

ABOUT THE MEDIATION TRAINING BINDER

2023 Mediation Training for Housing Specialist. The Trial Court is sponsoring a Mediation Training Program in 2023 for new Housing Specialists. The Executive Office of the Trial Court has solicited and selected a new vendor to provide a 32-Hour Basic Mediation Training Program for new Housing Specialist in the Housing Court Department. The new vendor is Mediation Works, Inc. and they will be providing the training and will provide their own training material for the training program.

Mediation Works, Inc. MWI is nationally recognized dispute resolution service provider and training firm based in Boston since 1994. Some of MWI's mediation training clients include Coca-Cola, Bose, General Motors, BMW of North America, the United States Postal Service, Mass Housing, and the Massachusetts Probation Department. Josh Hoch will be the Lead Trainer for this program and ADR Coordinator for the Trial Court will be aiding the program.

Prior Mediation Training for Housing Specialists. The Trial Court has provided mediation training programs for all Housing Specialist since 2001. The first program was conducted in April of 2001 and resulted in training all the Housing Specialist on staff from all Divisions of the Housing Court Department at that time. This training was led by Joshua Jacks from Metropolitan Mediation Services (MMS) and the ADR Coordinator for Trial Court, with other trainers and coaches from MMS. Subsequently, all new Housing Specialists were trained in 2005, 2006, 2014 and 2017 by Joshua Jacks of MMS, and the ADR Coordinator for the Trial Court. The Mediation Training Binder is based on material originally created by the Metropolitan Mediation Services (MMS) and its Executive Director, Joshua Jacks for the Trial Court Standing Committee on Dispute Resolution.

Mediation Training Binder. In addition to the training material proved by MWI, The Trial Court is providing all new Housing Specialists with the training material used in the prior trainings. The Mediation Training Binder is based on the prior MMS' training programs from 2001, 2005, 2006, 2014 and 2017. Most of the training material and all of the role-plays are the same from the prior MMS training to ensure consistency in information and practice. The Mediation Training Binder material is intended to supplement the material from MWI. The Mediation Training Binder is not to be used or distributed without the permission of both MMS and the Trial Court.

ADR Coordinator: 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.

Mediation Training Program

for

Housing Specialists

in the

Housing Court Department

2023

Provided by the Executive Office of the Trial Court

HOUSING COURT MEDIATION TRAINING MATERIAL

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ABOUT THE TRAINING

The training material for the 2017 Housing Court Mediation Program is based on material originally created by the Metropolitan Mediation Services (MMS) and its accomplished Executive Director, Joshua Jacks for the Trial Court Standing Committee on Dispute Resolution.

Rule 8 of the Uniform Rules on Dispute Resolution (SJC Rule 1:18) mandates qualification standards for all neutrals in court-connected dispute resolution. The training requirements for mediators are 30-hours of training. 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.

The Trial Court has sponsored mediation training programs for all Housing Specialist since 2001. The first program was conducted in April of 2001 and resulted in training all the Housing Specialist on staff from all Divisions of the Housing Court Department at that time. This training was led by Joshua Jacks and the ADR Coordinator for Trial Court, with other trainers and coaches from MMS. Subsequently, all new Housing Specialists have received the same mediation training from trainers, Joshua Jacks of MMS and the ADR Coordinator for the Trial Court in 2005, 2006 and 2014.

The current training curriculum and related materials are based on the prior MMS' training programs and have been updated and adapted by the ADR Coordinator for the Trial Court. All the information and training materials for this 2017 mediation training program have been reproduced with the permission of the authors and/or acquired by the Trial Court through other dispute resolution training initiatives. Much of the training material and role plays are the same from the prior MMS training to ensure consistency in instruction and practice. The current training material is not to be used or distributed without the permission of both MMS and the Trial Court.

The goals of the training are to: (1) comply with the training requirement for mediators in Rule 8 of the Uniform Rules on Dispute Resolution; (2) promote a shared understanding of the mediation process, the role of the mediator and best practices for mediators; (3) build mediator skills and awareness of strategies for effectively managing the mediation process and facilitate settlement and (4) provide Housing Specialists in the Hosing Court Department with standard mediation training material and instruction. The format of the mediation training program combines presentations, interactive discussions, and group exercises and role plays. The objective of the training is to have active participation of the new Housing Specialists in exploring mediation theory and practice, as it relates to the role of Housing Specialist in providing mediation in the Housing Court Department.

Trainer: 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.

WHERE DO WE LEARN HOW TO RESPOND TO CONFLICT?

Common sources of our instinctive, reflexive and learned response to conflict:

- Parents
- Siblings
- Playmates
- Religion
- Teachers/School
- Government/Law
- Professional training

- TV/Film/Literature/Music
- Classmates
- Organizations/Clubs
- Role models/Mentors
- Employers
- Conflict resolution trainings?

Some common conflict prescriptions:

- Fight fire with fire.
- An eye for an eye.
- Pick your battles.
- You can catch more flies with honey than with vinegar.
- Fool me once, shame on you. Fool me twice, shame on me.
- Turn the other cheek.
- Never throw the first punch. Always throw the last.
- Give as good as you get.

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PERSONAL APPROACH TO CONFLICT ASSIGNMENT

Write, for your own eyes only, answers to these four questions:

1. How were conflicts resolved in your family when you were growing up?

2. What lessons have you learned about conflict resolution from your experiences with family, friends, co-workers, etc.?

3. When you have a conflict with someone, how do you prefer to handle it?

4. What approaches to handling conflicts are you less comfortable with or would rather not use?

Conflict Management Styles Assessment

Please **CIRCLE ONE** response that best describes you. Be honest, this survey is designed to help you learn about your conflict management style. There are no right or wrong answers!

Name _____

Date _____

	Rarely	Sometimes	Often	Always
1. I discuss issues with others to try to find solutions that meet everyone's needs.	1	2	3	4
2. I try to negotiate and use a give-and-take approach to problem situations.	1	2	3	4
3. I try to meet the expectations of others.	1	2	3	4
4. I would argue my case and insist on the advantages of my point of view.	1	2	3	4
5. When there is a disagreement, I gather as much information as I can and keep the lines of communication open.	1	2	3	4
6. When I find myself in an argument, I usually say very little and try to leave as soon as possible.	1	2	3	4
7. I try to see conflicts from both sides. What do I need? What does the other person need? What are the issues involved?	1	2	3	4
8. I prefer to compromise when solving problems and just move on.	1	2	3	4
9. I find conflicts exhilarating; I enjoy the battle of wits that usually follows.	1	2	3	4
10. Being in a disagreement with other people makes me feel uncomfortable and anxious.	1	2	3	4
11. I try to meet the wishes of my friends and family.	1	2	3	4
12. I can figure out what needs to be done and I am usually right.	1	2	3	4
13. To break deadlocks, I would meet people halfway.	1	2	3	4
14. I may not get what I want but it's a small price to pay for keeping the peace.	1	2	3	4
15. I avoid hard feelings by keeping my disagreements with others to myself.	1	2	3	4

Scoring the Conflict Management Styles Assessment

As stated, the 15 statements correspond to the five conflict management styles. To find your most preferred style, total the points for each style. The style with the highest score indicates your most commonly used strategy. The one with the lowest score indicates your least preferred strategy. However, all styles have pros and cons, so it's important that you can use the most appropriate style for each conflict situation.

Style Corresponding Statements: Total:

Collaborating: (questions 1, 5, 7): _____

Competing: (questions 4, 9, 12): _____

Avoiding: (questions 6, 10, 15): _____

Accommodating: (questions 3, 11, 14): _____

Compromising: (questions 2, 8, 13): _____

★ My preferred conflict management style is: _____

★ The conflict management style I would like to work on is: _____

How can I practice this conflict management style?

Brief Descriptions of the Five Conflict Management Styles

Keep in mind that one style of conflict management is not necessarily better than another; each style has pros and cons, and each can be useful depending on the situation. This assessment is intended to help you identify your typical response to conflict, with the goal that when you encounter future conflicts, you will be aware of not only your instinctive reaction, but also the pros and cons of that reaction for the specific situation. Furthermore, you will also be aware of the other styles of conflict management that you could draw on to resolve the situation, if one of the other styles is more appropriate for the current situation.



Owl

Collaborating

Owls highly value both their goals and their relationships. They view conflict as a problem to be solved and seek a solution that achieves both their goals and the goals of the other person. Owls see conflicts as a means of improving relationships by reducing tensions between two persons. They try to begin a discussion that identifies the conflict as a problem, and strive to resolve tensions and maintain the relationship by seeking solutions that satisfy both themselves and the other person.



Turtle

Avoiding

Turtles tend to value avoiding confrontation more than either their goals or relationships. They often find it easier to withdraw from a conflict than to face it. This might even include completely giving up relationships or goals that are associated with the conflict.



Shark

Competing

Sharks typically value their goals over relationships, meaning that if forced to choose, they would seek to achieve their goals even at the cost of the relationship involved. Sharks are typically more concerned with accomplishing their goals than with being liked by others. They might try to force opponents to accept their solution to the conflict by overpowering them.



Teddy Bear

Accommodating

Teddy Bears typically value relationships over their own goals; if forced to choose, Teddy Bears will often sacrifice their goals in order to maintain relationships. Teddy Bears generally want to be liked by others, and prefer to avoid conflict because they believe addressing it will damage relationships. Teddy Bears try to smooth over conflict to prevent damage to the relationship.



Fox

Compromising

Foxes are moderately concerned with both their goals and their relationships with others. Foxes typically seek a compromise; they give up part of their goals and persuade the other person in a conflict to give up part of their goals. They seek a conflict solution in which both sides gain something; the middle ground between two extreme positions. They are willing to sacrifice part of their goals in order to find agreement for the common good.

Adapted from: Conflict Management Styles Descriptions. Docstoc, <http://img.docstoccdn.com/thumb/orig/47081621.png>



Conflict Management Styles Assessment

Facilitator Notes

Purpose: A self-assessment that allows participants to identify preferred conflict styles.

Materials: A copies of the reproducible self-assessment and scoring sheet for distribution to participants

Set Up: Distribute prior to full discussion of the 5 identified conflict styles. The assessment should take about 10-15 minutes to answer the questions. It should take about 5-10 minutes to score the results.

After they answer the assessment questions, you may want to hold off scoring it until after discussion each of the 5 conflict styles. Then the participants will be in a better place to confirm (or disagree) with their results.

The instructions for taking and scoring the assessment are self-explanatory.

Notes: The assessment is for discussion purposes only. It is not a validated, scientific instrument. Each participant needs to determine the accuracy of the results, they should not assume that the results are conclusive. After listening to the description of each of the conflict styles, the participant is free to which are their preferred styles (regardless of what the assessment says).

The assessment is also confidential. Participants may wish to share their results, but they should not be required to share.

Debrief: One of the primary values of this activity is to generate discussion on conflict styles and the possible impact each style might have on how people address conflict situations. It is best if the participants do most of the talking during the debrief. Some of the questions that can be asked (on a volunteer basis) include:

1. Do you agree with the results of the assessment?
2. Were there any surprises in the results?
3. Do the results help explain how things have gone in different conflict situations you have encountered?

As you go through the rest of your presentation, or in debriefing any activities, you can refer people back to their results and ask how their preferred style may be impacting their approach to conflict.



Conflict Management Styles Assessment

Source: Reginald (Reg) Adkins, PhD, Elemental Truths
<http://elementaltruths.blogspot.com/2006/11/conflict-management-quiz.html>

We each have our own way of dealing with conflict. The techniques we use are based on many variables such as our basic underlying temperament, our personality, our environment and where we are in our professional career. However, by and large there are five major styles of conflict management techniques in our tool box. In order to address conflict we draw from a collaborating, competing, avoiding, accommodating or compromising style of conflict management. None of these strategies is superior in and of itself.

How effective they are depends on the context in which they are used.

Each statement below provides a strategy for dealing with a conflict. Rate each statement on a scale of 1 to 4 indicating how likely you are to use this strategy.

1 = Rarely 2 = Sometimes 3 = Often 4 = Always

Be sure to answer the questions indicating how you would behave rather than how you think you should behave.

- 1. I explore issues with others so as to find solutions that meet everyone's needs. _____
- 2. I try to negotiate and adopt a give-and-take approach to problem situations. _____
- 3. I try to meet the expectations of others. _____
- 4. I would argue my case and insist on the merits of my point of view. _____
- 5. When there is a disagreement, I gather as much information as I can and keep the lines of communication open. _____
- 6. When I find myself in an argument, I usually say very little and try to leave as soon as possible. _____
- 7. I try to see conflicts from both sides. What do I need? What does the other person Need? What are the issues involved? _____
- 8. I prefer to compromise when solving problems and just move on. _____
- 9. I find conflicts challenging and exhilarating; I enjoy the battle of wits that usually follows. _____
- 10. Being at odds with other people makes me feel uncomfortable and anxious. _____
- 11. I try to accommodate the wishes of my friends and family. _____
- 12. I can figure out what needs to be done and I am usually right. _____
- 13. To break deadlocks, I would meet people halfway. _____
- 14. I may not get what I want but it's a small price to pay for keeping the peace. _____
- 15. I avoid hard feelings by keeping my disagreements with others to myself. _____





How to score the Conflict Management Assessment

As stated, the 15 statements correspond to the five conflict resolution styles. To find your most preferred style, total the points in the respective categories. The one with the highest score indicates your most commonly used strategy. The one with the lowest score indicates your least preferred strategy. However, if you are a leader who must deal with conflict on a regular basis, you may find your style to be a blend of styles.

