, adversarial skills, attention to detail, sequential order, and maximizing client gains.

Reflecting the influence of dominant culture values on legal training, lawyers tend to be oriented to individualist perspectives, expecting clients and others to act in autonomous, self-interested ways.

When the influence of legal culture in mediation shapes and alters disputes in ways that exclude important aspects of worldviews, context, relationships, or the full range of human experiences, mediation becomes a venue that reproduces some of the limitations ADR was designed to address.

Culturally competent mediators:

Make room for various starting points,

Recognize the need to translate worldviews and currencies back and forth among parties who may have conflated cultural differences with bad intentions or character flaws, and

Recognize that legal culture as it influences mediation may filter out some elements essential to satisfying processes and durable outcomes.

The Top Ten Reasons Why Mediators Should Not Evaluate¹

An “**evaluative**” mediator gives advice, makes assessments, states opinions – including opinions on the likely court outcome, proposes a fair or workable resolution to an issue or the dispute, or presses the parties to accept a particular resolution.

These activities are inconsistent with the role of a mediator because:

- I. THE ROLES AND RELATED TASKS OF EVALUATORS AND FACILITATORS ARE AT ODDS.
- II. EVALUATION PROMOTES POSITIONING AND POLARIZATION, WHICH ARE ANTI-THETICAL TO THE GOALS OF MEDIATION.
- III. ETHICAL CODES CAUTION MEDIATORS – AND OTHER NEUTRALS – AGAINST ASSUMING ADDITIONAL ROLES.
- IV. IF MEDIATORS EVALUATE LEGAL CLAIMS AND DEFENSES, THEY MUST BE LAWYERS; ELIMINATING NONLAWYERS WILL WEAKEN THE FIELD.
- V. THERE ARE INSUFFICIENT PROTECTIONS AGAINST INCORRECT MEDIATOR EVALUATIONS.
- VI. EVALUATION ABOUNDS: THE DISPUTING WORLD NEEDS ALTERNATIVE PARADIGMS.
- VII. MEDIATOR EVALUATION DESTRUCTS FROM THE FOCUS ON PARTY RESPONSIBILITY FOR CRITICAL EVALUATION, RE-EVALUATION AND CREATIVE PROBLEM-SOLVING.
- VIII. EVALUATION CAN STOP NEGOTIATION.
- IX. A UNIFORM UNDERSTANDING OF MEDIATION IS CRITICAL TO THE DEVELOPMENT OF THE FIELD.
- X. MIXED PROCESSES CAN BE USEFUL, BUT CALL THEM WHAT THEY ARE!

THE ROLES AND RELATED TASKS OF EVALUATORS AND FACILITATORS ARE AT ODDS.

Evaluators and mediators use different skills, techniques, competencies, training norms, and ethical guidelines.

¹ Love, Lena P. 24 Fla. St. U. L. Rev. 937 - 948. 1996 - 1997.

Evaluative tasks can compromise a mediator's neutrality in actuality AND in the eyes of the parties.

Evaluation can diminish a mediator's capacity to achieve his primary goal by diverting focus to another task.

Other Differences between Evaluation and Mediation

	Evaluators	Mediators
Role	Uses predetermined criteria to evaluate evidence and arguments presented by adverse parties to assess and decide the issue at hand.	Assists disputing parties in making their own decisions and evaluate their own situations.
Activities	<ul style="list-style-type: none"> -Finds "the facts" by properly weighing evidence; -Judges credibility and allocates the burden of proof; -Determines and applies the relevant law, rule or custom to the specific situation; -Makes an award or rendering an opinion. 	<ul style="list-style-type: none"> -Facilitates communications; -Promotes understanding; -Focuses the parties on their interests; -Seeks creative problem solving to enable parties to reach their own agreement. -Pushes disputing parties to question their assumptions, reconsider their positions, and listen to each other's perspectives and arguments. -Urges parties to consider relevant law, weigh their values, principles, and priorities; and develop an optimal outcome.
The parties:	EXPRESSLY ask the evaluator to resolve the conflict.	Request that the mediator FACILITATES parties' evaluation.

EVALUATION PROMOTES POSITIONING AND POLARIZATION, WHICH ARE ANTITHETICAL TO THE GOALS OF MEDIATION.

Disputing parties act differently in front of an evaluator than in the presence of a mediator because they are in a competitive mind-set and seeking to capture the evaluator's favor and win the case.

EVALUATION ABOUNDS: THE DISPUTING WORLD NEEDS ALTERNATIVE PARADIGMS.

The legal community needs a model from among the array of dispute resolution processes that will assist parties to evolve in their understandings, relationships, and arrangements.

Integrating evaluation into mediation will cause a shift towards an adversarial framework where mediators will "trash and bash" to get parties to settle.

"Trash and bash" is accomplished by telling parties how bad their case is, and then attempting to reach a settlement by aggressively countering/decreasing a party's offer.

MEDIATOR EVALUATION DESTRUCTS FROM THE FOCUS ON PARTY RESPONSIBILITY FOR CRITICAL EVALUATION, RE-EVALUATION AND CREATIVE PROBLEM-SOLVING.

Conflicts represent true crises for the individuals, communities or institutions involved and hold the potential for doing extreme harm OR for creative changes and restructuring.

A mediator's task is to elevate the dialogue of conflict from recriminations and blame to the generation of possibilities and breakthrough ideas.

"Evaluative mediation" pulls mediation away from creativity and into the adversarial frame.

EVALUATION CAN STOP NEGOTIATION.

Opinions have consequences. They can damage:

The mediation process itself, and

The perception by the parties of the mediator's impartiality.

If a party has an unrealistic assessment of its case, a mediator can remain impartial by encouraging parties to re-evaluate through:

Enabling each side to present its best case and strongest arguments,

Seeking professional advice,

Questioning conclusions of the parties, and

Urging neutral evaluation to break a stalemate.

Adversarial behaviors run counter to a mediator's efforts to move parties towards a different perception of their own situation and of each other because it hinders an atmosphere of respectful collaboration that is a necessary foundation for creative problem solving.

ETHICAL CODES CAUTION MEDIATORS – AND OTHER NEUTRALS – AGAINST ASSUMING ADDITIONAL ROLES

Mediation ethical codes include a preference to keep processes “pure” and note that party self-determination is a fundamental principle of mediation.

Arbitrator ethical codes discourage neutrals from participating in settlement discussions unless requested to do so by all parties because:

The arbitrator may be improperly influenced by the settlement discussions,

The arbitrator may impede the discussions by her presence and,

The arbitrator's questions and suggestions while acting as a mediator can create improper pressure to settle.

Where processes become “mixed” (the arbitrator assumes mediation tasks or the mediator assumes arbitration tasks), the mediator or arbitrator should:

Define her new role,

Alert parties to the impact it may have on her ability to facilitate discussions, and

Obtain informed consent from all parties.

IF MEDIATORS EVALUATE LEGAL CLAIMS AND DEFENSES, THEY MUST BE LAWYERS; ELIMINATING NONLAWYERS WILL WEAKEN THE FIELD.

Mediators fall under legal Model Standards once they provide legal opinions, thus limiting the pool of mediators to lawyers.

The loss of the talents and perspectives of nonlawyer mediators would weaken mediation and pull it into an adversarial paradigm.

THERE ARE INSUFFICIENT PROTECTIONS AGAINST INCORRECT MEDIATOR EVALUATIONS.

There are insufficient due process protections in place for disputants to appeal decisions made on the inadequately informed opinion of a mediator.

A UNIFORM UNDERSTANDING OF MEDIATION IS CRITICAL TO THE DEVELOPMENT OF THE FIELD.

To combat the confusion of the different types and consequences of alternative dispute resolution processes, it is necessary to promulgate statewide standards and the subscription of neutrals to a specific code of ethics.

MIXED PROCESSES CAN BE USEFUL, BUT CALL THEM WHAT THEY ARE!

Parties sometimes request that neutrals assume a variety of roles.

These mixed processes can address particular needs of a situation and can be very helpful.

If a neutral takes on the multiple roles of a mixed process, she is:

Bound by more than one code of ethics,

Charged with separate goals and tasks, and

Should inform the parties of these responsibilities.

A Primer on Successful Negotiation

By David A. Hoffman

- I. Introduction
- II. Positional Bargaining - Negotiation Tactics
 - A. Hardball Tactics
 - B. Cooperative vs. Competitive Bargainers
- III. Interest-Based Bargaining - Principled Negotiation
 - A. Getting to YES
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- IV. Integrating Positional and Interest-Based Bargaining
 - A. Game Theory
 - B. Overcoming Barriers to Settlement
- V. Successful Bargaining - Lessons from the Field of Mediation
 - A. Empowerment and Recognition
 - B. Conflict as Opportunity

Bibliography

I. Introduction

Negotiation has a bad name in our culture.¹ Recall one of the opening scenes in the recent film "Air Force One," in which the President of the United States, played by Harrison Ford, castigates himself and other foreign policy makers for their willingness to negotiate with terrorists and vows never to negotiate again. Or, recall the hero of the science fiction film "The Fifth Element," played by Bruce Willis, who offers to negotiate with one of the villainous Mangalors who have captured the control room of the spaceship and then, when face to face with the chief Mangalor, quickly shoots him

¹ My frame of reference, for purposes of this article, is the mainstream culture of the United States, as depicted in the popular media. The culture of the United States is, of course, composed of many sub-cultures, including many that differ in significant respects from that of the mainstream.

squarely between the eyes, while an impressed colleague asks: "where did he learn to negotiate like that?"²

In these films, and in much of our culture, negotiation is treated as an activity suitable only for unprincipled wimps ("Air Force One") or indecisive fools ("The Fifth Element"). Moral: real men and women don't negotiate.

