MWI Mediation Training – Handout Packet

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MWI Mediation Training

Handout #1:

Conflict Styles Worksheet

CONFLICT STYLES WORKSHEET

Directions: After reading the fifteen approaches to handling conflict listed below, please assess whether you apply these approaches often, occasionally, or rarely.

If the approach describes what you do often, write a "3" on the blank line below next to the corresponding number. If it is an occasional response, write a "2" in the appropriate blank. Select a "1" if you rarely employ the response described.

How do you usually handle conflict?

1. Threaten or fight the other person.
2. Try to understand the other person's point of view.
3. Look for a middle ground.
4. Admit that you are wrong even if you do not believe you are.
5. Avoid the person.
6. Firmly pursue your goals.
7. Try to find out specifically what you agree / disagree on to narrow down the conflict.
8. Try to reach a compromise.
9. Give in.
10. Change the subject.
11. Whine or complain until you get your way.
12. Try to get all concerns out into the open.
13. Give in a little and encourage the other party to do the same.
14. Pretend to agree.
15. Try to turn the conflict into a joke.

1._____	2._____	3._____	4._____	5._____
6._____	7._____	8._____	9._____	10._____
11._____	12._____	13._____	14._____	15._____
TOTALS -	**A.** _____	**B.**_____	**C.**_____	**D.** _____	**E.** _____

Scoring: Now add all the numbers in each column. The columns reflect five styles of resolving conflict. After compiling your scores, find out which conflict style(s) described below corresponds to your highest score. Does this style fit your perception of yourself? What about your second and third highest scores?

A. **COMPETING** - "*hard bargaining*" or "*might makes right*"
Pursuing your own demands at the expense of the other party. Competing can mean "standing up for your rights," defending a position which you believe is correct, or simply trying to win.

B. **COLLABORATING** - *"win-win negotiating*" or "*two heads are better than one*"
Working with someone by exploring both of your interests, generating options, assessing alternatives, and finding a solution that satisfies the concerns of both parties.

C. **COMPROMISING** - "*splitting the difference*"
Seeking a middle ground by "splitting the difference," and partially satisfying both parties.

D. **ACCOMMODATING** - "*soft bargaining*" or "*killing your enemy with kindness*"
Yielding to another person's point of view; paying attention to their concerns and neglecting your own.

E. **AVOIDING** - "*leaving well enough alone*"
Not addressing the conflict, either by withdrawing from the situation or postponing a discussion.

MWI Mediation Training

Handout #2:

MWI Agreement to Participate

& Confidentiality Agreement

AGREEMENT TO PARTICIPATE IN MEDIATION

This is an Agreement between Charles P. Doran ("the Mediator") and the undersigned Parties (collectively, "the Parties") to enter into voluntary mediation. The Parties and the Mediator agree and understand as follows:

VOLUNTARY PROCESS: The Parties understand that mediation is a voluntary process and that the Parties retain their right to a judicial or administrative hearing should the participants decide to withdraw before an agreement is reached.

CONFIDENTIALITY: The Parties agree that the entire mediation process, including all written submissions and communications, is confidential pursuant to Commonwealth of Massachusetts General Law ch. 233, § 23C, and shall be treated as a compromise negotiation for the purposes of the United States Federal Rules of Evidence and applicable Commonwealth of Massachusetts law. The Parties and the Mediator will not disclose any information including offers, promises, conduct, statements or settlement terms whether oral or written, made by any of the Parties, their agents, employees, experts and attorneys or the Mediator in connection with the mediation, except where disclosure is required by law or court rule, and all such information shall be inadmissible at trial, provided, however, that no such information which is independently obtained and admissible shall be rendered confidential or inadmissible because it is referred to in the mediation process.

The Mediator will keep the details of the case and all related documents confidential. However, the Mediator reserves the right to disclose to the appropriate authorities information obtained during the course of the mediation concerning a) the abuse or neglect of a child or elderly or disabled person, b) the risk of serious harm to an individual, or c) the planned commission of a crime.

The confidentiality and privilege provided for in this Agreement shall not apply to evidence relating to the liability of the Mediator in a subsequent suit against the Mediator or disciplinary proceedings against the Mediator. The confidentiality and privilege provided for in this Agreement shall not apply to information that the Parties agree in writing, after the conclusion of the mediation, may be disclosed. Unless the Parties agree otherwise in writing, nothing in this Agreement shall prevent any Party from presenting an interim agreement or signed memorandum of understanding executed as part of the mediation process to a court for purposes of enforcement.