Style Corresponding Statements:	Total:
Collaborating: 1, 5, 7	_____
Competing: 4, 9, 12	_____
Avoiding: 6, 10, 15	_____
Accommodating: 3, 11, 14	_____
Compromising: 2, 8, 13	_____

Brief Descriptions of the Five Conflict Management Styles

Collaborating Style: Problems are solved in ways in which an optimum result is provided for all involved. Both sides get what they want and negative feelings are minimized.

Pros: Creates mutual trust; maintains positive relationships; builds commitments.
Cons: Time consuming; energy consuming.

Competing Style: Authoritarian approach.

Pros: Goal oriented; quick.
Cons: May breed hostility.

Avoiding Style: The non-confrontational approach.

Pros: Does not escalate conflict; postpones difficulty.
Cons: Unaddressed problems; unresolved problems.

Accommodating Style: Giving in to maintain relationships.

Pros: Minimizes injury when we are outmatched; relationships are maintained.
Cons: Breeds resentment; exploits the weak.

Compromising Style: The middle ground approach.

Pros: Useful in complex issues without simple solutions; all parties are equal in power.
Cons: No one is ever really satisfied; less than optimal solutions get implemented.

THE PRINCIPLES OF MEDIATION

➤ VOLUNTARINESS OF PARTICIPATION

➤ SELF DETERMINATION

➤ INFORMED CONSENT

➤ NEUTRALITY OF THE MEDIATOR

➤ CONFIDENTIALITY

III. Mediator Skills Checklist

Philosophy: Mediators have an obligation to the public and the profession to conduct their practice in a competent and ethical manner. Central to the code of behavior required of mediators is a commitment to and respect for the parties and the mediation process. Central also is the personal integrity with which each mediator enhances the quality of the process.

The following list of observable behaviors is not intended as an exhaustive list, but as a reflection of the minimum requirements for basic mediator competency. The skills evaluation checklist should be used to evaluate mediators during training, mentoring, and evaluation:

A. Managing the Process

The mediator:

-
1. Is able to explain the mediation process and role of mediator
 2. Sets a tone that helps to put people at ease
 3. Guides transitions between stages
 4. Has a good sense of timing
 5. Is flexible in tailoring the process to the needs of the parties
 6. Respects the parties' rights to make their own decisions
 7. Upholds the parameters of confidentiality

B. Managing Interactions

The mediator:

- a. Maintains an open, honest and supportive atmosphere
- b. Treats parties with respect and affirmation
- c. Maintains neutrality
- d. Demonstrates effective active listening skills
- e. Uses clear language
- f. Maintains composure when challenged
- g. Avoids appearance of bias or favoritism
- h. Handles conflict and strong emotions effectively
- i. Helps parties to see things positively
- j. Helps parties to see problems from the others' point of view
- k. Is able to ask tough questions in a non-threatening manner
- l. Avoids giving opinions or making judgments
- m. Works cooperatively with co-mediator
- n. Keeps discussions focused on issues relevant to the negotiations
- o. Demonstrates patience and persistence

C. Managing Information

The mediator:

1. Asks relevant and open-ended questions
2. Presents and re-frames information clearly
3. Seeks understanding of underlying needs
4. Determines areas of flexibility
5. Keeps track of new information and changing perspectives
6. Develops strategic direction
7. Introduces brainstorming or role reversal to encourage re-evaluation of positions and development of options
8. Encourages parties to develop new solution
9. Identifies common interests
10. Encourages collaborative efforts between parties

11. Recognizes potential areas of agreement
12. Summarizes at appropriate times
13. Supports parties' control of the outcome
14. Helps to frame a clear, balanced, specific and future-oriented agreement

IV. Alternative Methods for Mediators

Mediators may meet the requirements of Rule 8 by the alternative methods set forth in this section.

A. Training Requirements. A mediator may meet the training requirement by providing an approved program with satisfactory evidence that he or she has:

1. Completed a basic mediation training of at least thirty hours, which is substantially equivalent to a course that meets the standards set forth in Rule 8 and these Guidelines, in another state or before the qualifications standards became effective, or taught such a course as a lead trainer;
2. Taken or taught a training course in the ethical standards set forth in Rule 9 of the Uniform Rules or substantially similar standards, and taken or taught a court orientation course substantially similar to the orientation required by Rule 8, before the Uniform Rules became effective; and
3. Either taken or taught a specialized training course as required by any Trial Court Department in which he or she is practicing.

B. Evaluation and Mentoring Requirements. A mediator may meet the mentoring or evaluation requirement or both by submitting to an approved program satisfactory evidence that he or she:

1. In a substantially equivalent process, was mentored or evaluated, or served as a mentor or evaluator, as applicable, before the qualifications standards became effective; and
 2. Formally mediated at least five cases in the three years preceding the date of application.
-



RULE 8 OF THE UNIFORM RULES ON DISPUTE RESOLUTION QUALIFICATION STANDARDS AND GUIDELINES FOR MEDIATORS

(i) Training Requirement. A mediator shall successfully complete a basic mediation training course of at least thirty hours and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8(b)(iv). A mediator shall also complete any additional, specialized training required by a Trial Court Department.

(ii) Mentoring and Evaluation Requirement. A mediator shall complete the mentoring and evaluation requirements contained in the Guidelines adopted pursuant to Rule 8(b)(iv).

(iii) Continuing Education. A mediator shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(iv) Continuing Evaluation. A mediator shall participate in regular evaluation as required by Rule 7.

MEDIATORS¹

I. Guidelines for Training Mediators, Including Curriculum Outline

Philosophy: Basic mediation training emphasizes interactive participation and encourages "learning by doing" in a constructive and supportive atmosphere. It includes a mixture of theory and practice that enhances the performance of trainees and provides a variety of learning techniques that reflects a sensitivity to individual learning styles. Lecture and role-play content covers basic considerations in the types of disputes addressed by the mediation program.

Training of mediators pursuant to Rule 8 shall substantially comply with these Guidelines.

A. Basic Training

1. The training program shall include:

- a. Minimum of thirty hours; thirty-six to forty hours recommended;
- b. Minimum of three coached role-plays with trainee as mediator, including a minimum of one complete role-play session (from introduction to conclusion of session); and
- c. One coach for each small group during role-play (a maximum of six trainees).

¹These Guidelines are an adaptation of the Training Standards of the Massachusetts Association of Mediation Programs and Practitioners.

2. Curriculum Outline shall include:

- a. Lecture/discussion/exercises
 - i. Overview of program
 - (aa) Explanation of training, apprenticeship and evaluation format
 - (bb) Role of program
 - (cc) Ethical Standards
 - ii. Overview of ADR
 - (aa) ADR processes
 - ~~(bb) Nature of conflict/behaviors in conflict~~
 - (cc) Steps of mediation process
 - (dd) Role of mediator
 - iii. Mediation skills/strategies
 - (aa) Listening
 - (bb) Using neutral language
 - (cc) Rephrasing
 - (dd) Asking follow-up questions
 - (ee) Re-framing
 - (ff) Summarizing
 - (gg) Identifying issues
 - (hh) Overcoming barriers to agreement
 - (ii) Negotiating agreement
 - (jj) Note taking
 - (kk) Agreement writing
 - iv. Critical issues
 - (aa) Values, bias awareness
 - (bb) Personally sensitive issues
 - (cc) Physical/substance abuse
 - (dd) Power imbalance
 - (ee) Cultural diversity
 - (ff) Ethical and other dilemmas for the mediator
- b. Mediation demonstration
- c. Coached role-plays

3. Evaluation in a Role-Play Situation:

- a. Shall occur at the end, or after completion, of a minimum of thirty hours of basic training;
- b. Shall be provided by the training team during the training or within a reasonable time after the conclusion of the basic training, or separately by a mediation program or independent evaluator;
- c. Shall apply criteria for successful completion of required evaluation, using the Mediation Skills Checklist set forth in section III;
- d. A prospective mediator may be given more than one opportunity to achieve a successful evaluation.

B. Court Orientation

Court orientation shall prepare mediators to conduct mediation within the judicial system, and shall include:

1. An explanation of the structure and processes of the courts;
2. An overview of the Uniform Rules on Dispute Resolution, with special emphasis on the guiding principles, the ethical and qualification standards for neutrals, and the administrative responsibilities of neutrals, programs and courts, under the rules; and,
3. When feasible, an introduction to the particular court or courts for which the mediator will be providing services.

II. Guidelines for Mentoring and Evaluating Mediators

Philosophy: Mediators learn to mediate well by practicing mediation in a supportive atmosphere. Evaluation of mediators is based primarily on competency as demonstrated in coached role-plays. Mediation mentoring allows the candidate to demonstrate his/her competency to integrate the lessons from training into actual practice.

Mentoring and evaluating mediators pursuant to Rule 8 of the Uniform Rules shall substantially comply with this Guideline.

A. The mentoring and evaluation process shall include:

1. Successful completion of a minimum of thirty hours of basic training and successful evaluation in a role-play situation;
2. Observing a minimum of one actual mediation conducted by a skilled mediator who

conducts a debriefing session with the mediator candidate;

3. Performing a minimum of one actual mediation with or observed by a skilled mediator who conducts a debriefing session with the mediator candidate and provides the program with an evaluation of the competency of the mediator candidate using the Mediation Skills Checklist set forth in Guideline III;
4. Assessing the progress of the mediator, recommending next steps, and determining when the mentoring and evaluation requirement has been successfully completed. The requirement shall be satisfied when the mentor determines that the mediator demonstrates competence using the skills evaluation checklist.

B. The mentoring and evaluation process may be conducted by a training program, mediation program, or independent mentor/evaluator.

MEDIATION INTRODUCTION

REQUIREMENTS

- ** MEDIATION IS A VOLUNTARY PROCESS
- ** MEDIATION REQUIRES THE PARTIES TO USUALLY COMPROMISE
- ** MEDIATION REQUIRES THE PARTIES TO COME TO THEIR OWN AGREEMENT

ADVANTAGES

- ** THE PARTIES CONTROL THE OUTCOME OF MEDIATION

- ** MEDIATION IS A CONFIDENTIAL PROCESS
- ** MEDIATION ALLOWS BOTH PARTIES TO FULLY EXPLAIN THEIR CASE
- ** MEDIATION IS A SUCCESSFUL WAY OF RESOLVING DISPUTES WITHOUT COURT INVOLVEMENT
- ** MEDIATION AGREEMENTS LAST BECAUSE THEY ARE BASED ON THE BEST INTERESTS OF THE PARTIES
- ** MEDIATION HAS A HIGH DEGREE OF SATISFACTION
- ** IF MEDIATION IS UNSUCCESSFUL THE PARTIES CAN STILL GO TO COURT

MEDIATOR'S ROLE

- ** MEDIATORS ARE IMPARTIAL, TRAINED VOLUNTEERS
- ** MEDIATORS DO NOT DETERMINE RIGHT OR WRONG, MAKE SUGGESTIONS, GIVE LEGAL ADVISE OR MAKE DECISIONS

MEDIATION FLOW CHART

1. **MEDIATION IS:**

A way to solve problems
A way for you to decide what happens

2. **MEDIATION PROCESS:**

WE DON'T - take sides
- decide who's right or wrong
- decide what the solution will be

WE DO - listen
- help you find solutions

3. **HOW MEDIATION WORKS:**

1st, we talk to everyone together
2nd, we meet with you one at a time
3rd, we come together to make an agreement

4. **CONFIDENTIALITY:**

We won't tell anyone what we hear in mediation
We won't repeat any information told to us in a private session unless you say its ok

5. **NOTE-TAKING:**

We will be taking notes just to keep track of what is said
We will rip up our notes at the end of the session

6. **GROUND-RULES**

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

7. **QUESTIONS????**

MEDIATION STEPS

THE INTRODUCTION

- Describe mediation
- Describe mediator's job
- Describe the steps
- Explain confidentiality
- Go over the ground rules
- Answer questions

THE FIRST JOINT SESSION

- Ask what happened
- Ask how they know each other
- Ask your questions
- Rephrase
- Summarize what each party said
- Ask how it can be resolved

THE MEDIATOR'S BREAK

- Go over what you know
- Decide what you need to know
- Decide who to see
- Decide which questions to ask
- Decide who will do what

THE PRIVATE SESSIONS

- Remind about confidentiality
- Ask if they have anything to add
- Ask how they feel about what happened
- Ask your questions
- Ask how to resolve each problem
- Ask what they can do
- Ask if they will share information with other party
- Summarize
- Check for confidentiality

THE LAST JOINT SESSION

- Summarize progress made
- Share information
- Problem-solve any disagreements
- Write the agreement
- End the mediation

THE AGREEMENT

- Keep it short and simple
- Use positive language
- Make it clear and understandable
- Keep it balanced

INTRODUCING THE MEDIATION PROCESS TO THE DISPUTING PARTIES

- As important as anything you say in the introduction is the **tone you set**. The process should be comfortable and non-mysterious.
- First, an **Overview** of what the process is:
Example: Mediation is a chance to try to work out the difference between you by talking about it- with the help of a neutral third party.
- Describe Your **Role** as Mediator:
Example: I am only here to try to help you to talk and reach an agreement. I am not like a judge. I will not decide who is right or wrong and I will not tell you what should happen.

- Explain the Principle of **Self Determination**.
Example: What comes out of this is up to you. You are not required to reach an agreement in mediation. If you do make an agreement, it will be you who decide what the agreement is.
- Describe the **Process**:
Example: I will begin by meeting with both sides together. Then, if it seems like it might be useful, I may ask to talk with each of you individually.
- Explain **Confidentiality** and **Exceptions** to Confidentiality, if any:
Example: What is said in mediation is confidential. I will not make any report other than that you did or did not reach an agreement. If you see me taking notes, those will be kept confidential, as well. Confidentiality of mediation is protected by statute and court rules. [Some programs tell parties that any mediator's notes will be destroyed.]
- Describe the **Agreement**:
Example: If you do reach an agreement, I will write it down and you both will sign it and get a copy of it. You should consider any agreement you sign to be binding and enforceable, though there may be some exceptions.
- **Begin** the Process:
Example: It is my job to not take sides, but I do have to begin somewhere. I generally begin with the person who first brought this matter to the program's attention. Of course, [to other side], your point of view is just as important and I will want to hear what you have to say, as well.