Yet the reality is that we negotiate all the time. If we have young children, we are engaged in negotiation from the minute they wake up -- over such weighty subjects as what they are going to eat for breakfast or wear to school. If we drive to work, we are "negotiating" the traffic to get there. If we are married or in a domestic partnership, negotiation is how we decide what videos to rent and when the refrigerator needs cleaning. Virtually every aspect of our lives involves negotiation -- even negotiations with ourselves (over what we will eat, or not eat, how we will spend our time, etc.)

In the workplace, negotiation is likewise ubiquitous. Almost every aspect of workplace activity requires coordination and teamwork, and negotiation lies at the core of those activities. A company's relationship with its employees is the product of a series of negotiations over the terms and conditions of employment and other issues relating to the employee's responsibilities. The satisfactory resolution of those issues depends on the ability of both management and employees to negotiate productively. Thus, effective negotiation can make the difference between a successful company and one that is not.

What is effective negotiation? Lawyers and social scientists who have studied negotiation behavior offer several answers to this question, and their answers have evolved rapidly in the last twenty-five years. Sections II - IV below briefly describe that evolution, and Section V suggests some future directions.³

II. Positional Bargaining - Negotiation Tactics

The early 1980s represent a watershed in the literature of negotiation. In 1981, Roger Fisher and William Ury published *Getting to YES: Negotiating Agreement Without Giving In*, arguably the most influential book ever written about negotiation.⁴ *Getting to YES*, which has been translated into 18 languages and has guided the

² Thanks to Robert Benjamin and Peter Adler, whose 1999 SPIDR conference workshop on negotiation and film highlighted these films, and others, as a window into our culture's ambivalence about negotiation.

³ The following description of recent developments in the field of negotiation touches on only some of the major themes and is not intended as a comprehensive survey of the field.

⁴ An expanded second edition was published in 1991 by Fisher, Ury, and Bruce Patton. In 1982, Howard Raiffa published *The Art and Science of Negotiation*, which applied game theory and economic analysis to the study of negotiation and which was also influential.

training offered to world leaders through the Program on Negotiation at Harvard Law School, offers a vision of negotiation as a principled activity in which the participants can each be made better off.

However, prior to the publication of *Getting to YES*, negotiation was typically viewed as an activity in which two or more parties each vied for advantage at the other's expense. The best negotiators were those who succeeded in obtaining the largest slice of the pie, with little attention paid to whether the pie could be expanded in some way.

A. Hardball Tactics

Typical of the literature of the pre-*Getting to YES* era is the advice given to legal services lawyers by Michael Meltsner and P.G. Schrag in their book *Public Interest Advocacy: Materials for Clinical Legal Education*.⁵ Their suggestions for negotiators combine such common sense advice as thorough preparation with a set of techniques designed to manipulate, deceive, or intimidate the opponent. The unspoken assumption in these suggestions is that the opponent is willing to take advantage of the negotiator -- fairly or unfairly -- and therefore success requires using competitive negotiation techniques, and using them more effectively than the opponent. The following is a short list of the techniques Meltsner and Schrag recommend:

- Arrange to negotiate on your own turf.
- Balance or slightly outnumber the other side.
- Time the negotiations to advantage.
- Lock yourself in.
- Designate one of your demands a "precondition."
- When it is in your interest, make the other side tender the first offer.
- Make your first demand very high.
- Place your major demands at the beginning of the agenda.
- Make the other side make the first compromise.
- Use two negotiators who play different roles.
- Be tough — especially against a patsy.
- Appear irrational where it seems helpful.
- Raise some of your demands as the negotiations progress.

⁵ A similar orientation can be found in G. Bellow & B. Moulton, *The Lawyering Process: Negotiation* (1981), which focuses on the skills needed for successful negotiation.

- Claim that you do not have authority to compromise.

Many of these techniques are as repugnant as they are common. Like the behavior all too many of us experience when we buy a car in an auto showroom, negotiation tactics of this kind involve treating the other party in a negotiation as a de-personalized enemy. They reflect an individualistic world view in which negotiation is merely the more civilized version of an otherwise vicious competitive struggle for advantage.

One of the hallmarks of this style of negotiation is the manipulation of the other party's point of view. For example, lecturers on the subject of negotiation like to tell the story of a mistake made by organizers of the presidential campaign of Theodore Roosevelt who printed up thousands of copies of a campaign flyer with a photograph of Roosevelt lifted from the popular press. Unfortunately, no one had asked the photographer for permission to use the photo. The campaigners anticipated having to pay the photographer a fortune because reprinting the flyers would be costly. Instead of negotiating the price, however, they sent him a telegram informing him that his photograph had been selected from among several others, but that he would have to pay a modest fee in order for his photograph to be used. He forwarded the money, and the flyers were distributed.

Obviously, there are disadvantages to negotiating in this way with employees, who would resent being deceived or treated like the enemy. Behavior which is the norm in the commercial marketplace or the auto showroom, where buyer and seller are unlikely to meet again, is unsuitable for workplace settings, where the employer and employee maintain an ongoing relationship. Clearly, a more collaborative mode of negotiation is needed in that setting.

B. Cooperative vs. Competitive Bargainers

In the late 1970s and early 1980s, Prof. Gerald R. Williams began a series of experiments to determine whether cooperative styles of negotiation could be as successful as competitive styles.⁶ He videotaped mock negotiations involving experienced lawyers from across the United States, and he polled the lawyers about the characteristics and effectiveness of the attorneys with whom they routinely negotiate. His findings showed that 65% of the lawyers were viewed as cooperative, while only 24% were considered competitive. Williams also found that the perceived effectiveness of negotiators did not correlate with their competitive or cooperative orientation. In other words, there were effective cooperative negotiators, just as there were ineffective competitive negotiators, and vice versa.

One of the goals of this exercise was to identify the characteristics of effective negotiators -- regardless of whether they were cooperative or competitive in style. Williams found the following characteristics (among others) were common to both

⁶ See G. Williams, *Legal Negotiation and Settlement* (1983).

types of effective negotiators: rational, experienced, perceptive, creative, analytical, self-controlled, intelligent, honest. The import of Williams' research was to counteract the view that the most successful negotiators are those that use competitive techniques, such as those recommended by Meltsner and Schrag. The meaning of these studies for the employment field was that managers could adopt more cooperative styles of negotiation without necessarily giving up any advantage to the employees.⁷

III. Interest-Based Bargaining - Principled Negotiation

As noted above, with the publication of *Getting to YES*, Roger Fisher and William Ury introduced a fundamentally different approach to negotiation. Instead of examining the personal characteristics of negotiators, or even the specific techniques they used (i.e., competitive vs. cooperative), Fisher and Ury argued that the most successful negotiators will focus on interests rather than positions.

A. Getting to YES

One of the important insights of *Getting to YES* is that successful negotiation often requires separating the people from the problem. In other words, reactions to proposals (particularly critical reactions) should be couched in such a way that the criticism is not taken personally by the other party. Fisher and Ury also advocate the use of principled benchmarks for resolving contested issues -- e.g., the fair market value of a car or house. By seeking out objective criteria for the resolution of disputes, the parties can be spared to some degree from the intense struggle over whose view shall prevail. A third vital insight offered by Fisher and Ury is that effective preparation for negotiation requires careful consideration of each party's BATNA -- their best alternative to a negotiated agreement. Unless and until each party knows their respective BATNA's, they will lack a principled basis for determining whether they should accept any given proposal or set of proposals. Finally, Fisher and Ury emphasize the importance of using negotiation to communicate about underlying interests so that mutually advantageous exchanges can occur. Using this technique, negotiating parties can expand the pie and thus create "win-win" results in which each of the parties is made better off than either could be in positional non-interest-based bargaining.⁸

⁷ In addition to the important perspective added by Williams' research on personality characteristics, a wealth of other descriptive studies of negotiation explore the ways in which race, culture, and gender (among other traits) affect bargaining. See, e.g., D. Tannen, *You Just Don't Understand: Women and Men in Conversation* (1988).

⁸ Fisher and Ury use the example of two children negotiating over an orange. They decide to cut the orange in half, which leaves each of them dissatisfied, but at least equally so. If they had employed interest-based negotiation, they would have learned that one of them wanted the orange rind for baking, while the other wanted only the pulp of the orange for juice. In other words, had they communicated about their interests, each could have had the equivalent of a whole orange.