The Parties to this mediation may disclose information about the mediation to their respective attorneys, financial advisors, therapists, or counselors, and, in the case of a business or non-profit organization, those within the business or organization with a need to know, provided, however, that all such individuals shall be informed by the party providing them with the information that it is confidential and governed by the terms of this Agreement.

ROLE OF MEDIATOR: The Parties understand that the Mediator is a neutral facilitator, and that the Mediator is not a judge and has no decision-making authority. The Mediator's role is to assist the Parties in their effort to reach their own mutually beneficial agreement.

CONSULTING WITH COUNSEL: The Parties understand it is neither MWI's nor the Mediator's role to give legal advice, counsel, or to analyze either party's legal rights and that the Mediator may not act as an advocate for any Party. Unrepresented Parties are encouraged to review their legal rights and obligations before finalizing any mediated agreement.

RECORDING: The mediation sessions are private and may not be recorded electronically or broadcast or disseminated in any fashion without permission of all Parties and the Mediator.

TESTIMONY AND RECORDS: The Parties agree that they will not at any time before, during, or after mediation call the Mediator as witness, or subpoena or demand the production of any records, notes, work product or the like that the Mediator produces, in any legal or administrative proceeding concerning the subject matter of the mediation. If a Party seeks to do so, that Party will indemnify the Mediator as to all costs in connection therewith, including attorney's fees and travel costs, and will compensate the Mediator for time spent, such compensation to be at the Mediator's then current hourly rate.

RELEASE OF DOCUMENTS: This "Agreement To Participate in Mediation" form and any "Memorandum of Understanding," or written agreement that is signed by the parties as a result of this mediation may be used in subsequent relevant proceedings.

RESOLUTION: All terms of a settlement are non-binding until they are put into a written agreement and signed by all of the Parties. Any settlement agreement may affect the legal rights of the Parties. The Parties understand they should have any settlement agreement independently reviewed by their own counsel before executing the agreement.

MODIFICATIONS OR AMENDMENTS TO AGREEMENT TO MEDIATE: No modification of this Agreement may be made except in a writing signed by the Parties and the Mediator.

MISCELLANEOUS: This Agreement constitutes the entire agreement of the Parties and the Mediator as to the mediation described above and supersedes all previous oral or written agreements between or among them regarding this mediation. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which together shall be deemed to be one and the same instrument. The counterparts of this Agreement and all Ancillary Documents may be executed and delivered by facsimile or other electronic signature by any of the Parties to any other party including the Mediator and the receiving party including the Mediator may rely on the receipt of such document so executed and delivered by facsimile or other electronic means as if the original had been received.

GOVERNING LAW: The terms of this Agreement to Participate in Mediation shall be governed by the laws of the Commonwealth of Massachusetts.

In consideration of the foregoing, the parties have set their hands and seals this _____ day, of _____, 2018.

_____ date	_____ date
_____ date	_____ date
MWI Mediator _____ date	_____ date

MWI Mediation Training

Handout #3:

MWI Agreement to Participate (used for the MWI Court Mediation Program)

AGREEMENT TO PARTICIPATE IN MEDIATION

We, the undersigned parties, hereby agree to have mediation services provided by MWI in accordance with the following terms:

[ ] Summary Process (Eviction) Court Division _____

[ ] Small Claims and other Civil Docket No. _____

VOLUNTARY PROCESS: We understand mediation is a voluntary process and the parties retain their right to a judicial or administrative hearing should the participants decide to withdraw before an agreement is reached.

CONFIDENTIALITY: We understand the mediator(s) and MWI cannot be subpoenaed to testify or produce records or work product in any future judicial or administrative proceedings relating to this matter (M.G.L. ch. 233 § 23C). We also agree to keep confidential all information discussed during the mediation. Notwithstanding, the mediator may disclose to appropriate authorities information obtained during the mediation concerning harm to self or others and/or the planned commission of a crime.

ROLE OF MEDIATOR: We understand the mediator(s) are not judges and have no decision-making authority. The mediators' role is to assist the parties in their effort to reach their own mutually beneficial agreement.

CONSULTING WITH COUNSEL: We, the parties, understand it is neither MWI's nor the mediators' role to give legal advice, counsel, or to analyze either party's legal rights. Unrepresented parties are encouraged to review their legal rights and obligations before finalizing any mediated agreement.