STAGES OF THE MEDIATION PROCESS: THE JOINT SESSION

Preliminaries

Set the tone. (These are principles that should apply throughout the mediation.)

- Help parties to feel comfortable with a familiar, informal setting, rather than an intimidating, formal setting. Such a setting empowers people to openly state and assert their interests.
- Express warmth, concern, and if appropriate, humor.
- ~~Model the informality of the mediation by, when appropriate, engaging in small talk (in an even-handed way).~~

Introductions: who's who in the room?

- Everybody's name should be known.
- Everybody's role should be understood. Is a companion an advocate; a lawyer; an organizational or corporate rep.; a witness; a friend for "moral support"; etc.? In some cases, titles might be helpful.
- There are not automatic rules about who can or cannot participate in mediation. If there is a dispute about who may be present, that must be RESOLVED. If it cannot be resolved, the mediation need not take place.
- There are not partisan "witnesses" to a confidential mediation. Everyone who remains in the room should be a participant, even if a passive one. Non-participants should leave the room.

Gain the parties' consent to participate.

- Mediator's explanation of the process.
- The mediator should assure that everyone understands the general purpose and the basic mechanics of mediation.
- Sometime people are unclear about the distinctions between "negotiation," "arbitration," and "mediation." Also, mediation varies from program to program and from practitioner to practitioner, so even if a party has "already experienced" mediation, give a complete explanation.
- ~~Many mediators and mediation programs will use an "agreement to participate" in mediation.~~

This can protect a mediator and parties by assuring and documenting "informed consent"

This can formally define the neutral as a mediator and trigger certain legal protections (such as confidentiality under MGL Ch. 233 sect. 23C).

STAGES OF THE MEDIATION PROCESS: THE JOINT SESSION

Communicating

- **The parties present their perspectives.**
 - Work with the parties to determine who should logically speak first. If it is a matter where there is clearly a “complainant” and a “respondent,” begin with the “complaint” (usually the plaintiff, if a legal suit is involved.)
 - Begin with an open-ended question such as, *what is this about from your perspective?* Not a close ended question, such as, what are you looking for?

 - Listen in a present and attentive manner, giving acknowledgments when called for.
 - If a party’s presentation is brief, or leaves areas that seem incomplete or vague, do not over investigate. Investigation, if necessary, can be conducted after everyone has a chance to speak. Often subsequent speakers will fill the gaps.
- **After Everyone Has Spoken, Try to Summarize the Conflict in a Concise Way.**
 - You do not have to repeat every event and detail that the speakers said.
 - Don’t be afraid to recognize the depth and nature of feelings that parties express. This is how parties know that they have been truly understood.
 - Only if a speaker seems to imply a lack of confidence that he or she has been heard or understood, should the mediator try to offer assurance by a more detailed summary.
- **Ask parties to say what they would most like to achieve in the mediation. (Not what they expect or are willing to settle for, but their high aspirations.)**
- **If the dialog gets stalled in repetitive, contentious assertions, the mediator can offer the alternative paths of using mediation either to try to *persuade* one another of perspectives or to accept differences in perspectives and try to *negotiate* outcomes.**

Taking Turns, Interruptions, Dialog, and Negotiation

Do not be rigidly bound to a single way for parties to engage with one another in the initial joint session. If one party injects a comment while another is speaking, don't immediately squash the communication. Observe how the original speaker responds. Perhaps this is the beginning of a productive dialog. Direct dialog can often be the most effective and efficient way for parties to communicate.

If the original speaker objects to the interruption, then acknowledge the importance and meaning of the message that "interrupter" has sent (e.g. *I understand that you have a very different perspective about this aspect of the conflict and we certainly want to hear more about that perspective. For now let [original speaker] continue.* If a constructive dialog does result from the "interruption," you can assist the dialog by acknowledging messages sent and specific areas of agreement and disagreement.

Usually, but not always, the parties will engage in a direct dialog with one another sometime during the first joint session. Overly rigid "ground rules" might prevent this. Possibly, with the mediators help, this dialog will evolve into a negotiation and, even a settlement without any use of private sessions.

Even if a dialog does take place, the mediator must always make sure that all parties have had a safe opportunity to completely express their perspectives and assert their interests.

JOINT SESSION - WHEN TO RECESS

WHEN THE JOINT SESSION NO LONGER FEELS SAFE.

- Is the emotional level extremely high? The joint session can and should tolerate a great deal of expression of emotions, but if a party is unable to control him or herself or if one party is intimidated by the emotional intensity of another, it may be time to end the joint session.
- Is the discussion stuck at insults, placing blame, or guilt and innocence? Many disputes begin this way, but a continuing focus on this kind of communication can alienate parties and damages the potential for resolution.
- Is one party at a clear disadvantage? If one party appears to be offering concessions prematurely, while the other is making demands and standing firm, there may be intimidation taking place. This is a time to break. Explore in private with the party who was making concessions what alternatives are available to them and what strategy is in their best interest.

WHEN YOU FEEL STUCK.

- Take a break and discuss the next move with your co-mediator or convener. If you are working alone, take a minute by yourself to think.

WHEN NOTHING NEW IS BEING DISCUSSED.

- Time is of value to most disputing parties and to mediators and mediation programs. Also, repeated assertions can be a cause of escalation. If parties are repeating themselves, they may have said all that they can in joint session.

WHEN YOU BELIEVE THAT THERE MAY BE INFORMATION WHICH A PARTY CAN'T SHARE PUBLICLY.

- Be conscious of the possibility of the need for a party to save face. It may prevent parties from admitting certain events or feelings in public. Might a party feel fearful? Intimidated? Ashamed? Is there information that a party feels is strategically unwise to disclose to the other?

WHEN YOU WANT TO SOLICIT AN OFFER FROM A PARTY AND FEEL THAT THEY ARE NOT PREPARED TO DISCUSS OPTIONS PUBLICLY.

- In many cases, a party will fear that if they consider an option in front of the other, the other may take it as an offer.

SOME CONSIDERATIONS ON WHOM TO MEET WITH FIRST IN PRIVATE SESSION

- **Co-mediators have differing perspectives about what a party has said or what they mean.**
- **The mediator feels a need for further information from a party.**

- **One party is seen as having the most to gain from concessions.**

- **One party is seen as having the least vision of available options.**

- **The mediator seeks to accommodate and reduce anxiousness on the part of a party.**

- **The mediator seeks to address high levels of emotion in one party.**

- **The mediator seeks to incorporate an apparently shy or withdrawn party into the process.**

- **The mediator seeks to balance process or to address a perceived imbalance. (Who spoke first in the joint session? Who spoke the most?)**

**MODEL STANDARDS OF CONDUCT
FOR MEDIATORS**

AMERICAN ARBITRATION ASSOCIATION
(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION
(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION
(ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005

The Model Standards of Conduct for Mediators 2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution¹. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.² Both the original 1994 version and the 2005 revision have been approved by each participating organization.³

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. ~~These Standards are designed to serve as fundamental ethical~~ guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

¹ The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

² Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

³ The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term "mediator" is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, ~~may also be affected by applicable law, court rules, regulations, other~~ applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

- A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.
1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.
 2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where

appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

- B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

- A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
- B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
 - 1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
 - 2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.
 - 3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.
- C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

- A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

- B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.
- C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.
- F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

- A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
 - 1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator

competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.
 3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.
- B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.
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- C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

- A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
 2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
 3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.
- B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

- C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.
- D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

- A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.
 - 1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
 - 2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.
 - 3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.
 - 4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.
 - 5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.
 7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.
 8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.
 9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
 10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.
- B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
 - C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

- A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.
 2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.
- B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.
- C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.
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STANDARD VIII. FEES AND OTHER CHARGES

- A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.
1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.
 2. A mediator's fee arrangement should be in writing unless the parties request otherwise.
- B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.
1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
 2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

- A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:
1. Fostering diversity within the field of mediation.
 2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
 3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
 4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
 5. Assisting newer mediators through training, mentoring and networking.
- B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

INFORMED CONSENT/SELF DETERMINATION

Rule 9 (c) Informed Consent. The neutral shall make every reasonable effort to ensure that each party to the dispute resolution process (a) understands the nature and character of the process, and (b) in consensual processes, understands and voluntarily consents to any agreement reached in the process.

(i) A neutral shall make every reasonable effort to ensure at every stage of the proceedings that each party understands the dispute resolution process in which he or she is participating. The neutral shall explain (aa) the respective responsibilities of the neutral and the parties, and (bb) the policies, procedures and guidelines applicable to the process, including circumstances under which the neutral may engage in private communications with one or more of the parties.

~~(ii) If at any time the neutral believes that any party to the dispute resolution process is unable to understand the process or participate fully in it -- whether because of mental impairment, emotional disturbance, intoxication, language barriers, or other reasons -- the neutral shall (aa) limit the scope of the dispute resolution process in a manner consistent with the party's ability to participate, and/or recommend that the party obtain appropriate assistance in order to continue with the process, or (bb) terminate the dispute resolution process.~~

(iii) Where a party is unrepresented by counsel and where the neutral believes that independent legal counsel and/or independent expert information or advice is needed to reach an informed agreement or to protect the rights of one or more of the parties, the neutral shall so inform the party or parties.

(iv) A neutral may use his or her knowledge to inform the parties' deliberations, but shall not provide legal advice, counseling, or other professional services in connection with the dispute resolution process.

(v) The neutral shall inform the parties of their right to withdraw from the process at any time and for any reason, except as is provided by law or court rule.

(vi) In mediation, case evaluation, and other processes whose outcome depends upon the agreement of the parties, the neutral shall not coerce the parties in any manner to reach agreement.

(vii) In dispute intervention, in cases in which one or more of the parties is not represented by counsel, a neutral has a responsibility, while maintaining impartiality, to raise questions for the parties to consider as to whether they have the information needed to reach a fair and fully informed settlement of the case.

Rule 1 (b) Guiding Principles. The interpretation of these rules shall be guided by the following principles:

(v) *Self-determination.* Wherever appropriate, people should be allowed to decide upon the issues to be discussed during a dispute resolution process, and to decide the terms of their agreements.

Rule 6 (i)

Inappropriate Pressure to Settle. Courts shall inform parties that, unless otherwise required by law, they are not required to make offers and concessions or to settle in a court-connected dispute resolution process. Courts shall not impose sanctions for non-settlement by the parties. The court shall give particular attention to the issues presented by unrepresented parties, such as the need for the neutral to memorialize the agreement and the danger of coerced settlement in cases involving an imbalance of power between the parties.

In dispute intervention, in cases in which one or more of the parties is not represented by counsel, a neutral has a responsibility, while maintaining impartiality, to raise questions for the parties to consider as to whether they have the information needed to reach a fair and fully informed settlement of the case.

WHY MEDIATORS MEDIATE

How do you define success as a mediator?

Rank the goals of mediation from highest goal (1) to lowest.

- **Help people learn to address future conflicts**
 - **Solve litigants' problems**
 - **Let parties feel heard**
-
- **Get parties to agree**
 - **Change and improve the parties relationships**
 - **Help people communicate better**
 - **Help parties discover and create new options**
 - **Keep people safe**
 - **Help parties make wise choices**
 - *Have a high success rate*

WHICH DO YOU FEEL SHOULD NOT BE A GOAL OF A MEDIATOR?

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.

DISPUTE RESOLUTION SPECTRUM

A sampling of dispute resolution options

Negotiation

- Parties attempt to resolve a dispute by discussing and exploring options. Often, competitive approaches dominate collaborative ones.
 - **Participation- Generally voluntary.** However, in some kinds of disputes parties can be required, either by contract or by law to negotiate with one another "in good faith."
 - **Outcome-** Voluntary.
 - **Confidentiality- Generally confidential.**
-
- **Control- the parties have control.** The parties can decide by agreement or one party can decide by exercise of power how the process is conducted and what kind of outcome will be accepted.

Mediation

- Parties choose a third party neutral to provide a mutually acceptable forum for discussing and exploring the dispute and various options. The mediator can enable or encourage the use of cooperative approaches over competitive ones.
- **Participation- Generally voluntary.** Parties can commit themselves by contract to mediate disputes that may arise. Also, some mediation programs (such as some court programs) offer various degrees of coercion to get parties to attempt mediation. In some cases, the law requires that parties attempt mediation before going forward with litigation
- **Outcome-** Voluntary.
- **Confidentiality- Almost always confidential.** In Massachusetts, confidentiality is protected by statute (M.G.L. Ch. 233 sect. 23C)
- **Control- Mediators** control many aspects of the process to insure fairness and safety. **Parties** control some aspects of the process, the agenda, and, within program limits, control the content of an agreement.

Arbitration

- Parties present their case to a neutral third party who decides the outcome. This can be a complex and formal process where decisions are based on laws regulations and precedents, or an informal process where the arbitrator relies on his or her own judgment, such as when children ask a parent or teacher to resolve a conflict.
- **Participation-** Varies. Parties can commit themselves by contract to resolve disputes by arbitration.
- **Outcome-** Varies. In many instances, parties are required by law or contract to participate in “binding” arbitration. In other cases, acceptance of the decision or recommendation of arbitrator is optional.
- **Confidentiality.** Varies. In some formal arbitration, a public record like a court record is kept and is treated as a public document. In other formal arbitration, and in informal arbitration parties may be able to choose by agreement if they want the process to be confidential.
- **Control.** Arbitration is generally a formal process. The parties have little or no control over the process and do not control the outcome.