Example: In a negotiation with a prospective sales manager, the company offers a salary and bonus package that is similar to that available in other firms of comparable size. The company says its goal is rapid expansion of its market. The prospective employee says that she does not need much of a guaranteed salary but wants to participate in the growth of the company and therefore offers to take a much lower salary in exchange for a bonus based on a fixed percentage of sales beyond the company's currently projected targets. Each side assesses its BATNA -- for the prospect, going to another firm; for the employer, looking for another sales manager -- and concludes this deal is better than the available alternatives. They sign an employment agreement incorporating these terms.

B. The Critique of Getting to YES

Critics of *Getting to YES*⁹ have assailed its optimistic assumption that negotiators will be candid about their true interests. Critics also pointed out that, with their emphasis on expanding the pie, Fisher and Ury had paid insufficient attention to the techniques bargainers use to maximize their share of the pie. Some critics questioned whether using Fisher and Ury's value-creating techniques might leave a negotiator vulnerable to the value-claiming techniques of the competitive bargainer. Moreover, while the Fisher-Ury approach may hold promise in settings where the parties have an ongoing relationship, its value seemed less obvious in settings (such as tort litigation) where the parties have no relationship, there are few if any opportunities for joint gains, and the goal is simply welfare maximization.

The Fisher-Ury techniques do not appear to have not been widely adopted in the workplace. Indeed, except in the area of compensation (where bonuses and commissions create opportunities for joint gains), it is unusual to see true "win-win" bargaining between management and employees; most decision-making is done hierarchically.

⁹ See, e.g., J. White, "The Pros and Cons of "Getting to YES," 34 J. Legal Ed. 114 (1984).

IV. Integrating Positional and Interest-Based Bargaining

The arrival of *Getting to YES* and its critique of positional negotiation turned the attention of negotiation scholars, researchers, and practitioners from the refinements of technique to the question of which fundamental orientation to negotiation is best. The Fisher-Ury analysis suggested an irreducible tension between integrative and distributive approaches to bargaining:

- | <u>Interest-Based/Integrative</u> | <u>Positional/Distributive</u> |
|-----------------------------------|--------------------------------|
| • Creating value | • Claiming value |
| • Cooperative | • Competitive |
| • Win-win solutions | • Win-lose outcomes |
| • Joint gains | • Zero sum |
| • Expand the pie | • Claim the biggest piece |

The next challenge, then, for those seeking to find the most promising methods of negotiation, was to reconcile, or at least develop strategies for managing, the tension between these two fundamentally different orientations to negotiation.

A. Game Theory

An experiment with computer programs, described in Robert Axelrod's book, *The Evolution of Cooperation*, in 1984, sought to determine the best method of handling a type of negotiation called the Prisoner's Dilemma. In the Prisoner's Dilemma, the negotiators communicate with each other only through their behavior.¹⁰ They are rewarded or punished for their behavior according to the following matrix, which is used to score each round of either cooperative or competitive moves:

		A's Behavior	
		A Cooperates	A Competes
B's Behavior	B Cooperates	A and B win	A wins big; B loses big
	B Competes	B wins big; A loses big	A and B lose

¹⁰ For a description of the Prisoner's Dilemma, see R. Fisher & S. Brown, *Getting Together: Building Relationships as We Negotiate* 198 (1988).

In this matrix, it is possible for one party to take advantage of the other party's cooperative moves, but not for long. Once it becomes apparent that one party is going to make competitive moves, the other party will do so as well. The winning computer program employed a simple tit-for-tat strategy: the program always began with a cooperative move but then mimicked the competing program's move on the previous round.

In the context of a real-life negotiation, this strategy suggests the value of disaggregating any negotiation into a series of moves so that the bargainer can determine whether the other party is willing to make a cooperative, value-creating move, or a competitive value-claiming move.

Example: In a negotiation over a severance package, the Human Resources manager refrains from making an initial offer; instead, she begins by asking the former employee what he is looking for. The employee responds by asking what the company's typical severance packages have been in recent years. They agree to exchange information about these two subjects before making any offers or counter-offers. They also agree on a time to do so. They then discuss arrangements for giving the ex-employee access to his personnel file. By the time they begin discussing the severance terms, each feels more trusting of the other because they have been able to cooperate on the preliminary steps in the negotiation.

The bottom line is that every negotiation has not only the potential for integrative and distributive moves, but also a need for such moves. At least in theory, the most successful negotiations would involve efforts by the parties to expand the pie to the greatest extent possible and then divide it without mutually destructive conflict. Accomplishing such an objective, however, requires overcoming a number of barriers.

B. Overcoming Barriers to Settlement

One of the barriers to optimal results in bargaining concerns communication. The Prisoner's Dilemma game, which radically oversimplifies real-life bargaining, does not permit communication. In ordinary, day-to-day settings, negotiators can communicate with each other between rounds of bargaining and thus attempt to secure agreements on bargaining behavior. Even so, negotiators will often fail to make optimal deals because of flawed communication, or barriers to effective communication.¹¹ One example is the phenomenon of reactive devaluation, a process in which our perceptions are influenced by the source of the information.

¹¹ For a fuller discussion of this phenomenon, see R. Mnookin, "Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict," 8 Ohio State Journal of Dispute Resolution 235 (1993).

Example: A manager looks at the strong resume and excellent salary history of a prospective employee and concludes that she will probably have to offer him a salary of \$50,000/year. The company could afford to do so but wants to pay as little as possible. The employee asks for \$45,000/year. The manager is puzzled, mentally devalues the prospect, and concludes there must be something about him or the market that she does not know. Under these circumstances, the manager offers the employee \$42,000, and he decides to go elsewhere. In this situation, the employee and the company could have struck a deal at a salary of \$45,000 - \$50,000 and both would have been better off.

Negotiation theorists have identified other barriers to successful negotiation, such as cognitive dissonance, loss aversion, and strategic bargaining. According to Robert Mnookin, each of these barriers can, in theory, be overcome by improved communication and more rational methods of option assessment. He points, in particular, to the use of mediation as one method of overcoming such barriers to successful negotiation.

V. Successful Bargaining - Lessons from the Field of Mediation

The process of mediation -- in which a neutral third party facilitates negotiation -- provides a useful lens through which to assess the effectiveness of negotiation. An intermediary can often provide a useful buffer for communications which might otherwise be devalued or go unheard. (For example, in the salary negotiation described above, an intermediary could have communicated separately with the company and prospective employee and made a proposal that would have been accepted by both sides.) There are other lessons, however, that the practice of mediation teaches.

A. Empowerment and Recognition

In their recent book, *The Promise of Mediation*, Robert Baruch Bush and Joseph Folger articulate a new rationale for the practice of mediation. Previous discussions of the subject had taken as their premise that the settlement of disputes was the primary reason for employing mediation. According to Bush and Folger, however, the primary value of the process is its ability to (a) empower participants to identify and articulate their needs and perspectives; and (b) provide opportunities for mutual recognition. Bush and Folger describe their model as based on a "relational," as opposed to an individualistic, world view. From their perspective personal transformation is a more valuable goal than solving problems. Within the world of mediation, this hypothesis is considered controversial.¹² However, it is instructive as a perspective on the meaning of "effective" negotiation.

¹² For a critique of *The Promise of Mediation*, see C. Menkel-Meadow, "The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices," 11 *Negotiation Journal* 217 (1995). For a critique of the concept of empowerment as a feature of

For purposes of negotiation in the workplace, for example, this perspective suggests that even in those settings where management is unable (for one reason or another) to approve a particular request from an employee, the manner in which the employee is treated may satisfy certain needs for empowerment and recognition that are at least as important as the substantive issue under discussion.¹³

The study of mediation and communication theory provides a set of tools for such empowerment and recognition, such as active listening and reframing. However, these tools cannot be employed in a mechanical way. Empathetic listening is as much a discipline of heart as of mind, just as thoughtful reframing requires intuition as much as intellect.

In a negotiation, these techniques may be valuable in and of themselves, because they demonstrate genuine concern, and that may be one of the other party's underlying objectives. However, they may also provide a broader window on the parties' respective interests -- i.e., as part of a conversation in which each negotiator understands more fully the wide range of interests that the other party brings to the table.

B. Conflict as Opportunity

Mediators are trained to think of conflict not as a social evil to be eradicated but rather as an inevitable part of life in any society. Conflict, from this standpoint, may often be a healthy expression of disagreement -- the soil from which a democratic and pluralistic society gains its strength. Indeed, mediators often invoke the image, first popularized in an inaugural address by President John F. Kennedy, of the Chinese character for "crisis" which contains within it the character meaning "danger" and the character for "opportunity."

The opportunity that exists in crisis also exists in every negotiation: the opportunity to maximize joint gains and distribute those gains fairly, to overcome barriers to communication, to develop a deeper understanding of the other person's needs and interests, and to create a setting in which people feel empowered rather than stifled.

mediation, see S. Cobb, "Empowerment and Mediation: A Narrative Perspective," 9 *Negotiation Journal* 245 (1993).