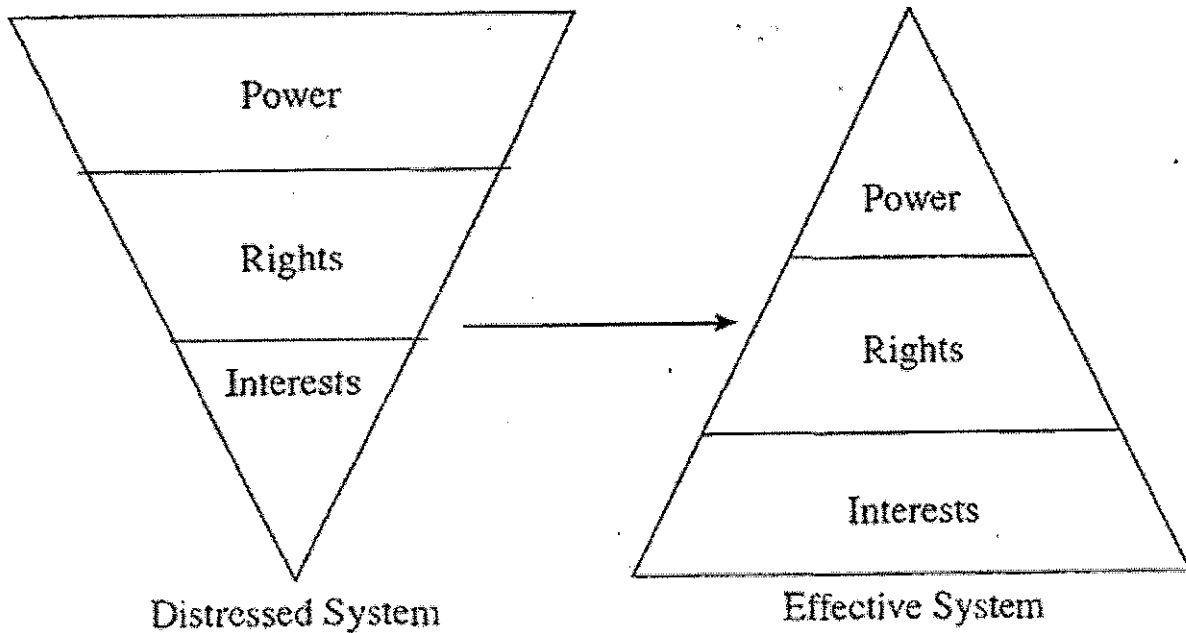
Adjudication

- Parties present their case to a court of law. This highly formal where strict rules dictate the process. A judge makes a binding decision. Most disputes brought to the courts for resolution are settled prior to final adjudication through one of the other processes discussed here.
- **Participation.** Generally, one party chooses to use a court as a forum to resolve a dispute and the other party or parties are compelled either to participate or to accept an adverse “default” judgment.
- **Outcome. Compulsory.** All parties are compelled to accept the ultimate judgment of court or to suffer penalties.
- **Confidentiality. Not confidential.** Generally, communications and documents used in legal disputes become part of a public record. Much of the process is open the public and the press.
- **Control. Adjudication is a formal process.** The parties have little or no control over the process and do not control the nature of the outcome.

INTERESTS- RIGHTS – POWER

Power, Right, and Interests all have important roles in the resolution of conflict. Rights are often integrally related to either power (e.g., rights which can be enforced by the power of law or rule) or to interests (e.g., rights as related to interests in being treated fairly, equitably, or in a dignified manner).

Interest based focus has the best potential to achieve a solution that is uniquely tailored to the individual and joint desires and needs of the parties. If a mutually satisfying, voluntary interest based outcome can be achieved, the assertion of power or rights can become unnecessary.



Note on Conflict Resolution: Power, Rights, and Interests

A conflict begins when one “party”¹ makes a claim or demand on another who rejects it. The conflict may arise from an endless number of scenarios. It may be about a grievance, such as perceptions about being treated unfairly by someone. It may also be a transaction, such as an attempt to concur on the value of a product or service. The *resolution* to a conflict might also take many shapes.² It may take the form of an agreement negotiated by the disputants, or the resolution may be a decision rendered by a neutral third party. Alternatively, the conflict may be resolved by one disputant choosing to abandon the claim or, alternatively, a by his or her opponent’s choice to allow it.

A conflict resolution method that focuses primarily on the needs and concerns of the parties in conflict is called an “**interests-based**”³ procedure. When disputants adopt an interests-based approach, they do so with the understanding that their objective is a solution that satisfies all concerned. The negotiators focus on mutuality (satisfaction for both sides) because their aim is to reveal *both* “positions” (stated demands) as well as “interests,” the underlying issues and feelings which may otherwise remain unexpressed or concealed in a particular dispute. For example, a disputant may take the *position* of objecting to a change in her job responsibilities. Her manager may take the *position* that she must perform the job as instructed. If the parties focus only on arguing their respective positions on the new arrangement, they may miss the opportunity to discuss any *interests* the employee has about adapting to the change in her work day, or the *interests* the manager has concerning pressure from her own boss to make immediate changes in the office routine. Information on the interests of both parties is needed before the true concerns of the disputants can be appreciated and mutual solutions can be developed.

¹ People involved in a conflict (individuals, teams, organizations, or nations) are commonly referred to as “disputants” or “parties” in negotiation analysis. A person who is neutral about the outcome but assists in some way in helping the parties reach agreement is called a “third party.”

² There has been ample research on the topic of conflict resolution processes and systems. Some key sources to consult include the following: Cathy Constantino and Christina Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations*, (Jossey-Bass Publishers, 1996); William Ury, Jeanne Bret, and Stephen Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, (Jossey-Bass Publishers, 1988); Slaikeu, Karl A., and Ralph H. Hasson. *Controlling the Costs of Conflict: How to Design a System for Your Organization*. San Francisco, CA: Jossey-Bass Publishers, 1998; Stephen Goldberg, Frank Sander, and Nancy Rogers, *Dispute Resolution, Negotiation, Mediation, and Other Processes*, (Little Brown, 1992).

³For a detailed discussion of “interest-based” bargaining, see Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, (Random House, 1981); R. Walton and R. McKersie, *A Behavioral Theory of Labor Negotiation: An Analysis of a Social Interaction System*, (McGraw-Hill, 1965); D. Pruitt and S. Lewis, *Development of Integrative Solutions in Bilateral Negotiation*, (Journal of Personality and Social Psychology, VOL 31, pp. 621-633, 1975).

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A conflict resolution method that focuses primarily on standards or established rules is called a “rights-based”⁴ procedure. There are often relevant measures—such as the prevailing rate for signing bonuses for new hires—that exist to guide disputants toward a fair outcome. When people in conflict choose to rely on standards or “rights,” they commonly do so because it may seem either sensible and/or more persuasive to them to discuss a benchmark which has some legitimacy outside of their own dispute. Some of these “rights” go beyond common practice and are formalized in law, policies, or contracts. Other rights are closer to what we might consider “norms,” socially accepted standards of behavior within a particular culture for such concepts as “reciprocity,” “precedent,” “ethics” and “fairness.” Sometimes rights are unclear. Usually, the lack of clarity is because there are different—and somewhat contradictory—standards that might apply and that might be appealing to only one of the disputants. Reaching agreement on rights, where the outcome will determine who gets what, can, therefore, often be difficult, leading the parties to turn to a third party to help them determine whose position has more merit. Common “rights” procedures that involve a third party are adjudication (a third party has the power to adjudicate (judge) and hand down a binding decision) and mediation (a third party manages the agreement-seeking process and may provide general information about applicable standards, but does not have the power to decide on the content of the agreement).

A conflict resolution method that focuses primarily on power is called a “power-based” procedure because it involves resolution of the dispute based on the resources each side both has available and has the capacity and willingness to use.⁵ Power is often defined as the “...ability to achieve outcomes you desire—get things done in the way you want them to be done.”⁶ For example, a co-worker may hold a position in an organization that allows her to withhold benefits in some tangible way that worsens the other party’s worklife. If the conflict becomes long-lasting or emotional, disputants may choose aggressive behaviors that range from exchanging insults to sabotage, even escalating to open warfare.

In practice, parties in conflict will frequently draw from components of all three procedures—some discussion of interests, some reliance on rights, and some attempts to use power. There are, of

⁴ For a discussion of “rights-based” procedures, consults the following sources: Jessica Jameson, *Employee Perceptions of the Availability and Use of Interest-Based, Rights-Based, and Power-Based Conflict Management Strategies* (*Conflict Resolution Quarterly*, VOL 19, No. 2, 2001); Stephen Goldberg, Frank Sander, and Nancy Rogers, *Dispute Resolution, Negotiation, Mediation, and Other Processes*, (Little Brown, 1992).

⁵ Some good sources to consult for a discussion of the concept of power in negotiations within organizations include: William Zartman and Jeffrey Rubin, ed., *Power and Negotiation*, (University of Michigan Press, 2000); R. Pinkley, M. Neale and R. Bennett, *The Impact of Alternatives to Settlement in Dyadic Negotiation*, (*Organizational Behavior and Human Decision Processes*, VOL 57, pp.97-116).

⁶ G. H. Salancik and Jeffrey Pfeffer, *Who Gets Power and How They Hold On To It: A Strategic-Contingency Model of Power*, (*Organizational Dynamics*, VOL 5, pp.3-21, 1977).

course, many responses to conflict. Two common alternatives to the processes outlined in this note are avoidance, a refusal to acknowledge or engage in the problem; and unilateral decision-making, in which one of the disputants requests (or allows) a third party to independently decide on an outcome to the dispute without a formal process.

So, what may be the likely outcomes of these different approaches that you should be aware of before you begin to formulate a strategy⁷ of your own? Focusing only on who is right—as in litigation and arbitration—or on who is more powerful—as in sabotage or unilateral decision-making—risks leaving at least one party perceiving herself as the loser. A party who feels she has lost is more likely to experience a recurrence of the same conflict and, further, is more likely to re-engage in purely positional or even destructive conflict behavior in future disputes with her opponent.

The experience of using the problem interests-based approach challenges negotiators because it requires time, information sharing, and at least minimal trust. The result, when the interaction is successful, is that negotiators typically have a higher level of *mutual* satisfaction and a lower rate of conflict recurrence than if they had chosen processes centered on determining rights or power. A related benefit of interest-based discussions is that parties tend to have an easier time initiating any necessary re-negotiation or introducing the idea of aiming for mutual satisfaction in new negotiations. That said, not all disputes can be—or should be—resolved by reconciling interests. Rights and power procedures can sometimes accomplish an outcome when interests-based procedures cannot. This is especially true when the parties have weak communication skills or are inexperienced in using problem solving techniques.

In sum, there is not *one* magic formula for managing conflict. Assess your own (and your opponent's) experience, motivation, and skill alongside the limitations and advantages of each of the resolution procedures available to you before formulating a plan. If conflict *resolution* is your goal, the more effective and functional approach to attempt is one where most of the issues in dispute are resolved by reconciling interests, some by means of determining rights, and the fewest of all through the use of power struggles.

⁷ Two good sources to consult on the topic of planning a strategy for conflict resolution are: D. Pruitt, *Strategic Choice in Negotiation*, (*American Behavioral Scientist*, VOL 27, pp. 167-194); L. Putnam and M. Holmer, *Framing, Reframing, and Issue Development*, (L. Putnam and M. Roloff, eds., *Communication and Negotiation*, pp. 128-155, 1992).

PRINCIPLED NEGOTIATION

From Getting to Yes
By Roger Fisher and William Ury

- ***Separate the People from the Problem***
 - Raise the issue with [the other side] explicitly... 'Let's look together at the problem of how to satisfy our collective interests'.
 - Sit on the same side of the table... Try to structure the negotiation as a side-by-side activity in which the two of you- with your different interests and perceptions, and your emotional involvement- jointly face a common task.

- ***Focus on Interests, not Positions***
 - Positions are specific defined actions or sets of actions in the form of offers (I will give to you or do for you...); demands (you must give to me or do for me...); proposals, refusal (I will not do for you or give you...) etc. It is very probable that two positions will be incompatible with one another.
 - Interests are broader, general goals that the articulated positions are intended to address. By identifying one's own and the others' underlying interests, a broader range of actions may be discovered that address a larger "basket" of both parties interests.

- ***Invent Options for Mutual Gain***
 - Separate inventing from deciding. Use something like "brainstorming." Don't judge the ideas people bring forward, just get them on board.
 - Broaden the options on the table rather than look for a single answer.
 - Search for mutual gain. In a negotiation, both sides can be worse off and both sides can gain. It's not about "I win" and "you lose".
 - Find ways to make the other party's decisions easier. Successful negotiation requires both parties to agree. How can you achieve your interests while also fulfilling the others'?

- ***Insist on Using Objective Criteria?***
 - Frame each issue as a joint search for object criteria.
 - "[Use] reason and be open to reason" as to which standards are most appropriate and how they should be applied.
 - "Never yield to pressure", only to principle.

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
 - B. The Critique of Getting to YES

- 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.

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.

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.

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).

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

USEFUL TOOLS AND CONCEPTS FOR MEDIATORS

Distributive and Integrative Bargaining

Distributive

Parties see the goal of the negotiation process as determining how a fixed set of resources should be allocated. More for one party means that there must be less for the others, like slices of a pie.

Integrative

Parties seek a solution that is a greater than the total of the initially perceived set of resources. Through discovery and introduction of alternative resources for exchange and beneficial trade-offs, parties arrive at a solution that minimizes, or maybe eliminates the need for compromise.