¹³ Another important and useful perspective on the psycho-social dimensions of negotiation comes from the recently published book by Doug Stone, Bruce Patton & Sheila Heen, *Difficult Conversations: How to Discuss What Matters Most* (1999), in which the authors explore (among other things) the ways in which an individual's self-image and self-esteem are impacted by the process of negotiation.

VI. Conclusion

Learning how to negotiate successfully depends on how one defines success. Twenty years ago, successful negotiation was defined primarily as the effective deployment of techniques designed to accomplish the negotiator's objectives by persuasion or manipulation. Success was measured solely by the extent to which the negotiator's objectives were met.

With the advent of principled, interest-based negotiation came a broader focus on welfare maximization: the successful negotiator looks for opportunities to make both sides better off, instead of seeing negotiation as a competitive, zero-sum exercise. Because of the risk that cooperative, interest-based negotiators would be vulnerable to negotiators who sought only to claim value (rather than participate in creating it), negotiation theorists developed the technique of tit-for-tat bargaining. To make effective use of this technique, however, negotiators must communicate their intentions and perspectives. Mediation offers an opportunity to do that more effectively, especially in those settings where cognitive or other barriers to effective communication exist. Mediation also shows, by example, the ways in which the deeper underlying interests of negotiators -- for empowerment and recognition -- may be met in the process of negotiation. Meeting those needs, while at the same time pursuing the welfare maximization goals attainable through principled, interest-based negotiation, may be seen as a worthwhile definition of successful negotiation.

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Tips on Asking Questions

1. **Identify the reasoning behind questions.**
A single question can cause defensiveness. A series of questions can feel like an interrogation. To avoid defensive reactions to any form of questioning, let the other person know the reasoning behind your line of questioning.
2. **Use open-ended prompts.**
Use open-ended questions as much as possible. The best way to start those questions includes "Could you tell me how that came about", "Can you tell me more about that", "What made you react that way" or anything that just leaves room for the other person to talk instead of answer "yes" or "no".
3. **Give acknowledgement responses.**
Brief, one to three word statements or nonverbal gestures demonstrate that you are following the conversation. Try a nod of the head or "Um-hmmmm", "I see", etc. If a person's comments become repetitious, summarize what has been said to indicate that you understand, and then follow with a statement that encourages closure such as, "Now that I understand that point, can we talk about....(new subject)?" or an invitation to expand.
4. **Value Silence.**
Sometimes silence for a few moments can be very powerful. It gives you and the other person a chance to think.
5. **Offer invitations to expand.**
Brief phrases or prompts will signal the other person that you hear what they have said and you can encourage the other person to talk even more by asking them if there's anything else, or if there is anything more they want to add.
6. **Offer opportunities for the other to clarify or be more specific.**
Often people make general statements like "you always interrupt me" or "you never pay attention when I'm talking". Encourage that person to be more specific. You could use phrases like "Could you give me an example of what you mean?" or "In what situation does this happen?".
7. **Make checks for accuracy.**
Many times you must check to make sure that you have understood a single thought correctly. You may also want to summarize what you think the other person has said. This will help them to feel as though you really are listening and will make sure you are both talking the same "language".
8. **Encourage problem-solving.**
Once the concerns have become clear you can start brainstorming ways that both your needs can be met. Be as creative as possible when searching for ways to resolve the issues and only settle on those things that both can be satisfied with.

Active Listening Techniques

ments that help the other person talk

Statement	Purpose	To do this...	Examples
Encourage	<ol style="list-style-type: none"> 1. To convey interest 2. To encourage the other to keep talking 	<ul style="list-style-type: none"> ...don't agree or disagree ...use neutral words ...use varying voices intonations 	<ol style="list-style-type: none"> 1. "Can you tell me more...?" 2.
Clarifying	<ol style="list-style-type: none"> 1. To help you clarify what is said 2. To get more information 3. To help the speaker see other points of view 	<ul style="list-style-type: none"> ...ask questions ...Restate wrong interpretation to force the speaker to explain further 	<ol style="list-style-type: none"> 1. "When did this happen?" 2.
Restating	<ol style="list-style-type: none"> 1. To show you are listening and understanding what is being said 2. To check your meaning and interpretation. 	<ul style="list-style-type: none"> ...restate basic ideas and facts 	<ol style="list-style-type: none"> 1. "So you would like your parents to trust you more, is that right?" 2.
Reflecting	<ol style="list-style-type: none"> 1. To show that you understand how the person feels 2. To help the person evaluate his or her own feelings after hearing them expressed by someone else 	<ul style="list-style-type: none"> ...reflect the speaker's basic feelings 	<ol style="list-style-type: none"> 1. "You seem very upset." 2.
Summarizing	<ol style="list-style-type: none"> 1. To review progress 2. To pull together important ideas and facts 3. To establish a basis for further discussion 	<ul style="list-style-type: none"> ...restate major ideas expressed including feelings 	<ol style="list-style-type: none"> 1. "These seem to be the key ideas you've expressed..." 2.
Validating	<ol style="list-style-type: none"> 1. To acknowledge the worthiness of the other person 	<ul style="list-style-type: none"> ...acknowledge the value of their issues and feelings ...show appreciation for their efforts and actions 	<ol style="list-style-type: none"> 1. "I appreciate your willingness to resolve this matter." 2.

INTERVIEWING

AVOID

TRY INSTEAD

INTERROGATING

Rapid Fire Questions:

- "Who was there?"
- "What time did this happen?"
- "What were you doing at the time?"

Open Ended Questions:

- "Would you describe what happened?"
- "What is troubling you about that?"
- "How did that affect...?"

INTERRUPTING SILENCE

Three second pause....mediator jumps in.

Let the silence be.
Give the parties time for reflecting and evaluating.

Ask yourself: what is this silence saying?
Speak only when you have a clear purpose.

MULTIPLE OR SERIAL QUESTIONS

Different questions strung together.

Same question in different ways.

- "In other words..."
- "What I mean is..."
- "For example..."

Ask one question and wait.

EMBEDDED ANSWERS

"You don't think they meant that, do you?"

"That couldn't be in his mind, could it?"

"Do you think... or do you think....?"

More open-ended questions:

"Tell me more about that."

"What else has been happening?"

"What led up to that?"

GOOD LISTENING SKILLS

- ◆ Stop talking. Do not interrupt.
- ◆ Put yourself in the other's place: Empathize.
- ◆ Look at the other person's facial expressions and body language.
- ◆ Concentrate on what is being said. Do not let your mind wander.
- ◆ Push away your own worries and fears -- suspend your own thoughts.
- ◆ Convey nonthreatening facial expression and body language.
- ◆ React to the ideas, not the person.
- ◆ Do not conduct a mental argument with the other person while he/she is speaking.
- ◆ Listen for what is not said as well as what is said.
- ◆ Avoid jumping to conclusions.
- ◆ Always check yourself for your own prejudices.
- ◆ Evaluate the facts, not your feelings.
- ◆ When the person has finished speaking, paraphrase what they said starting with "I hear you say...."
- ◆ Look at the person, or ask the other person to make sure you paraphrased correctly. If not, try again.
- ◆ Ask the other person to do the same when it is your turn to speak.

How to Win Arguments, As It Were

by DAVE BARRY

I argue very well. Ask any of my remaining friends. I can win an argument on any topic, against any opponent. People know this, and steer clear of me at parties. Often, as a sign of their great respect, they don't even invite me. You too can win arguments. Simply follow these rules:

- Drink Liquor.

Suppose you're at a party and some hotshot intellectual is expounding on the economy of Peru, a subject you know nothing about. If you're drinking some health-fanatic drink like grapefruit juice, you'll hang back, afraid to display your ignorance, while the hotshot enthralls your date. But if you drink several large martinis, you'll discover you have **STRONG VIEWS** about the Peruvian economy. You'll be a **WEALTH** of information. You'll argue forcefully, offering searing insights and possibly upsetting furniture. People will be impressed. Some may leave the room.

- Make things up.

Suppose, in the Peruvian economy argument, you are trying to prove Peruvians are underpaid, a position you base solely on the fact that YOU are underpaid, and you're damned if you're going to let a bunch of Peruvians be better off. **DON'T** say: "I think Peruvians are underpaid." Say: "The average Peruvian's salary in 1981 dollars adjusted for the revised tax base is \$1,452.81 per annum, which is \$836.07 before the mean gross poverty level."

NOTE: Always make up exact figures.

If an opponent asks you where you got your information, make **THAT** up, too. Say: "This information comes from Dr. Hovel T. Moon's study for the Buford Commission published May 9, 1982. Didn't you read it?" Say this in the same tone of voice you would use to say "You left your soiled underwear in my bath house."

- Use meaning/less but weightily-sounding words and phrases.

Memorize this list:

- Let me put it this way
- In terms of
- Vis-a-vis
- Per se
- As it were
- Qua
- So to speak

You should also memorize some Latin abbreviations such as "Q.E.D.," "e.g.," and "i.e." These are all short for "I speak Latin, and you do not."

Here's how to use these words and phrases. Suppose you want to say: "Peruvians would like to order appetizers more often, but they don't have enough money."

You never win arguments talking like that. But you **WILL** win if you say: "Let me put it this way. In terms of appetizers vis-a-vis Peruvians qua Peruvians, they would like to order them more often, so to speak, but they do not have enough money per se, as it were. Q.E.D."

Only a fool would challenge that statement.

- Use snappy and irrelevant comebacks.

You need an arsenal of all-purpose irrelevant phrases to fire back at your opponents when they make valid points. The best are:

- You're begging the question.
- You're being defensive.
- Don't compare apples and oranges.
- What are your parameters?

This last one is especially valuable. Nobody, other than mathematicians, has the vaguest idea what "parameters" means.

Here's how to use your comebacks:

- You say: "As Abraham Lincoln said in 1873..."
Your opponent says: "Lincoln died in 1865."
You say: "You're begging the question."

OR

- You say: "Liberians, like most Asians..."
Your opponent says: "Liberia is in Africa."
You say: "You're being defensive."

- Compare your opponent to Adolf Hitler.

This is your heavy artillery, for when your opponent is obviously right and you are spectacularly wrong. Bring Hitler up subtly. Say: "That sounds suspiciously like something Adolf Hitler might say" or "You certainly do remind me of Adolf Hitler."

So that's it: you now know how to out-argue anybody. Do not try to pull this on people who generally carry weapons.

(C) THE MIAMI HERALD

CHAPTER 6 - CHALLENGES & STRATEGIES

Overcoming Resistance to Using ADR

Although mediation/alternative dispute resolution has grown rapidly over the past several years, there is still considerable resistance to it. There are a variety of reasons, and sometimes excuses, cited by attorneys for the failure to use mediation/ADR more widely. Here are a few:

Good Lawyers Can Settle Cases Directly

- To an important degree, this is true, but there are special advantages to coming fresh to a situation, appearing neutral to all sides, and having one's priority be to make peace and maximize benefits for everyone rather than obtain the best deal for a single player.
- ADR techniques have not been taught in law or business schools until recently. And just as sophisticated clients benefit from the outside perspective provided by a good lawyer, so even experienced negotiators can perform more effectively with the help of a mediator.

We Don't Yet Know Enough To Settle

- While it is true that parties need basic information about the merits of a case in order to settle it, experienced counsel and sophisticated parties, working together, can avoid lengthy discovery.
- The large amounts of time and money commonly spent on adversarial discovery are not often necessary to lay a foundation for a good settlement, and the information one gains through legal proceedings is not necessarily the most relevant for negotiations.
- Mediation often produces the best discovery of the participants' needs and interests, as well as the path to an effective settlement.

The Other Side Might Exploit Our Good Faith

- Lawyers often resist mediation because they fear that by expressing a willingness to mediate, they will signal the other side that their case is weak or that the client is anxious to settle. They also fear that their adversaries will exploit the process for delay or to obtain ammunition for trial.
- In most cases litigators do eventually manage to raise the issue of settlement with their opponents, although often late in the game after significant costs have been incurred and parties have become entrenched in their positions.
- Mediation makes beginning negotiations easier because the neutral can become the advocate for the settlement and each side can permit itself to be coaxed into staying at the table. Mediator can also impose ground rules to protect the parties from exploitative tactics.

Some Cases Have to Be Decided By A Court

- While some disputes are so novel and important that they require a public judgment or precedent that only a court can issue, such cases are rare.
- Even in high-stakes symbolic cases, the parties are often better off settling in an imaginative way than seeking the limited remedies available from a court.
- Also, perceptions can change during the life of a case, and the principled dispute that seemed too important to compromise initially, a year or two later may be viewed as a nuisance that should be disposed of as quickly and as cheaply as possible.

What Will Lawyers Do If Peace Breaks Out?

- The problem is less serious than trial lawyers may fear. Good lawyers do get good results in the mediation process, and most clients want legal representation when they mediate.
- Lawyers really do not want to try every case. They can use ADR to settle their questionable cases and put their energy into the cases they want to pursue in court.
- Whether or not ADR flourishes, conflicts will remain and there will still be a central role for advocates.

Challenges and Strategies for Conciliators in Facilitating Settlement (Wearing the Mediator Hat)

During the "Exploration of Settlement" Phase of the Conciliation Process, the conciliator's overall goal is to stimulate constructive negotiations. Conciliators should ask themselves two questions:

1. What **obstacles** are preventing the parties from settling this dispute themselves?
2. What **strategies** are most likely to overcome these barriers and bring the negotiations to closure?

A. Obstacle: *Procrastination:* parties or counsel are unwilling to raise topic of settlement – fearful will show lack of confidence in case or over-eagerness to bargain; reluctant to confront unpleasant issues; hoping discovery will rehabilitate their position or other side will give up; personal friction between the attorneys or the parties.

Strategy: Create a "Settlement Event" to provide focus and encouragement of compromise; impose benchmarks and deadlines to induce closure. Use the conciliation as the settlement event or set up a mediation; set up specific block of time for the session and invite the key players; state your expectation that the parties are open to compromise and that the case will settle.

B. Obstacle: *Need to Vent Arguments and Emotions:* unresolved process and emotional needs; failure to settle through direct negotiations may be because one or more of parties wants their day in court – wants process experience of appearing before a neutral, stating grievances and being heard; besides arguing substantive issues, parties may want to express feelings about events that gave rise to the controversy or about how they have been treated since the dispute arose.

Strategy: Provide a "day in court" through the opening session; allow each side to tell their story (provides parties with psychological benefit of listening to their counsel argue their case to their opponents; allows each side to hear a direct summary of the strengths of the others case; allows parties to meet the emotional need to express feelings to one's adversary and the neutral); help disputants express emotions in caucus (allows parties and their attorneys to release some of the anger, sadness, frustration and other negative feelings that they have about the dispute; makes feelings less of a barrier to settlement)

C. Obstacle: ***Positional Bargaining:*** an approach in which each side state an extreme position and then trades concessions to close the remaining gap; parties can become locked into positions from which they cannot extricate themselves, or the atmosphere can deteriorate as they feel that they are being pressured to make more than their fair share of compromises.

Strategy: Ask for movement to restart the process, then coach the negotiators about later steps; explain opponents' perspectives; package concessions; reduce suspicion and frustration by verifying that the other side is making an effort and is felling pain too; encourage the players to think about new options; move parties from positional bargaining to principled or interest-based negotiation:

Principled negotiation bases positions on objective principles and facts, explaining the reasons for each offer or demand made; tends to be a narrow approach that focuses on the legal claims for relief; narrow because revolves around only one or two issues.

Interest-based negotiation does not limit inquiry to legal issues and remedies; creative bargainers seek to identify and explore both sides' underlying needs and interests, identify and address emotional issues and personal problems that are impeding agreement; willing to discuss matters irrelevant to the dispute and to involve clients actively in the negotiations; look for settlement packages that will advance their own interests with the least possible harm to the other side or will satisfy both sides' goals simultaneously; find resolution that is best possible fit between the parties' needs.

D. Obstacle: ***Lack of Realism about the Merits:*** Litigants are commonly unrealistic about the merits of their cases (both sides often believe that they have more than a 50% chance of winning); these overly optimistic perceptions make it harder to reach settlement; also, parties often understand the weaknesses in their case, but bluff about them in order to bolster their bargaining position.

Strategy: Reality Test: question the litigants about key issues; draw out and dramatize the monetary and nonmonetary costs of continuing to litigate; lead the disputants through a systematic analysis of the strengths and weaknesses of their case; offer a prediction of the likely outcome in adjudication.

There is a tension inherent in reality testing between being pointed enough to force the players to confront the problems with their legal options and not pushing them into stubbornness or hostility.

Thus, conciliators should begin with open-ended questions, gradually focusing more specifically on weak points and making confrontational comments only if necessary; ask merits questions in private and withhold personal opinions about the merits until conciliator has established a good relationship with the participants and is convinced that evaluation will be necessary to break an impasse. (If one or more of parties remains wedded to an unrealistic view of the merits, needs help in justifying settlement to a superior, can refer to case evaluation or nonbonding arbitration.)

E. Obstacle: *Hidden Issues:* issues besides legal disagreements that are keeping the parties apart (e.g., feelings of lack of respect among parties/attorneys; feelings stemming from the incident that gave rise to the dispute; unconscious feelings; relationship issues; miscommunication of negotiating messages)

Strategy: Probe for psychological obstacles and missed opportunities for Gains such as good past relationship between the parties; ask explicitly whether such an issue exists; approach issue first in private caucus; consider sounding out lawyers away from their clients; solicit ideas for addressing problems and exploiting opportunities; rely on the privacy of caucuses; consider using "brainstorming" techniques

F. Obstacle: *Inability to Close the final Settlement Gap*

Strategy: Propose a Settlement Package: first strongly push the parties to develop a final offer themselves; offer a package designed to be acceptable to all parties, given the history of the bargaining and their current attitudes toward settlement; ask one side to agree on the condition that the other does so as well; alternatively, label the package a "conciliator's proposal" and present it to both parties simultaneously; offer the package on a "What If?" basis, with disclosure of each disputant's consent contingent on the other side's acceptance of the terms.