Trade-offs

A mediator listens with a trained ear to discover alternative dimensions or "currencies" for exchange. The staff of "give and take" can include money, goods, services, expressions of feelings or acknowledgment, or social behaviors. Sometimes, when one of these "currencies" has greater value to one party than cost to another, such exchanges can have the effect of "expanding the pie." The more dimensions of exchange that are considered, the more likely it becomes that a mutually beneficial exchange can be achieved.

Positions and Interests

Positions

Positions are firm demands, or restrictions about what one's self or others shall do. By focusing on a *position*, it becomes easy to lose sight of valuable alternative options. Where parties' *positions* are incompatible with one another, impasse is likely.

Interests

Interests are the broader needs that a party's *positions* are intended to address. By discovering and addressing one's own and other's *interests*, one can discover alternative proposals that might more fully satisfy both parties.

Skilled Listening

A party or mediator discovers another's interests and alternative dimensions for exchange largely by listening skillfully. Often parties express these interests or alternatives subtly or unintentionally. A mediator's ear becomes "tuned," through training and experience, to pick up these expressions.

BATNA

One of a mediator's fundamental roles is as a decision coach. Every choice anyone makes carries possible benefits and possible risks. Parties generally choose the option that they feel will probably produce the best outcome from them. In mediation, a party faced with the choice of putting a proposal on the table, or accepting someone else's proposal, needs to weigh the benefits and risks of that proposal relative to what can be accomplished if the mediation fails, or the "Best Alternative To a Negotiated Agreement" ("BATNA").

CHALLENGING THE TRIAL BATNA

Be Specific. Do not just point out in a general way that a person might not triumph in trial.

Step 1. *How are you likely to be challenged if his doesn't settle and goes to trial?*

- a. Invite the party to anticipate: What [arguments, testimony, evidence] can you anticipate that the other will present to the court?
- b. It's ok to direct attention to overlooked challenges: It seems to me- tell me if you think I am wrong- that the other may offer this [argument, testimony, evidence] to the court.
- c. How do you think you would respond to those challenges?
- d. What [argument, testimony, evidence] will you present to the court?

Step 2. *Do you feel that these challenges place you at any risk?*

- a. Do you think there is a chance that the judge might be persuaded by the other's [argument, testimony, evidence]?
- b. Even if you do not feel as though any individual [argument, testimony, evidence] puts you at risk, might the totality place you at risk?

Step 3. *Is there anything you would like to achieve in this mediation that might be preferable to that risk?*

- a. Is there something you would like to propose that would be preferable?
- b. What might that be?
- c. Perhaps some new idea? Perhaps a compromise?

Step 4. *Perhaps, if you go to trial and win, you will feel vindicated. If you lose, will you say to yourself, "I am glad that I stood up for what I believed in," or will you say, "I wish I had worked it out when I had the chance."?*

FOCUS ON INTERESTS AND POSITIONS IN MEDIATION

**A process that focuses on
*positions and neglects interests***

- Parties press for concessions from the other side and resist making concessions themselves.
 - Making concessions is related to losing face.
 - Parties fail to discover alternative approaches to resolving their disputes.
 - Impasse is likely.
 - If conflict is resolved there is likely to be a clear loser.
-

**A process that focuses on
*interests and neglects positions***

- Parties gain an understanding of one another's wants and needs.
- Process stagnates, failing to move from learning and understanding to formulation of a plan or agreement.
- Parties become frustrated and alienated from the process.

**A process that addresses *both*
interests and positions**

- Parties use their understanding of interests as a basis to propose a variety of offers.
- Process alternates, as needed, between broad based discussion of interests until new options are discovered and exchanges of proposals that address new understandings of interests.
- The probability of reaching an agreement that addresses both parties' interests are improved.

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 Mediation Case Scenarios

Scenario #1

The mediator knows the lawyer for one of the parties; the lawyer was a college classmate of the mediator, 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 mediator, and counsel for Party A issues a deposition subpoena, ordering the conciliator to testify about the discussion in the mediation and to bring her notes from the mediation session. Party B opposes the testifying of the mediator.

Scenario #3

In a business divorce case, Partner A discloses to the mediator 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 mediator not disclose this information to her partner or she will quit the mediation.

Scenario #4

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

Scenario #5

In an unsafe-conditions case, the mediator 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 mediator 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 mediator?
- C. How would you do it? What would you say to the parties? (Role play this in your small group.)

**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.

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 writing 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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A WORKING DEFINITION OF OFFERS

- **An offer is a fixed set of actions proposed by a party to a dispute. It can consist of...**
 - A demand or request for action by another. You must do this...
Example: You must come at reliable time when you pick up our children.
 - A restriction on another's action. You must not do this...
Example: You must not play loud music in you apartment.
 - An insistence or request that one's self will take an action. I will do this...
Example: I will play music in my apartment at night.
 - An insistence or proposal that one's self will not take an action. I will not...
Example: I will not do any further repairs on your boat.

- **The action can be part of an exchange – giving or receiving something.**
 - I will pay you \$285.43
 - You must pay me \$18,355.00
 - I will give you the parts for an exhaust system
 - You must give me 18 pounds of dried cranberries.
 - You will allow you to have access to my property as far as eight feet to the west of the apple tree.

- **For the purpose of this discussion, the following terms all are offers and all consist of a set of state actions:**
 - Offer
 - Proposal
 - Position
 - Demand
 - Refusal

- **The final agreement in a mediation is usually a statement of an offer (a set of action) that all sides can support.**

THE MEDIATORS ROLE IN FACILITATING EXCHANGES OF OFFERS

In many mediations, parties will move in a natural and spontaneous way into a productive discussion and exchange of offers. When they do not, the mediator can guide the process through the following sequence.

1. At the start of many mediations, parties approach the mediation in positional terms, sometimes deeply entrenched. In this circumstance, the mediator's role is to broaden the discussion, encouraging parties to think about and communicate their broader interests.
2. It is wise for the mediator to give parties a chance to hear one another's initial aspirations near start of the mediation. This should be done before the end of the initial joint session, even if private sessions are used. Parties might state these aspirations in either interest based or positional terms.
3. After the parties express their initial aspirations, which are almost always apparently incompatible with one another, the mediation should generally focus on discovering and understanding broader interests, using tools such as open-ended questions and active listening.
4. Once parties have communicated and gained some understandings of one another's perspectives, interests, and attitudes, if the parties do not move on their own initiative to a discussion and exchange of specific options (or offers), the mediator can inquire of the parties if such a discussion seems like a sensible next step. *This is an important transition point in a mediation.* Often, if there is an extended period of repeated expressions of perspectives, interests, and attitudes without a sense of achievement through negotiation, parties will grow frustrated and impatient with each other and with the process, often resulting in escalation of the conflict.
5. Once parties have exchanged a series of offers but have arrived at an impasse, failing to reach a commonly acceptable resolution, the mediator should again broaden the discussion, encouraging the parties to consider, once again, a broader range of perspectives, interests, and attitudes.
6. The mediator can help the parties to cycle between 4 and 5 above, alternatively broadening and narrowing the focus of the discussion. The result might be a final, mutually acceptable proposal, which can constitute an agreement.

INTRODUCING OPTIONS IN MEDIATION WHILE PRESERVING PARTIES' FREEDOM OF CHOICE

When working under time pressure, mediators often feel it is necessary to introduce options in order to move the process along. However there is great risk that any suggestion by a Housing Specialist will be compelling to parties for some of the wrong reasons. Parties will often be influenced by a strong tendency to comply with authority, defer to assumed expertise, or to conform to the opinion of a group (as would be the case if a landlord, his lawyer, and a mediator, all appeared to favor a certain outcome.) Mediation outcomes can be more satisfying if options are generated by the parties and, generally, mediators will exercise a great deal of patience to allow this to happen. But, many mediators will eventually fall back to introducing options if the parties fail to do so, cannot reach agreement based on their own proposals, or a decision must be made in short order. When putting your own ideas forward, pitch them like softball, underhand, slow, as questions and with no insistence.

Here are some ways to introduce proposals that preserve parties' self-determination:

- As important as anything you say, is the tone and demeanor you present to the parties. Appear humble, rather than authoritative. Parties should feel empowered to disagree with, modify, or reject your proposal. For example, *I don't know if this idea is worth considering from your perspective but given our short time one thing you might think about is...*
- Any proposal you make should be informed by your understanding of all parties' interests and should be tailored to, hopefully, address those interests.
- If you are concerned that your proposal might make one party feel put "on the spot" or at a negotiating disadvantage, introduce it in a private session with that party.
- Start out with broad, non-specific ideas that encourage parties to take initiative to "fill in the blanks." Only progress gradually to more specific proposals if you need to.
- Offer a menu of options for parties to choose from, rather than a single idea. For example, if parties are concerned about when a rent arrearage will be paid, a mediator might say, *Oh, I don't know. You could offer [or demand] payment over a week, a month, six months, a year...*
- If you use the "menu" option (above), don't assume that the parties are even in the same ballpark as you. Enable them to select the settlement range in their interest by including extremes. So the previous example could become, *Oh, I don't know. You could offer [or demand] payment today or over a week, a month, six months, a year, or many years.*
- As a last resort, you can reduce the menu to options that you feel, in your experience, are realistic, as in, *While I am not in a position to judge what is in your best interest, I can give you a sense of how others in similar position have acted...*
- In private sessions, ask parties how they might feel if the other were to make a certain proposal. If they respond that it would be acceptable, ask if they want you to offer that to the other party.

SOME GENERIC COMPONENTS OF MEDIATED AGREEMENTS

Mediated agreements can take a great variety of forms and can address a great variety of issues. Following is a list of examples.

Agreements to do things or make exchanges that resolve the conflict to all parties' satisfaction within a defined period of time:

- Make money payments.
- Accept money payments.
- Exchange any of an infinite potential array of goods or service.
- Conduct (or restrain from conducting) any of an infinite potential array of acts or behaviors.

Agreements to conduct a process over time that has the potential to resolve the dispute:

- Continue negotiation (perhaps through ongoing mediation or other "ADR" processes.)
- Conduct investigations to discover information that is prerequisite to settlement.
- Parties provide others with information (perhaps documents, or other forms of evidence) that is required before a settlement can be reached.
- Trial periods where various commitments can be tested.
- Endeavor to engage additional parties whose participation is viewed as necessary for settlement.
- A time period to consider or consult about the desirability of proposed resolutions.

Agreements that effect the disposition of legal or administrative matters (usually to dismiss current claims and/or waive appeals or future claims):

- Complaining party withdraws or requests withdrawal of a complaint.
- Complaining party waives rights to reinstate complaints.
- Responding party waives rights to initiate complaints (counter-claims).
- Either or both parties waive rights of appeal.

Agreement that do not resolve that dispute, but mark the progress made toward resolution.

- Express new understandings of facts or perspectives.
- Express overriding principles will that govern a relationship.
- Any of the elements of the preceding sections can be part of such an "interim" agreement.

SOME ASPECTS OF WELL WRITTEN AGREEMENTS

- **The true intentions of the parties.** Most importantly, an agreement should represent the true intentions and understanding that the parties have arrived at. If, as the agreement is being written, the parties differ about the language to be used, this can represent truly unresolved issues that the mediator should address with the same energy and enthusiasm as the original mediation. At this late stage of the process, it is an easy mistake for the mediator to dismiss these remaining differences as trivial or petty.
- **Commitments to actions.** The meat of an agreement is usually a commitment to a set of actions (non-actions), such as giving and accepting certain exchanges of things or money and promises to do (or not do) specific things. However, often agreements also express mutually understandings about agreed to principles and the underlying purposes of the agreement. Such statements can offer guidance to parties in the case of future differences about how the agreement should be interpreted or in case of other, future disputes.
- **Clear and logical.** The agreement should be clear and logical. It is sometimes useful to organize the agreement into clauses and sub-clauses, similar in form to an outline. Clauses can be organized into categories. It is often sensible to lay out the commitments in chronological order.
- **Contingencies.** The strongest agreements contain simple commitments, without some parts being contingent on others. However, contingencies are often a demanded and accepted part of agreements. For instance, one party may not be willing (or able) to do something, until the other has completed a prior act. Such dependencies and chronologies should be clearly described in the agreement.
- **Specific.** The agreement should be as specific as the parties need it to be in order to avoid future misunderstanding. The mediator should explore with the parties apparent ambiguities or uncertainties that might arise under the agreement. However, parties often choose to accept certain ambiguities and uncertainties in order to smooth over currently unresolvable aspects of a larger agreement. Though such ambiguities and uncertainties can be treacherous in the future, a mediator should accept them as long as the parties understand and accept the risks involved. In general, a mediator should respect parties' informed choice to trust or to accept risks.
- **Recognize mutual contributions.** An effort should be made for the agreement to represent the contributions of all parties. However, the attempt to make the agreement appear evenhanded should not outweigh the need for clarity and logic. Sometimes, all the acts committed to may appear to represent contributions by only one side. In such a case, it is important for the agreement to acknowledge the contribution made by the other side's *acceptance* of the other's acts. For example, if a dispute is based on a legal suit for a \$50,000 dollars, and a settlement is for \$20,000, it may appear that the defendant is making the only contribution by the act of "paying \$20,000." The agreement should also recognize the plaintiffs' contribution by "accepting" the payment.

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.

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.

- **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).

- **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."

- **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.

- 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 caught fish as being bigger than it was.

Cognitive Barriers to effective negotiation and how to Overcome Them

by Dwight Golann

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Students at Harvard are preparing to negotiate the settlement of a personal injury case. Before they begin, the students are told to make a private assessment of the plaintiff's chances of winning based on their confidential bargaining instructions. What the students don't know is that there is nothing confidential about their information: Representatives of the plaintiff and defendant have received exactly the same instructions. Since both sides have the same data, they should logically come out with the same answer—but this is not what occurs.