Special Characteristics of Legal Disputes

Legal disputes -- disputes in which there is an actual or potential legal claim -- have special characteristics that add another layer of complexity to the conflict and call for special tactics and strategies for dispute resolvers:

- **Legal System:** The legal system often forces litigants to make arguments and seek remedies that may have little to do with what they most care about and what is causing the conflict. Parties often get involved in a lawsuit over inflammatory and largely irrelevant issues.
- **Litigation:** The litigation itself can fuel the parties' anger and suspicions, making it hard for them to think realistically about the dispute or talk constructively with each other about settlement.
- **Court Option:** The parties to a legal dispute cannot easily walk away from a failed negotiation because one or both of them have the option to obtain a binding decision from a judge, jury or arbitrator.
- **BATNA:** The value of the parties' options away from the bargaining table, known as each side's "best alternative to a negotiated agreement" (BATNA), is a key factor in most negotiations and their disagreements about the value of that alternative often dominate the discussions. This makes techniques for analyzing the merits particularly important in legal disputes.
- **Nonlegal Issues:** At the same time, the existence of a court or arbitrator as a shadow decision maker has a significant drawback: It contributes to the tendency of the negotiators to treat nonlegal issues in such disputes, such as emotional concerns and personality conflicts, as irrelevant, although in practice these factors often play a crucial role in creating impasses.
- **Pretrial Process:** The pretrial process empowers the parties to inflict significant costs and aggravation on each other. Although litigants are often reluctant to admit it, the high costs inherent in the adjudication process are another special factor in negotiation such disputes.
- **Attorneys:** Attorneys are almost always involved as negotiators or advisors to the parties. Their presence can be helpful when the advocates use their objectivity and experience to clarify issues and move their clients toward a sensible resolution. Attorneys can become a complicating factor, however, if they allow themselves to be influenced by a short-term interest in generating fees from the controversy, if they become personally involved in the disputes or cannot get along with opposing counsel, or when one party is represented by counsel and the other is not.

Conflict Resolution Tips for Conciliators

(Do's)

- Control the flow of negative language.
- Reframe issues neutrally.
- Let participants vent emotions. Show empathy.
- Actively listen and show understanding.
- Ask about personal relationships among parties and counsel.
- Look for non-legal factors in the dispute.
- Ask about the history of prior negotiations.
- Ask about litigation alternatives and costs.
- Help participants generate creative settlement options.
- Encourage principled and interest-based negotiation.
- Determine what obstacles have prevented parties from settling.

(Don'ts)

- Skip the introductory remarks.
- Assume the participants understand the conciliation process.
- Become frustrated with the parties' extreme positions.
- Focus exclusively on the legal issues.
- Ask judgmental questions.
- Ask leading questions unnecessarily.
- Usurp the negotiation process by offering advice about terms too early.
- Humiliate a participant.
- Give biased evaluations to push participants to settle.
- Give up too soon.

CHAPTER 7 - ROLE PLAYS

Key elements of a successful role play

Conciliators

- Act and think like a conciliator - mixed process
- Talk about contested issues, settlement options, trial preparation
- Follow conferencer's goals
- Respond to the parties' concerns - probe interests
- Improvise in keeping with the ethics of conciliation
- Respond to your coaches' suggestions
- Have fun
- Remember! We learn from our mistakes. Take risks!

Parties

- Get into your role - follow one page summary of feelings/interests
- Clarify concerns about roles with coach and other parties
- Improvise within the context of your role
- Stay in touch with your feelings
- Avoid trying to "stump the conciliator"
- Respond to suggestions from coaches

Observers

- Use the handout, questions for observers
- What worked well?
- What actions seemed to open up the parties to process?
- What actions seemed counterproductive?
- What would you suggest?
- Did the conciliator engage parties about the strengths and weaknesses of their case?
- Provide your insights to the group at the end or during the role play

Coaches

- Help set up the role play
- Help each parties interpret roles
- Improvise changes in roles as necessary
- Help keep role play on a productive course
- Provide guidance as needed
- Use the role play check list
- Facilitate discussion at the end or during the role play
- Be the time keeper - 1 hour per role play, switch roles every 15minutes!

**Fishbowl Demo – Conciliation Role Play
(Business Divorce Case)**

General Information

Pat and Sam formed a dental practice 7 years ago in Newton after graduating from the same dental school. Although the practice was a success, tensions eventually developed between the two partners as to how to operate the business. A year ago, they dissolved their partnership, and Pat purchased the business. Pat is now running the practice himself in Newton and Sam has joined an established dentistry practice in Boston.

An outstanding issue has arisen between Pat and Sam regarding the distribution of profits from an educational brochure that they developed for their dental school. This item was not addressed in the partnership dissolution. The partners had donated the rights to the brochure to the school, but since then, the school has sold the brochure to a non-profit group and has passed along a share of the proceeds to Pat and Sam (\$15,000). Pat received the check and did not give any of these funds to Sam. The partnership agreement provides that all assets of the partnership be divided 50/50 between the partners, with the exception of personal work-product from books, articles and other publications. The dissolution agreement provides that as of this dissolution date, Pat is entitled to all profits from the business.

Sam has sued Pat in District Court claiming rights to the full \$15,000. Sam is being represented by her/his brother-in-law/sister-in-law who is a lawyer. Pat is pro se. The matter has been assigned by the court for conciliation through the local county bar association.

QUESTIONS FOR OBSERVERS

1. Did the conciliator show that s/he was listening and trying to understand each parties position?

Yes No

2. Were the phrases and questions used by the conciliator neutral and non-judgmental?

Yes No

Like what?

3. Did the conciliator encourage the parties to think about different options?

Yes No

How?

4. Did the conciliator transmit information about the case that was helpful toward settlement discussions?

Yes No

Like what?

5. Write down questions that you thought the conciliator posed that were helpful

6. In your opinion, what worked well?

7. Other comments

LESSONS FROM GEESE

“Lessons from Geese: is from on a speech given by Angeles Arren at the 1991 Organizational Development Network and was based on the work of Milton Olson. It has been circulated to Outward Bound staff throughout the United States. We share it here with the hope that we can all learn these lessons.

FACT 1: As each goose flaps its wings it creates an “uplift” for the birds that follow. By flying in a “V” formation, the whole flock adds 71% greater flying range than if each bird flew alone.

LESSON 1: People who share a common direction and sense of community can get where they are going quicker and easier because they are traveling on the thrust of one another.

FACT 2: When a goose falls out of formation, it suddenly feels the drag and resistance of flying alone. It quickly moves back into formation to take advantage of the lifting power of the bird immediately in front of it.

LESSON 2: If we have as much sense as a goose we stay in formation with those headed where we want to go. We are willing to accept their help and give our help to others.

FACT 3: When the lead goose tires, it rotates back into the formation and another goose flies to the point position.

LESSON 3: It pays to take turns doing the hard tasks and sharing leadership. As with geese, people are interdependent on each other's skills, capabilities and unique arrangements of gifts, talents, and resources.

FACT 4: The geese flying in formation honk to encourage those up front to keep up their speed.

LESSON 4: We need to make sure our honking is encouraging. In groups where there is encouragement, the production is much greater. The power of encouragement (to stand by one's hear or core values and encourage the heart and core of others) is the quality of honking we seek.

FACT 5: When a goose gets sick, wounded, or shot down, two geese drop out of formation and follow it down to help and protect it. They stay with it until it dies or is able to fly again. Then, they launch out with another formation or catch up with the flock.

LESSON 5: If we have as much sense as geese, we will stand by each other in difficult times as well as when are strong.

HONK!!!! HONK!!!!!!

Conciliation Role Play – Consumer Case

GENERAL INFORMATION

Mr./Ms. Greenberg purchased carpet for the living room, dining room, bedroom, loft, and hall two months ago. BC Carpet sold and installed the wall-to-wall 600 square feet of carpet for a total price of **\$12,600** (\$21/sq.yd.).

Now, the Greenbergs contend that the carpet has developed bulges in all of the rooms and that there is excessive “flattening” of the carpet in high traffic areas.

BC Carpet inspected the carpet when they were notified of the problem one month ago, and they claim that there are only minor problems with bulges, which can be corrected by tightening the carpet at one edge.

According to BC, the “flattening” is normal and not easily visible. BC Carpet owner Mr./Ms. Johnson was awaiting a call from the Greenbergs to arrange a time to tighten the carpet when s/he got notice for the lawsuit filed in Lowell District Court.

The claim is for \$12,600, the full purchase of the carpet and installation.

Conciliation Role Play – Consumer Case

PLAINTIFF MR./MS. GREENBERG

Confidential Information for Mr./Ms. Greenberg

You are **upset about the quality of the rug.**

You thought you had purchased a high quality carpet from a reputable dealer and experienced installer and **instead** you have a substandard defective rug!

The flattened areas look horrible! Also, **you have been tripping on the carpet** where there are bulges, and you almost have fallen.

The high traffic areas in the hallway and living room are the worst areas (about 25% of the total carpet).

You want the carpet totally replaced in these areas with a better grade of carpet (\$25/sq. yd.) at no cost to you. If you had to purchase this on your own, it would cost **\$4,125**. In addition, you want the carpet tightened to take care of the bulges.

The reason you filed suit was because you were getting **“the runaround”** and now believe they sold you **“knock off”** carpet.

It was **never** your understanding that BC Carpet was willing to tighten the carpet for you.

You and the owner of BC Carpet have exchanged words on several occasions about your claim of being **defrauded**. You are not sure you can trust them and aren't sure that you want them to do the work.

You came in today wanting cash so that you could hire someone else to replace the carpet.

Your spouse had originally wanted a higher quality of carpet, **but you said no!** It was **too expensive**.

You feel bad because you should have listened and bought a better carpet.

You are open to settlement ideas as it relates to getting the carpet replaced for **free**.

You are **representing yourself** and **want this case resolved** short of trial.

Conciliation Role Play – Consumer Case

DEFENDANT MR./MS. Johnson – Owner of BC Carpet

Confidential Information for Mr./Ms. Johnson

You are the **owner** of BC Carpet and have been in business for 10 years. **Business has been slow recently.**

When you received the call from the Greenbergs, you went immediately to their home to inspect the carpet. **You had warned the customer that when s/he picked the cheaper carpet that bulging may happen.**

You found **mild wear** in the high traffic areas which is **not abnormal** for this price of carpet.

You **never heard back from the Greenbergs** after telling them you would tighten the carpets and that they needed to schedule a time for you to come in to do so. You are always willing to address a customer's complaint and **pride yourself on your customer services.**

You were **shocked** when you received notice of the lawsuit. **Due to your current cash flow problems, you have no money to offer a cash settlement.**

You do not have the better grade of carpet in stock and would have to purchase it from the distributor. **Your cost to replace the carpet for the high traffic areas would be \$1,650; it retails for \$4,125.**

You are **willing to compromise** on some sort of settlement, **which doesn't include you paying any cash to anyone.**

Your bottom line is selling the new carpet to the Greenbergs at your cost (**\$1,650**) and providing free installation.

You do not want the Greenbergs to know about your financial problems. You have a contract in the works with a big developer which may have lead to improvement in your business in 3 months, but you're trying to hang on until then. If they can wait for 3 months, you are willing to negotiate a monetary settlement.

You have heard from a few people that the Greenbergs have been **badmouthing** your business around town saying **that you are selling "knock off carpet at premium rates."**

Your attorney has served Mr./Ms. Greenberg with a **defamation countersuit** today, before the conciliation.

Conciliation Role Play – Consumer Case

COUNSEL FOR DEFENDANT JOHNSON d/b/a BC CARPET

Confidential Information Defendant's Counsel

You are a **friend** of Mr./Ms. **Johnson**.

You know that BC Carpet is having financial difficulties and have agreed to **file an appearance in this case for the conciliation only** in exchange for a free carpet installation for your daughter's bedroom.

You think the Greenbergs are way out of line in suing for the full purchase and installation price. **The carpet is perfectly fine and may only need a tuck here or there.**

You believe that this case should be settled out of court, but you know that Mr./Ms. Johnson does not currently have money to pay out any settlement, and that the parties have not been communicating with each other.

You have **discussed** with Mr./Ms. Johnson and his/her brother the option of **selling replacement** carpet at **your cost** to the Greenbergs and providing a **free installation** to resolve this matter.

BC Carpet is willing to do this, but they are extremely upset that they are being badmouthed around town by the Greenbergs. **They want this to stop, and they want an apology.**

Before the Conciliation, you served Mr./Ms. Greenberg with a **defamation counterclaim**.

Conciliation Role Play - Consumer Case

CONCILIATOR

Contested Issue:

1. Liability: is the carpet defective, or not fit for the particular purpose?
2. Damages: what is the cost to tighten the bulging? What is the value of BC Carpet's services to date?
3. Negotiation History: the plaintiff feels BC Carpet may have sold them defective or "knock off carpet" and the defendant feels the plaintiff did not cooperate with his offer to fix it and is now bad mouthing BC Carpet.
4. Issues for Trial: counterclaim and need to prove defect or breach of warranty.

Conciliator's Goals:

- A. To facilitate a settlement of the case where the plaintiff gets new carpet; OR
- B. To help the parties agree on the following:
 1. How to consolidate the issues for trial,
 2. A trial date,
 3. That they will consider scheduling a mediation session before trial.

Conciliation Role Play - Tort Case

GENERAL INFORMATION

This case involves a car accident in a rotary between Sandra Small and Gerry Jerome. Ms. Small was driving home from work when she entered the rotary, and on her way out of the rotary, she was struck from behind by the defendant's car. Ms. Small was sent to the emergency room, where she was diagnosed with neck and lower back injuries.

A police report was filed which states that the defendant may have been traveling at an excessive speed, but no citation was issued at the scene. The left front section of the defendant's car hit the rear of the plaintiff's car. The police report lists one eye-witness named Bill Waters, who was sitting in his car at a gas station just off the rotary at the time of the accident.

Plaintiff claims that the defendant was operating his car negligently at the time of the accident because he was speeding and failed to yield to her in the rotary.

Defendant is contesting both liability and damages. His position on liability is that the plaintiff was entering the rotary and he had the right of way. As to damages, the defendant contends that the plaintiff suffered only a soft tissue injury at best, and had only a very short period of disability.

Conciliation Role Play - Tort Case

PLAINTIFF'S COUNSEL

You represent the Plaintiff, a **77-year-old** Sandra Small. Ms. Small filed suit against Defendant Gerry Jerome, the driver of a car that hit her while she was driving in a rotary.

On the day of the accident, Ms. Small was driving home from her part-time job at Lowell General Hospital. She entered the rotary, and on her way out of the rotary, she was struck from behind by the defendant's car. Ms. Small was sent to the emergency room, where she was **diagnosed with neck and lower back strain** and elevated blood pressure. A chiropractor treated her for over one year.

Ms. Small incurred **\$5,170** in **medical expenses** and **was out of work for 5 weeks**. She was **partially disabled** for an additional **46 weeks** per her primary care physician. Her primary care physician has causally related the treatment and disability to the accident. **Her lost wages total \$1,600**. PIP has paid \$4,000 to her.

You claim that the defendant was operating his car negligently at the time of the accident because he was **speeding and failed to yield** to her in the rotary.

Your position at the conciliation conference is that liability is clear and her damages are significant.

The depositions of both Sandra Small and Gerry Jerome have been taken, and you have provided defense counsel with all relevant medical records.

You want a trial date as soon as possible, preferably within the coming months because Ms. Small is elderly and in poor overall health. As her counsel, you are concerned that she will not be able to testify at trial if it is not scheduled soon.

Your demand at the conciliation conference is \$15,000. You are **frustrated** by the lack of attention this case has received by the defendant's insurer United Insurance Companies, Inc.

You believe that this case is going to have to be tried.

You are willing to settle the case and are open to the idea of mediation, but it would have to take place ASAP!

Your client has **authorized** you to **settle** the case at conciliation for **\$10,000**.

Conciliation Role Play - Tort Case

PLAINTIFF SANDRA SMALL

Plaintiff Sandra Small is a **77-year old** woman. You are a widow and live with your sister.

You have experienced back and neck pains for over one year since the accident. You have been receiving treatment from a chiropractor and **your treatment has just ended.**

Prior to the accident, you worked 10 hours per week for \$8.50 per hour. (\$85 weekly). After the accident, you were out of work for 5 weeks. You then returned to work but could only work 3 hours per week (one afternoon) for almost a year. You could not return to your full schedule sooner due to the back pain which prevented you from being able to stand on your feet for a long time.

You have recently returned to work at your regular schedule. But, you are worried about your blood pressure and your overall health.

You want this case to be over with already. **You cannot understand why the insurance company does not take your injuries seriously.**

You have been in other car accidents over the years, but none that have caused you this much pain and suffering.

You have discussed settling the case with your attorney for less than \$15,000.

You have **agreed** that if the defense **offers** anything close to **\$10,000**, you would take it just to have the case over with so you can move on with your life.

Conciliation Role Play - Tort Case

DEFENDANT'S COUNSEL

You represent the Defendant, Gerry Jerome.

The defense is contesting both liability and damages. Your position is the plaintiff was not in the rotary for as long as she claimed, and thus your client had the right of way.

There was **very minor damage to defendant's car**, and since there were no photographs of the plaintiff's car, you assume her damage was also minor.