In fact, hundreds of law and business students told to negotiate for the plaintiff assessed her chances of winning at nearly 20% higher than did the students assigned to the defense (the figures appear on page 51). When they were asked to estimate the damages that a jury would award the plaintiff if she did win, there was a similar disparity: Plaintiff bargainers estimated her damages at almost \$100,000 higher than did the defense negotiators.

What caused these distortions? It was not that the negotiators were uninformed about the case, since they all had the same information. Nor was it due to their lack of experience: When I posed the same problem to experienced litigators in training to become mediators, a similar pattern emerged: Lawyers assigned to the plaintiff were consistently more optimistic than those assigned to the defense. Experiments in other settings also confirm the existence of an "advocacy effect" in case evaluation.

In real-life negotiations lawyers on opposing sides often arrive with sharply differing assessments of the odds of winning in court. In my experience as a mediator, the sum of these estimates commonly totals well over 100%. Even allowing for the inevitable "puffing" that occurs in bargaining, both sides honestly believe that they have a better than even chance of prevailing. These variances in perception obviously can affect the outcome of a

negotiation, since bargainers who value a case differently will find it very hard to agree as to what constitutes a "fair" settlement.

These and other hidden barriers to successful negotiation lie in the domain of cognitive psychology, the science of how people assimilate information and make decisions. This article focuses on four common cognitive obstacles that pose challenges even for experienced negotiators and mediators, and gives some practical ideas about how to overcome them.

Selective Perception

The first factor that explains the results at Harvard, as well as problems that arise in real-life bargaining, is that negotiators often miss key data in the case that would be apparent to an outsider. This phenomenon, known as "selective perception," happens in this way: Whenever we encounter a new problem, we must interpret a stream of unfamiliar, often conflicting data. We respond by instinctively forming an hypothesis about the situation, then organize what we later see and hear with the help of that image. The problem is that our hypothesis also operates as a filter, protecting us from conflicting data by automatically screening it out—which in turn reinforces the belief that our initial view was correct.

Selective perception is a universal phenomenon. Henry David Thoreau was probably thinking about it when he said, "We see only the world we look for." One typical (and embarrassing) example occurred to me and my wife around a neighbor's party invitation. We received the invitation in late June, complete with a red, white and blue border of flags and firecrackers. We arrived on the Fourth of July—only to find our neighbor's house completely empty. Back at home, we looked again at the invitation: It plainly said "Saturday July 3." But we hadn't seen the date because we already "knew" when the party would be held from glancing at the invitation's border. Selective perception affects lawyers and clients as well as partygoers.

Every piece of litigation involves a story, and lawyers usually hear only one version of that story from their client. Based on this data, they tend to form an hypothesis about the dispute. In many instances selective perception then takes over to "protect" both lawyers and clients from the dissonance of conflicting evidence. How can you address this problem?

- Don't misinterpret this behavior as intentional. If your

opponents are hobbled by selective perception, they are not consciously disregarding facts that are clear to you: Rather, they are unable to hear or see your evidence at all.

- Instead of repeating yourself, listen to the other side—then summarize what you have heard (“Let me be sure I’ve heard you right...”). You should feel free to state clearly that you disagree, as long as you make clear that you’ve heard your opponent. As a mediator, I find that litigants are often surprised and disarmed to realize that an adversary has actually listened to them. Moreover by listening, you create an implicit bargain: Your counterpart should reciprocate by listening to you.

- Ask questions focused on points that your adversary has missed, using a reasonable, let’s-review-the-pros-and-cons tone. This will usually be more effective than the aggressive questions that litigators are trained to pose. Your goal is to engage the other side in a genuine discussion.

- Supplement your presentation with visual aids. An opponent who is not able to “hear” you will sometimes respond to a chart or exhibit. As a mediator, I have seen this kind of “deafness” cured by an advocate’s deft use of exhibits. Enlarged or color documents can be especially effective for this purpose.

Optimistic Overconfidence

Assessing the value of a legal case requires predicting events that are uncertain, for example, how an unknown jury will react to evidence that may or may not be admitted. These assessments are often unreliable. For one thing, people are consistently overconfident about their ability to assess uncertain data. To demonstrate this phenomenon I sometimes ask the audience to answer a series of questions about which they are likely to know almost nothing. Almost every audience answers more than half of my questions incorrectly. For example, I might ask them, “What is the diameter of the sun?” To make it easier I tell them to pick a range of numbers wide enough apart that they have a 90% chance of being right (e.g., “10-1 billion miles” would almost certainly be correct). One would think that almost everyone would select a range that was wide enough. But most people answer with ranges that are too narrow—for example, “400,000-500,000 miles.” (The actual diameter of the sun is 861,400 miles).

Why is this? The problem is that when we don’t know something—even a fact that we aren’t expected to have at our fingertips—either we are embarrassed to admit our ignorance or simply feel a competitive urge to be right. So we give a more precise answer than our knowledge can

support: We are overconfident, in other words, about our ability to assess uncertainty.

There is a related problem. When people in an uncertain situation are asked to estimate the likelihood of a good or bad outcome, they consistently underestimate the chances of an unfavorable result. The reason, it appears, is that we like to believe that we are in control of events and thus able to bring about good results, even when we cannot.

These tendencies become even stronger when the person making the judgment acquires a personal stake in the outcome. In psychological experiments, for example, subjects who have wagered that a horse will win a race are typically more confident, both about their ability to handicap races and about the chance that their chosen horse will win, than are people who have not placed a bet.

How do these forces affect negotiations over lawsuits? Lawyers are often asked to estimate the likely outcome of court proceedings at a point when they have little basis for offering an accurate assessment. In such situations, to maintain their reputations as expert litigators and to avoid appearing ignorant to a client or another lawyer, they are likely to offer an overoptimistic estimate, and have more confidence in the correctness of their forecast than their knowledge supports. To make matters worst, both lawyers and clients “bet” on their cases by investing substantial amounts of time and money in them, thus accentuating the inherent tendency to err. How can a negotiator or mediator overcome optimistic overconfidence?

- Work to distance the “players” from their “horses” by lessening the effect of their emotional attachment to the case. Try to induce the parties to discuss the dispute as an abstract problem rather than as the matter in which they have made a large investment. Break the case down into a series of issues rather than a simple question of value; this will also encourage analysis that is less affected by wishes and emotions.

- Take the focus off this particular dispute and analyze the range of results in similar cases. What do statistics say about possible outcomes for this sort of claim? People tend to think that their own case is “special,” an exception to the rule. By discussing large numbers of disputes, it becomes easier for litigants to appreciate the likelihood that their case will follow a similar pattern.

- Before you start to negotiate, carefully list both the strong and weak points of your case and analyze them one by one. Since few advocates are willing to share an honest analysis with an adversary, this technique is useful primarily

for internal discussions with clients, and during a mediator's private caucuses with disputants.

- Consider using "decision analysis," an analytic technique that helps to expose unreasonable assumptions and identify the cumulative impact of risk. Certain clients, such as accountants, engineers and some business executives, are especially likely to appreciate this kind of hardheaded quantitative analysis.

Loss Aversion

No one likes to lose, whether the issue is money or an abstract legal argument. Recent studies have made us aware, however, of just how strongly feelings of loss can affect bargaining decisions. The results of this research require modification of one of the pillars of modern negotiation—the search for "win-win" terms. Creating interest-based bargains is certainly valuable, but it turns out to be even more important that neither side in a negotiation feel that it has "lost."

To understand the impact of loss on bargaining, consider the following experiment: Students who had expected to attend a seminar without charge were told after they arrived that because of unexpected expenses, they would each have to pay \$20. They could, however, spin a roulette wheel, with three chances in four of not having to pay the \$20 and one chance of having to pay \$100. These odds discouraged gambling: Since the average cost of spinning the wheel was \$25, the smart choice was to pay the \$20. However, a large majority of students chose to spin the wheel. Having expected to pay nothing, they apparently experienced the demand for \$20 as an unwelcome loss, and were willing to take an unreasonable risk to avoid it.

This phenomenon, known as "loss aversion," affects legal bargaining because litigants usually enter negotiations with a clear view about what is the "right" settlement in their case. In effect they carry a mental benchmark about the expected settlement value, a figure that is often distorted by optimistic overconfidence and includes recovery of their legal expenses. For example, the plaintiff in a case that is objectively valued at \$75,000 may honestly believe that it is worth \$90,000. Since he has had to pay \$25,000 in legal expenses to pursue justice, the plaintiff may have a settlement benchmark of \$115,000 in mind. The defendant, however, may well see the same case as being worth only \$60,000, even before factoring his costs of defense. In situations like this one, no settlement is possible, either through direct negotiation or mediation, unless at least one party accepts an outcome that is significantly worse

than his or her internal sense of what is fair. This inevitably produces strong feelings of loss. To avoid that loss, litigants often elect to spin the roulette wheel of litigation, even when the objective odds are against them. What can be done to prevent feelings of loss from distorting negotiators' decisions?

- Be alert for selective perception: If information will lead a party toward a result that it views as a loss, the litigant may unconsciously fail to see it at all.
- Look for settlement terms that have not previously been discussed—especially items other than money. This is helpful for two reasons: First, because the other side has probably not attached a benchmark value to them, such terms will not trigger feelings of loss. Equally important, the new terms may help to distract an opponent from any concerns about losing. Henry Kissinger is said to have remarked that his key to mediating peace agreements in the Middle East was to make deals so complicated that neither side could decide who was winning. This is a form of "win-win" bargaining, but undertaken more for the purpose of diverting people's attention from feelings of loss than for the intrinsic value of the new terms.
- Don't be overoptimistic about obtaining a deal that requires a party to trade something that he or she had expected to keep in return for a new item, even if the trade seems to produce net value for the recipient. Studies suggest that people discount the value of gains and overvalue unexpected losses. Thus, the acquisition of a dollar feels as if it is worth only about half that sum, while the unexpected loss of the same dollar feels like the expenditure of two to three dollars.
- People feel losses and gains more when they occur in a series of small steps than if they take place as a single event. (Readers who believe that it hurts less to yank a bandage off than to peel it away bit by bit will understand this intuitively.) Similarly, people tend to feel that a series of small gains are more valuable than the same total gain provided in a lump sum. (Imagine taking small mouthfuls of a favorite dessert, as opposed to gulping it in a single swallow.) As a result, if you must propose terms that the other side will experience as a loss, you should bundle them together and offer them at one time. Similarly, negotiators should unbundle "gain" terms, offering them one by one for maximum impact.
- Characterize the situation in a different way, moving the listener's internal benchmark so as to reduce his or her feeling of loss. A person's internal benchmark is often entirely subjective or based on flimsy information. Thus, changing a person's benchmark ("re-framing," as mediators call it) can be effective in overcoming resistance to

settlement.

Example: A corporation sued a supplier over an allegedly defective product. After a year of litigation, the plaintiff's vice president was discussing a defense settlement offer with his outside counsel. The offer made objective sense to the litigator in light of the company's damages and the objective risk of losing at trial, but the executive refused to consider it. He insisted that any recovery had to include not only damages, but also the nearly \$50,000 that the company had paid in legal costs to bring the case. Indeed, perhaps because he felt responsible for the decision to sue, the executive seemed to care more about recovering the legal fees than the damages themselves. The company's lawyer was in a bind because she knew that there was no basis for seeking attorneys' fees in a breach-of-warranty case.

"You need to think about this like a hard-headed businessman," she argued. "At the point you came into my office, the defendant was offering you zero. You've made an investment in this case, and you're now being offered a return on it. How does the deal look—money in versus money out? What are the pros and cons of cashing out now, versus investing more and looking for a better payout later?"

After some resistance, the executive began to talk about what should be considered the "capital" in this situation, and gradually became less emotional. Eventually, with a few "sweeteners" that obscured the money terms, he decided to take the deal.

Reactive Devaluation

Imagine that you are defense counsel in a lawsuit. Your opponent is demanding that you pay \$100,000 to settle, but appears sure that you will never agree. Now you decide to offer that sum. Is your adversary pleased? To the contrary, her first reaction is likely to be that she has undervalued the case; it must be worth more than \$100,000, because you are the enemy and would never offer a fair deal.

We all have a tendency to reject offers made by anyone we see as an adversary, a phenomenon known as "reactive devaluation." Our instinctive response to an opponent's offer is reminiscent of Groucho Marx, who vowed never to join any club that would have him as a member. How can you respond to reactive devaluation when it occurs?

- Mediators have an enormous advantage because they are not subject to this problem. Over and over again I have seen litigants approach with open minds an idea that the mediator proposes when they would instantly reject the same proposal if it came from an opponent. (Of course, if a party sees the mediator as simply transmitting an adversary's offer, reactive devaluation will apply with full force.)

- The best approach is to arrange for a mediator, or another person whom your adversary perceives as neutral, to "adopt" your offer as his or her own. This may not be feasible, however: Often disputants will not agree to mediate, and even when they do, mediators are cautious about assuming responsibility for proposals, knowing that they will lose most of their effectiveness if either side suspects them of advocating a biased solution.

- If you can't arrange for a mediator to adopt your offer, you can still gain a moral advantage by suggesting that a neutral outsider review it for fairness. Your willingness to submit to outside scrutiny will be strong evidence that you view your proposal as objectively fair.

- Another option is to discuss the pros and cons of a proposal in the abstract, without actually offering it. Like B'er Rabbit, who pled not to be thrown in the briar patch, your very reluctance to endorse a proposal will sometimes make it more attractive to the other side.

- In some cases it may be possible to propose two packages that have equivalent value to you, and ask your opponent to choose whichever he or she prefers.

Conclusion

Advice about negotiation often focuses on conscious strategy and tactics. In fact, some of the most important factors affecting our judgments, and those of our negotiating partners, operate beneath the surface of our minds, outside our awareness. Knowing that these forces exist, and how to deal with them, will make you a more effective negotiator.

Note: Key research into the cognitive effects discussed here was done by Daniel Kahnem and Amos Tversky. For an excellent, in-depth analysis of how cognitive obstacles influence negotiation, see Richard Birke & Craig R. Fox, "Psychological Principles in Negotiating Civil Settlements," 4 Harv. Neg. L. Rev. 1 (1999).

Cognitive Distortions in Case Evaluation

Will the plaintiff win her case?

	Plaintiff's Counsel	Defense Counsel
Harvard Business	61%	43%
Harvard Law	65%	48%

If so, what damages will she recover?

Harvard Business	\$286,000	\$189,000
Harvard Law	\$264,000	\$264,000



"Psychological Impediments to Mediation Success: Theory and Practice"

21 Ohio St. J. on Disp. Resol. 281

The article examines four psychological biases that impede mediation success: optimistic overconfidence, attribution biases, framing effects, and reactive devaluation. Each bias is broken down into its psychological elements. The author then explains how the biases impede mediation, and offers interventions mediators can take to lessen the psychological effects of the biases on mediation.

Examples of **optimistic overconfidence** are the tendencies of people to think highly of themselves, viewing their skills as above average, hold greater expectations for the future, and think they are less likely than an average person to have something bad happen to them. People with optimistic overconfidence are less willing to settle in mediation because they like their litigation chances. When a dispute involves multiple issues, each party tends to focus on the issues he or she feel most confident about and ignores issues he or she feel less confident about but might be more likely to win. Optimistic overconfidence in attorneys presents a further problem because the attorneys would like the mediator to think the attorney believes his or her party will prevail in litigation. Along the same line, attorneys focus more on facts supporting their position and overestimate their skill when informing a client of his or her chances to prevail in litigation. Cases that are unsuccessful in mediation but settle on the courthouse steps show that optimistic overconfidence is likely present in all disputes.

Three interventions that are likely to reduce the psychological effect of optimistic overconfidence in mediation were proposed. Explaining the concept of optimistic overconfidence, allowing parties to reveal particular weaknesses in caucus to bring their confidence down to more

reasonable levels, and asking parties to view the other party's argument as a judge would are ways that a mediator can help a party "de-bias" himself or herself. By allowing parties to lay out all arguments and information that might come out in court the mediator gives parties a chance to "de-bias" each other. The final proposed intervention to reduce optimistic overconfidence involves the mediator actually confronting each party with his or her weaknesses in the dispute.

Attribution biases result from attributing causal meaning to behavior. Two types of behavioral characteristics were discussed. Dispositional characteristics are particularities in character or personality that one may control but ultimately generate a negative experience, resulting in the affected party growing angry. Situational characteristics are particularities outside the party's control, and should not result in the affected party becoming less angry than he or she would from an adverse party's dispositional characteristic. However, parties often mistake situational characteristics for dispositional, called "correspondence bias" or "Fundamental Attribution Error," which results in unnecessary anger. Naturally, an increase in anger is correlated with impasse (what the author calls the "malevolent utility function"). Parties exhibiting the malevolent utility function want to prevent their opponent from gaining through settlement, which leads an angry party to reject offers he or she would normally accept absent feeling anger. Furthermore, people do not like to view themselves as the "bad" one and become angrier when others take action that affects him or her negatively. When taking action in a dispute that harms the other party, however, the acting party does so because he or she believes the other party deserves such action. That increases emotions in disputes, which leads to anger and retaliation. Attribution biases also arise from a party assuming his or her point of view is the only true point of view, and that the other side views the dispute incorrectly. The author called that belief "naïve realism."

Attribution biases can make people unreasonably angry for the circumstance, and result in the absence of a bargaining zone because both parties believe their dispute must be litigated. The author proposed three ways mediators might intervene to lessen the psychological effect of attribution biases in mediation. Much like optimistic overconfidence, one approach would have the mediator explain the concept and consequences of attribution biases to the parties. A mediator might have both parties explain to each other their reasons for taking action while forbidding parties from blaming one another, and having the party that caused harm as a naive realist offer an apology. The third suggested intervention would have the mediator provide plausible explanations for the other party's behavior in caucus.

Framing effects are biases that result from a party's risk aversion. When given the choice between a certain and risky option, parties will most likely take the certain option. Framing effects impede mediation when two elements are present: the existence of both risky and riskless choices (with settlement being more riskless, and litigation more risky); and competing reference points (i.e., the expected value of adjudication). Examples of reference points include a party's financial position, and target values at which point a party chooses settlement over adjudication. Two proposed interventions to lessen the psychological effect of framing were allowing the mediator to change reference points so that each party views settlement as a gain rather than loss, and making each party aware of the transaction costs they would incur by forgoing settlement and engaging in litigation.

Reactive devaluation occurs when an offering party offers a concession, but the offeree views the offer as less desirable than had the offeror never made the offer. The author attributes this bias to reactance theory, which is basically a "grass is always greener" view of offers. Offerees might devalue offers because he or she: (1) views the offer as good for the offeror and bad for

himself or herself; (2) has a malevolent utility function where acceptance would reduce the value received; (3) hopes the offeror will concede more; or (4) thinks an attractive, but unrealistic, offer will be made. Reactive devaluation is most problematic when the bargaining range is narrow, and offers can be easily devalued to outside the bargaining range.

The author proposed four interventions to lessen the psychological effect of reactive devaluation in mediation. In one approach, the mediator "vouches" for the reasonableness of the offer if the party is devaluing due to the fear of private information or aspiration increases. Also, if a party is devaluing because he or she thinks the offer is nowhere near his or her goal, the mediator could offer his or her opinion of how close the offer actually is to what the party wants. Mediators could also propose settlement terms to prevent spiteful devaluation. Finally, mediators could make both sides evaluate possible settlements before allowing either side to make an offer. However, doing so might result in false evaluations that lead to unrealistic aspirations.

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.

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.



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.

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.

TYPES OF ETHICAL DILEMMAS MEDIATORS FACE*

*From Robert A. Baruch Bush, "The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications," 1994 Journal of Dispute Resolution 1, 9-10.

A. Keeping within the limits of competency

1. When "diagnostic" competency is lacking
 - (a) to diagnose a history of violence
 - (b) to diagnose a mental incapacity
2. When substantive or skills competencies are lacking

B. Preserving impartiality

1. In view of relationships with parties or lawyers
 - (a) after disclosure and waiver of objections
 - (b) when relationships arise after mediation
 - (c) when class or group "relationships" exist
2. In view of a personal reaction to a party in mediation
 - (a) Antipathy to a party
 - (b) Sympathy to a party

C. Maintaining confidentiality

1. Vis-à-vis outsiders
 - (a) reporting allegations of violence or crime
 - (b) communicating to a court or referring agency
 - (c) communicating to a party's lawyer
2. Between the parties
 - (a) when disclosure would prevent "uninformed" settlement
 - (b) when disclosure would break "uninformed" impasse

D. Ensuring informed consent

1. In cases of possible coercion of one party
 - (a) by the other party
 - (b) by the party's own lawyer/advisor
 - (c) by the mediator's "persuasive" measures
2. In cases of party incapacity
3. In cases of party ignorance
 - (a) of factual information known to the mediator
 - (b) of legal/expert information known to the mediator

E. Preserving self-determination/Maintaining nondirectiveness

1. When tempted to give the parties a solution
 - (a) at the parties' request
 - (b) on the mediator's own initiative
2. When tempted to oppose a solution formulated by the parties
 - (a) because the solution is illegal
 - (b) because unfair to a weaker party
 - (c) because the solution is unwise
 - (d) because unfair to an outside party

F. Separating mediation from counseling and legal advice

1. When the parties need expert information
2. When tempted to express a professional judgment
3. When a party needs a therapist or advocate

G. Avoiding party exposure to harm as a result mediation

1. When mediation may make a bad situation worse
2. When mediation may reveal sensitive information
3. When mediation may induce "detrimental reliance"

H. Preventing party abuse of the mediation process

1. When a party conceals information
2. When a party lies
3. When a party "fishes" for information
4. When a party stalls to "buy time"
5. When a party engages in intimidation

I. Handling conflicts of interest

1. Arising from relations with courts or referring agencies
2. Arising from relations with lawyers/other professionals

BUSH'S ETHICAL TENSIONS

- A. Competence
- B. Impartiality
- C. Confidentiality
- D. Informed consent
- E. Self-determination
- F. Role limitation
- G. Avoid harm
- H. Good faith
- I. Conflict of interest

Retrieved from <http://www.usdoj.gov/adr/workplace/pdf/dilemmas.pdf> on 15 October 2009

ETHICAL DILEMMAS

The following material on ethical dilemmas on the topic of self determination and legal advice in mediation are taken from the influential article by Robert A. Baruch Bush - "The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications," 1994 Journal on Dispute Resolution 1, pages 22-34.

A. PRESERVING SELF-DETERMINATION/MAINTAINING NON-DIRECTIVENESS

One of the central bases and values of the mediation process is party self-determination and control over whether, and on what terms, to settle disputes, without imposition from any outside authority.

The mediator facilitates the parties' problem-solving efforts, but is not supposed to be directive or controlling in any way. That is a key aspect of impartiality, which permits the process to educate and empower the parties rather than provide an externally imposed solution to the problem.

Despite this ethic of empowerment, many mediators experience great tension between the dictates of this principle and the desire to intervene more directly and substantively in certain cases.

In general, the question is when, if ever, the mediator can and should abandon the non-judgmental posture and be more directive.

The non-directiveness dilemma comes up in several different types of situations.

1. **Temptation to "give" the parties a solution.** In this situation, the parties have not yet agreed upon any solution, or have reached point of impasse. Here, the non-directiveness dilemma can arise because the mediator is tempted to give the parties a solution.

(a) The parties ask the mediator for a recommendation on how to end the dispute.

(b) In other cases, either before any agreement or when a point of impasse has occurred, the mediator thinks she can see a good or ideal solution that the parties have not seen but will find acceptable.

2. **Temptation to oppose a solution by the parties.** The parties have arrived at a solution of their own design, but the mediator believes that it is a poor solution to the dispute, and feels pulled to direct the parties away from it or, if necessary, to block it entirely.

There are a number of variations of this situation, corresponding to the type of quality concern the mediator sees. In most of the variations, there are overlaps between the non-directiveness dilemma, including consent and impartiality and separating mediation from therapy and legal advice.

(a) **Solution is illegal.** Sometimes the parties agree to a solution that is against the law, and the mediator is concerned about whether he should step in to prevent this from happening.

(c) Solution is unfair or unwise in mediator's judgment. Many times, even though there is no clear gross imbalance of power between the parties, what the parties agree upon is a poor solution in the mediator's judgment, because it is either unfair, lopsided, violates fundamental rights, or simply a bad idea. Therefore, the mediator feels impelled to intervene directly to prevent the outcome.

In general, beyond questioning the party making the "bad deal" to confirm that they fully understand and accept its terms, how far should the mediator go?

Should he suggest the need for legal advice, or even insist on it, if the party is unrepresented; if the party refuses to seek legal advice or is already represented, should he directly warn the party/lawyer that it is a "bad deal"; should he insist on a cooling off period before drafting the agreement to avoid hasty decisions; if all else fails, should he refuse to draft an agreement on the proposed terms?

Again, all of these steps help guard against unfair and unjust outcomes. But all of them, in varying degrees, deny self-determination, impose the mediator's values on the parties, compromise impartiality, and risk lost settlements and increased costs.

(d) Solution is adverse to the interest of an absent third party. This is a subset of the "agreement contrary to mediator's judgment" situation discussed above. However, since it is so frequently mentioned by mediators, it deserves separate mention. The situation is that the parties are making an agreement that, in the mediator's judgment, would adversely affect some absent third party, especially a vulnerable party such as a children. To avoid this outcome, the mediator feels impelled to intervene in a directive way.

Again, beyond questioning the parties as to their understanding and acceptance of the terms of agreement, how far should the mediator go in suggesting or requiring legal or family-counseling advice, warning or advising parties himself, or refusing to draft agreements?

The consequences of choosing one way or the other are also parallel to those discussed above, although here there is the special feature that the risk of injustice falls not on the parties themselves, but on (vulnerable) third parties. Therefore, the mediator's concern for fairness is not a matter of paternalism toward the parties, but a matter of protecting unrepresented (public) interests, and this may carry a stronger claim against the value of self-determination.

B. SEPARATING MEDIATION LEGAL ADVICE/ADVOCACY

Mediation is a unique dispute resolution process. It is distinct from adjudication and arbitration, and mediators are distinct from judges and arbitrators. More important here, it is distinct from both legal advice/representation; and mediators are distinct from lawyers in what they do.

Nevertheless, drawing the line between mediation and lawyering - is difficult at times.

the parties consult their lawyers (or that the lawyers take another look in the library)?

Should it make a difference if one or both parties are represented by lawyers, *i.e.*, should information be given only to unrepresented parties? Or should the mediator refrain from giving *any* legal information, no matter what?

If the mediator offers the legal information, or even indirectly challenges one party's knowledge of the law, he may by doing so direct or determine the outcome, as well as compromise his impartiality. He may also alienate any lawyers involved.

But if he withholds the information, he permits one or both parties to act without full knowledge and undermines informed consent. And whatever he does, one or the other of the parties is likely to feel injured by the mediator, because he either concealed a law that favored them or revealed a law that disfavored them.

2. **Professional judgment.** Another level of the dilemma involves the situation where the parties are considering a solution on which the mediator, by virtue of his expertise feels qualified to express a professional judgment or opinion, either in response to a question or on his own, and he sees that doing so could make a difference to the parties' decisions about what to do. **Here the issue is not just providing objective information, but expressing a subjective judgment.**

This is something that lawyers regularly do for their clients. But should mediators ever do this for parties? Many examples also raise non-directiveness questions, as discussed above.