Contrary to the plaintiff's assertions, the police report states that the defendant was in the rotary before the plaintiff, so the plaintiff had the obligation to yield. However, the report also notes that neither car had used caution in the rotary.

The police report lists one eye-witness named Bill Waters, who was sitting in his car at a gas station just off the rotary at the time the accident occurred.

On the issue of damages, you contend that the **plaintiff suffered soft tissue injury** at best, and that the records show prior car accidents.

According to your IME (independent medical exam), Ms. Small received **excessive treatment** and that **any disability** from this accident was just **one week**.

You are **frustrated** that you **just received** Ms. Small's **medical records** just last week, despite numerous requests and a pending motion to compel production of documents. **This is why you have yet to respond to the Plaintiff's offer.**

After contacting and speaking with the witness, Bill Waters, you have determined that **his testimony may be helpful** in proving your client had the right of way, so you need to depose him and call him as a witness at trial.

Mr. Waters told you that he **may be moving out of state** within the next six months. You have not discussed this with opposing counsel.

You have arranged for the insurance adjuster to be available by telephone during the conciliation.

You have authority to offer \$6,500 at the conciliation.

You **can call** the adjuster for **more authority** if the negotiations get into the **\$7,000 - \$11,000** range.

The insurer would agree to go to **mediation**.

Conciliation Role Play - Tort Case

CONCILIATOR

Contested Issue:

1. Liability: who was in the rotary first? Who had the obligation to yield?
2. Damages: was plaintiff's treatment reasonable and necessary or was it excessive?
3. Negotiation History: the plaintiff feels case not taken seriously and the defendant feels the plaintiff did not cooperate with providing medical records because she has something to hide.
4. Timing of Trial: the plaintiff wants trial right away due to condition of client and defendant may want a delay to depose the eye-witness.

Conciliator's Goals:

- A. To facilitate a settlement of the case between \$7,000 and \$11,000; OR
- B. To help the parties agree on the following:
 1. A deadline to depose the eye witness,
 2. A trial date,
 3. That they will consider scheduling a mediation session before trial.

CHAPTER 8 - FORMS & BIBLIOGRAPHY

BERKSHIRE PROBATE COURT CONCILIATION PROGRAM

Plaintiff(s)

Docket No. _____

v.

DRAFT

Defendant(s)

PARTICIPATION AGREEMENT

The above-referenced parties have agreed to participate in a conciliation session being conducted by the Berkshire County Bar Association at the Berkshire Probate and Family Court. There is no charge to the parties for participating. Conciliation is a voluntary process in which a neutral conciliator attempts to help the parties settle a case by clarifying the issues and assessing the strengths and weaknesses of each side. If a settlement cannot be reached, the conciliator will try to help the parties narrow the issues that are in dispute, and ascertain the steps which remain to prepare the case for trial.

At the conclusion of the conciliation, the conciliator will complete and submit to the Court a Conciliator's Report.

The parties agree that any discussions undertaken during the conciliation process, and any documents created for the sole purpose of facilitating the conciliation, with the exception of the Conciliator's Report, shall be strictly confidential and may not be disclosed by either party in any legal proceeding or otherwise, except as ordered by a court of competent jurisdiction.

The parties further agree that they will not subpoena, nor cause a subpoena to issue to the Berkshire County Bar Association Conciliation Program, any of its officers, agents, employees or personnel, or any conciliator, seeking the production of testimony, documents, conciliator's notes, or any other information relating to the conciliation of this matter, except as ordered by a court of competent jurisdiction.

By signing below, the parties acknowledge that they understand and agree to the terms set forth above, and that any agreement reached will be entered into voluntarily by them.

Plaintiff(s)

Sign _____
Print Name _____

Defendant(s)

Sign _____
Print Name _____

Attorney for Plaintiff(s)

Sign _____
Print Name _____

Attorney for Defendant(s)

Sign _____
Print Name _____

Date: _____

Date: _____

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LOWELL DISTRICT COURT
DOCKET NO. _____

Plaintiff(s)

v.

Defendant(s)

CONCILIATOR'S REPORT

1. Conciliation was conducted on _____.

The parties have requested additional time to complete the conciliation process and the case is now scheduled for further conciliation on _____.

2. **SETTLEMENT:** The case has been settled. A Stipulation of Dismissal/Agreement for Judgment is to be filed by _____.

3. **NO SETTLEMENT:**

A. The case is ready for trial: By Jury _____ Jury-Waived _____
Number of witnesses: For Plaintiff _____ For Defendant _____
Estimated length of trial: _____

B. The case is not ready for trial for the following reason(s):

4. The parties agree to the facts set forth in the attached, signed Stipulation.

5. The following material issues remain to be resolved at trial:

Date: _____

Conciliator: _____

Party Name: _____ Case Name: _____ Docket #: _____ Date of Conciliation: _____ Conciliator Name: _____ Settled: yes no Pro Se: yes no Party: Plaintiff Defendant	The purpose of this form is to help monitor the quality of our conciliation services. Please return the completed form to the Judge's Lobby and place in the Conciliation Administrator Box.
--	--

**LOWELL DISTRICT COURT CONCILIATION
PARTY EVALUATION FORM**

Conciliator:

- Explained conciliation process and his/her role? yes somewhat no
- Helped identify trial preparation issues? yes somewhat no
- Listened to your concerns? yes somewhat no
- Understood the issues? yes somewhat no
- Took sides? yes somewhat no
- Was too forceful? yes somewhat no
- Met privately with each party? yes no
- Overall performance? Excellent Good Fair Poor

Conciliation Process:

Please describe your experience with this Conciliation:

- a. very good b. good c. fair d. poor

If Conciliation was helpful, please describe the reasons why (circle all that apply):

- a. settled the case b. helped parties understand other side's view of dispute
- c. moved case closer to resolution d. helped to uncover flexibility
- e. clarified issues for trial f. evaluated strengths and weaknesses

Other: _____

If Conciliation was not helpful, please describe the reasons why (circle all that apply):

- a. parties too far apart b. increased animosity between parties
- c. made problems worse d. other party/attorney not committed to conciliation process
- e. conciliator didn't have the experience necessary to resolve the dispute

Other: _____

Additional Feedback:

Have you participated in conciliation before? Yes No

If yes, how does this conciliation compare? _____

Should conciliation be made available for all civil cases in the Lowell District Court? Yes No

Additional Comments:

Attorney Name: _____	Please return to the Conciliation Administrator box in the Judge's Lobby
Party: Plaintiff's Atty Defendant's Atty	

**LOWELL DISTRICT COURT CONCILIATION
ATTORNEY EVALUATION FORM**

Conciliator:

Helped identify trial preparation issues?	yes	somewhat	no
Evaluated strengths and weaknesses?	yes	somewhat	no
Listened to you and your party's concerns?	yes	somewhat	no
Understood the issues?	yes	somewhat	no
Took sides?	yes	somewhat	no
Was too forceful?	yes	somewhat	no
Met privately with each party?	yes		no
Overall performance?	Excellent	Good	Fair Poor

Conciliation Process:

Please describe your experience with this Conciliation:

- a. very good b. good c. fair d. poor

If Conciliation was helpful, please describe the reasons why (circle all that apply):

- | | |
|------------------------------------|---|
| a. settled the case | b. helped parties understand other side's view of dispute |
| c. moved case closer to resolution | d. helped to uncover flexibility |
| e. clarified issues for trial | f. evaluated strengths and weaknesses |

Other: _____

If Conciliation was not helpful, please describe the reasons why (circle all that apply):

- | | |
|--|---|
| a. parties too far apart | b. increased animosity between parties |
| c. made problems worse | d. other party/attorney not committed to conciliation process |
| e. conciliator didn't have the experience necessary to resolve the dispute | |

Other: _____

Additional Feedback:

Have you participated in conciliation before? Yes No

If yes, how does this conciliation compare? _____

Should conciliation be made available for all civil cases in the Lowell District Court? Yes No

Additional Comments:

MIDDLESEX MEDIATION AND CONCILIATION PROGRAM

MIDDLESEX C.C. LAW CENTER
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LOWELL, MA 01852-1987

TELEPHONE (978) 656-3342
FAX (978) 441-1749

**LOWELL DISTRICT COURT CONCILIATION
REPORT TO CONCILIATION ADMINISTRATOR**

Plaintiff(s): _____	Defendant(s): _____
Attorney: _____	Attorney: _____
Address: _____	Address: _____
Phone: _____	Phone: _____

Date of Conciliation: _____	Docket Number: _____
Conciliator: _____	Referral Source: _____
Case Type: Contract Tort Consumer Prot. Equit. Remedy	When Referred (case event): Final Pre-Trial Other _____
Small Claims Appeal Summary Process Dog Appeal Other _____	Trial Scheduled: _____

Outcome: Settled Not Settled Partially Settled Pending
Second Conciliation Session Scheduled for: _____
Referral to Mediation: _____
Referral to Private ADR: _____
Notes: _____ _____ _____ _____ _____ _____

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Prepared by Boston Law Collaborative, LLC

www.BostonLawCollaborative.com

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