However, the questions there concerned the propriety of mediator advice-giving as one form of directiveness, where the mediator is not speaking as an expert or professional. The questions here concern the propriety of the mediator specifically acting as "expert-advice giver," *per se*.

(a) Legal advice. Should the mediator express his professional legal judgment to one or both parties? Should he do so only if he qualifies it as a mere personal opinion, not a professional judgment? Or should he always refrain from expressing his own opinion, no matter how it is framed, even if he believes that one party is unwisely ignoring or giving up important legally protected rights? Does it matter whether or not the affected party has a lawyer?

Expressing the expert opinion risks undermining self-determination and compromising impartiality. Additionally, expressing legal opinions in mediation runs the risk of alienating the practicing Bar, losing their support for mediation, and exposing oneself to legal disciplinary action.

Refraining from expressing opinions, however, risks complicity in an agreement that compromises someone's legal rights. (If the mediator tries to avoid this dilemma by saying nothing but discontinuing the mediation, this simply shifts the problem to the non-



KEY ELEMENTS OF A SUCCESSFUL ROLE PLAY

Mediators

- Act and think like a mediator - facilitated process
- Talk about contested issues, settlement options, trial preparation
- Follow roleplay information
- Respond to the parties' concerns - probe interests
- Improvise but keep to the facts of the roleplay
- Respond to your coaches' suggestions
- Have fun
- Remember! We learn from our mistakes. Take risks!

Parties

- Get into your role - follow roleplay information
- 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 mediator"
- 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 mediator identify areas of concern for both parties?
- Did the mediator explore possible solutions with both parties?

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

MEDIATION ROLE PLAYING

- The purpose of the role-plays is to give participants a chance to learn...
 - ...by experiencing the various stages of a mediation as a mediator and a participant.
 - ...by confronting challenges in a mediation process.
 - ...by receiving feedback from coaches and other role play participants.
 - ...by observing and critiquing others.

- Mediator(s):
 - Remember that you are not obligated to conclude a role-play (or a real mediation) with an agreement. Try to understand and address the parties' interests.
 - In role-plays (like in real mediations) time usually is of interest to the parties. The time in role-plays is usually compressed. Try to remember to impose some discipline on the process. Watch the time. The role-play coach may ask you to "skip ahead" so you can confront different challenges.
 - There is a lot to think about and remember while practicing so many new skills. Try to remember to also be yourself and bring your natural caring and warmth to the process.
 - Try to not become defensive in response to feedback from your coach or the other role-play participants. Remember, the role-play is not a test; it is a chance to learn.

- Parties:
 - Try to be real. Think about the role not just in terms of the facts, but also in terms of how you think a person might really respond to her or his perception of the facts. What would your attitudes, your emotions, and your overall orientation to the dispute, the other party, or the mediators be? Have some fun! Be an actor.
 - Don't necessarily recite all of your role right at the start. Leave some challenge for the mediator to draw out some information.
 - Because this is a learning experience and time is somewhat compressed, it is important that you respond to actions the mediators take. If the mediator says or does something that would make your party more likely to soften his or her stand or to make a concession or proposal, then go ahead and do so. But don't be so easy that there is not enough challenge or learning for the mediators. This is a difficult line to draw and the role-play coach may give direction in this regard.

- Observers:
 - You are able to learn by observing the more and less successful tactics of the mediators without having to think about your own performance.
 - Make notes about these tactics and any other questions or comments you have.
 - Give your feedback in the debriefing sessions. What do you think helped or hindered the process? What might you have tried if you were the mediator?

Fishbowl Demo – Mediation 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 for mediation from court to the local community mediation.

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

Instructions for Sam

You are extremely upset about this! Pat has tried to stick it to you again! You cannot believe that he has kept the brochure funds all to himself when you were the one who developed it! What nerve! You were always the creative one – looking for new technology, new services, new ways to expand and grow the business. Pat was a stick in the mud. He just wanted to keep doing things the same way. He was like that when you were friends with him in dental school. That brochure was not a big deal when you put it together several years ago as a fundraiser for your dental school, but you work with the dental school alumnae association has definitely been a help to you professionally. You ended up hooking up with your current partners through the association.

The only reason you know about the brochure money at all is because you happened to bump into your former dental assistant who still works for Pat at the grocery store, and she happened to mention it to you. Otherwise, you never would have known about it.

When you mentioned this to your brother/sister-in-law, she/he agreed to file a lawsuit against Pat to force him to give you the money. Pat was always a tight wad - the only time he coughed up any money was to get rid of you and take over the business, and even then you ended up taking a lot less than the business was worth, because you needed the funds to buy into this new practice. With hindsight, you are not sure you made the right decision to join them. Besides, your family misses socializing with Pat's family.

Nevertheless, you are pleased that you were able to file this lawsuit and show Pat that you mean business. You are looking forward to the trial.

Additional Instructions for Sam:

1. The goal of this demo is to show that it is necessary during mediation to, not only explore the legal issues but also to probe and address the emotional/psychological issues and to engage the clients directly, not just the lawyers.
2. Let your attorney do most of the talking at first. Wait to speak until the mediator addresses you or if your attorney asks you a question.
3. Have a smug, superior, self-righteous attitude. Show this in your body language, and when you do speak. The mediator should pick up on this and try to engage you, win your trust and enlist you into addressing what is really bothering you (not the money so much as what it represents – your value, creativity, etc.) Say some nice things about Pat if given the opportunity.

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

Instructions for Sam's Attorney

You are Sam's brother/sister-in-law. You find the District Court suit for him because you think that Pat really took advantage of Sam during the dissolution. You also think that it is wrong for Pat to keep the brochure profits since it was Sam's brochure to begin with. Based on your reading of the partnership and dissolution agreements, Sam is entitled to the full amount, and that is what you are seeking.

You have not yet sought discovery from the Alumnae Association to find out the timing of the brochure sale, and if this case is going to be tried, you will need to do this and more. You are hoping that the two of them can settle this out of court. So far you have not charged Sam for your services, but you will need to start charging him if the case does not settle soon. It has been difficult for you to resolve this so far because Pat will not take your calls or respond to your letters. At mediation today, you are going to try to scare Pat into seeing that he has a weak case and that it will be costly for him to go through with a trial in this case. He is going to have to hire a lawyer to represent him.

The partnership agreement provides that the parties try to resolve disputes through mediation, and you did suggest this to Sam when he first talked with you, but Sam was too angry to listen. Maybe the mediator can get through to him. You probably would not need mediation if Pat were represented by a lawyer, and if the lawyer was a good one.

Additional Instructions for Sam's Attorney:

1. The goal of this demo is to show that it is necessary during mediation to not only explore the legal issues, but also to probe and address the emotional/psychological issues and to engage the clients directly, not just the lawyers.
2. You should do most of the talking at first, although you may want to let Sam tell some of his story. You want the initial focus on you and your legal assessment of the case. Sam will wait to speak until you or the mediator addresses him/her.
3. Focus initially on the strength of your legal case (and the weakness of Pat's.) Keep emphasizing this. Try to intimidate Pat. Tell him you would clearly win at trial, and even in mediation.
4. The mediator should pick up on this and try to move you to focusing on the underlying interests of your client (need for recognition, closure, relationship with Pat and his family, etc.) and working toward a settlement. Be open to mediation, but skeptical about whether it will work in this case because Pat has no lawyer.

**Fishbowl Demo -- Mediation Role Play
(Business Divorce Case)**

Instructions for Pat

You have known Pat for 10 years. You cannot believe how much she has changed! She used to be a great person. Now all she thinks about is money. You bought the business from him fair and square, when she said he wanted to leave. It's not your fault if she is unhappy in that new mega-practice.

You do not understand why he is making a "federal case" out of the brochure profits. Since then, she has published numerous articles and is in the process of writing a book. She could have cared less at the time that was developed, and you did contribute some to it. Anyway, whatever rights to the brochure existed passed on to you when you bought her out.

You believe that you have a strong legal case. You have read the agreements, and it is pretty clear to you that the profits are yours. You do not need a lawyer to tell you so. That brother/sister-in-law of Sam's is a pain. Trying to intimidate you with letters and phone calls! You are looking forward to hearing the mediator tell the two of them that they are wrong, and you are right!

If Sam had not brought this lawsuit, if he had just called you in a friendly manner and asked you about the brochure funds, then maybe you would have split them with him, but not now. He never even calls and asks about your family, and she is the godmother to your oldest son!

Additional Instructions for Pat:

1. The goal of this demo is to show that it is necessary during mediation to not only explore the legal issues, but also to probe and address the emotional/psychological issues and to engage the clients directly, not just the lawyers.
2. Try to match Sam's lawyer in arguing about the legal merits of your case. Keep asking the mediator if s/he agrees with you.
3. Have a calm, reasonable demeanor in your body language and when speaking. Do not bring up the personal stuff with Sam unless the mediator asks about it. The mediator should inquire about your relationship and history with Sam. Be complimentary toward Sam where appropriate, but also talk about how you have been hurt by his actions as well (by his wanting to end the partnership.)

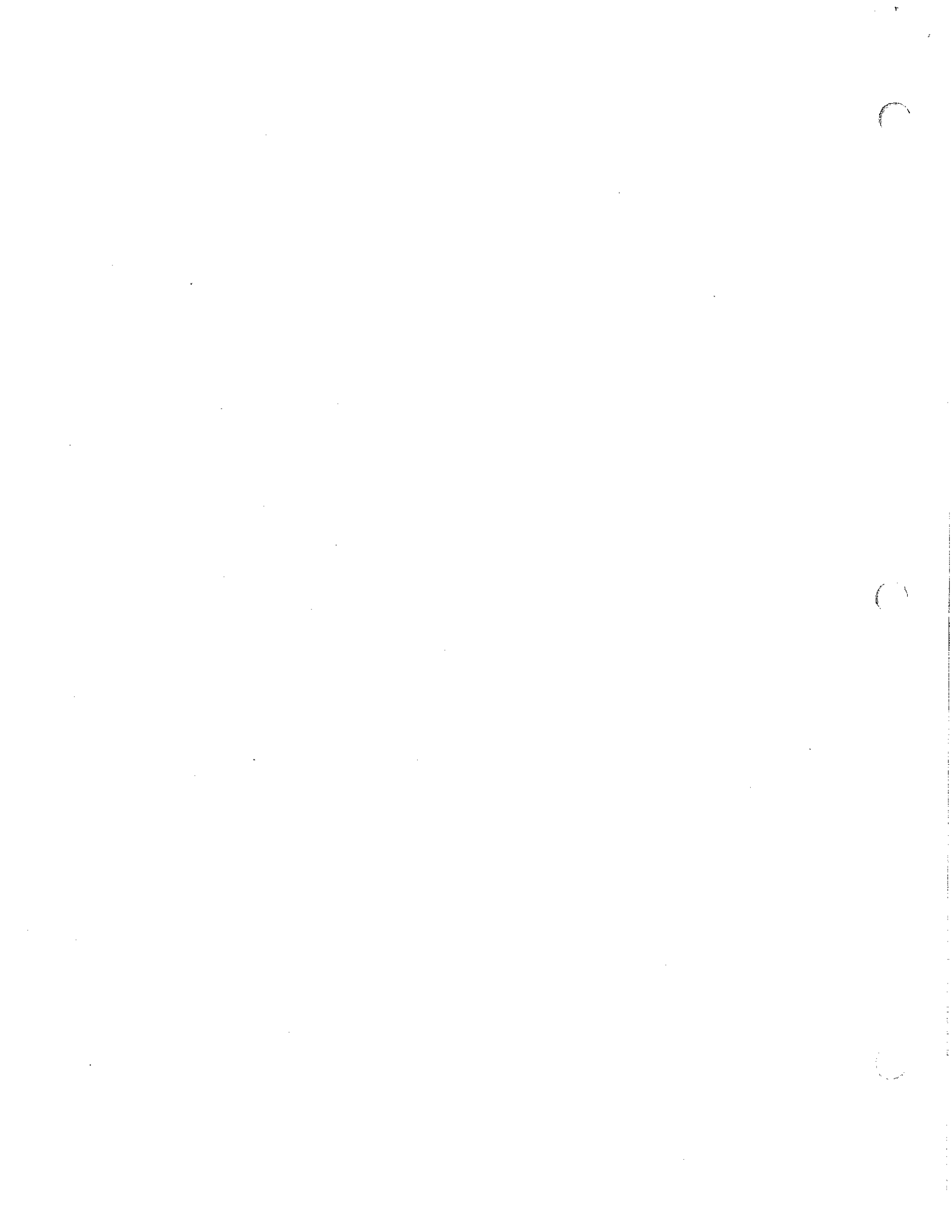
**Fishbowl Demo – Mediation Role Play
(Business Divorce Case)**

Instructions for Mediation

1. The goal of this demo is to show that it is necessary during mediation to:

Not only explore the legal issues, but also to probe and address the emotional and psychological issues

Not only engage the lawyers, but also to engage the clients directly.
2. The parties are going to come into the mediation arguing the merits of the legal dispute. You will need to engage them on this for a bit. You will then need to move them toward a discussion of their relationship and the interpersonal issues that are underlying this dispute.
3. Make sure to address questions to Sam as well as his/her lawyer.
4. Make sure you get Pat to tell you how wronged s/he feels as well. Sam will make it out that s/he is the only victim in the case.



QUESTIONS FOR OBSERVERS

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

Yes No

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

Yes No

Like what?

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

Yes No

How?

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

Yes No

Like what?

5. Write down questions that you thought the mediator 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!!!!!!