Plaintiff	_____	_____	_____
	(signature)	(print name)	(date)
Plaintiff	_____	_____	_____
	(signature)	(print name)	(date)
Defendant	_____	_____	_____
	(signature)	(print name)	(date)
Defendant	_____	_____	_____
	(signature)	(print name)	(date)
Mediator	_____	_____	_____
	(signature)	(print name)	(date)
Mediator	_____	_____	_____
	(signature)	(print name)	(date)
Observer	_____	_____	_____
	(signature)	(print name)	(date)

Plaintiff email _____ & phone: _____

Defendant email _____ & phone: _____

MWI Mediation Training

Handout #4:

Mediators' Introduction

Mediators' Introduction

1. INTRODUCTION
Welcome parties | Introduce mediators | Use of first names ok?

2. EXPLAIN PROCESS
Define mediation | Define role of mediators and parties

3. VOLUNTARY
Explain how mediation is a voluntary process | If parties want to leave, ask them to state reason so as to address concern

4. CONFIDENTIALITY
Discussion stays in room | Mediators cannot be called to testify on behalf of either party if asked | Explain exceptions to confidentiality

(If co-mediating, split the opening here.)

5. NEUTRALITY
Explain goal of being perceived as neutral by both parties

6. STRUCTURE OF MEDIATION
Initial public session | Mediators' break | Private sessions | Final public session | Note-taking

7. AGREEMENTS
Parties determine terms | Mediators can help write | An agreement written and filed with the court has same weight as judgment

8. CONFIRM PARTICIPATION
Ask - Decision-makers at the table? | Time constraints? | Any questions? | Sign Agreement to Participate form | Ask parties to provide contact information for follow-up survey

MWI Mediation Training

Handout #5:

Mediation Note Sheet

INTERESTS: What motivates each party to mediate; their goals, needs, hopes, fears, etc…

Party A's Interests:

Party B's Interests:

OPTIONS: What parties could do together to meet their interests. Possible solutions on the table.

ALTERNATIVES: What each party could do on their own to meet their interests away from the table.

What Party A would do if no agreement:

What Party B would do if no agreement:

Party A's BATMA:

Party B's BATMA:

OBJECTIVE STANDARDS: Standards of fairness recognized by the parties.

Industry standards, precedents, company policies, laws, expert opinions, etc…

RELATIONSHIP: The quality of the parties' interactions and their level of trust.

Describe current relationship:	Describe future ideal relationship:

.

COMMUNICATION: How parties send and receive information.

Current quality of communication:	Preferred quality of communication:

COMMITMENT: How everyone will negotiate (process) and what the end result will look like (outcome).

Process (amount of time, agenda, commitment to seek win-win outcomes, etc.):	Substantive (options in action – amount owed, payment schedule, etc.)

MWI Mediation Training

Handout #6:

Mediated Agreement Page

Date: _____ page ___ of ___

MEDIATED AGREEMENT

We _____ and _____

have voluntarily participated in this mediation and will abide by the following terms of agreement:

We understand the mediators and staff at MWI cannot be involved in any future judicial or administrative proceedings pertaining to this case. We also understand a copy of this agreement will be kept on file at MWI and with any referring agent.

PARTY:_____ _____ _____
PRINT NAME SIGNATURE DATE

PARTY:_____ _____ _____
PRINT NAME SIGNATURE DATE

PARTY:_____ _____ _____
PRINT NAME SIGNATURE DATE

PARTY:_____ _____ _____
PRINT NAME SIGNATURE DATE

MWI Mediation Training

Handout #7:

Sample Mediation Memo

Ralph
(plaintiff)

vs.

Auto Service
(defendant) Jose

Docket No. 0305 SC

page 1 of 1

MEDIATION MEMORANDUM

Auto Service, Jose agrees to pay Ralph $400.- cash on this day 4/1/03 to fix damages to Ralph fence. Jose (Auto Service) reports he is making this payment to preserve the business relationship, not as an admittance of guilt.

Ralph requests of Auto Service to let him know (by knocking on door or calling) 922 St. Boston (617) 12327 prior to dropping off any undriveable cars in his lot.

Ralph 4/1/03
plaintiff date

Jose 4/1/03
defendant date

DISTRICT COURT DEPARTMENT OF THE TRIAL COURT

MWI Mediation Training

Handout #8:

Mediation Checklist

Mediation Checklist

PRIOR TO MEDIATION

- ✓ Bring multiple copies of mediation forms (Agreement to Participate / Agreement for Judgment / Mediation Memorandum / ADR Referral Form)
- ✓ Meet with your co-mediator to discuss process, style and post mediation feedback (*meet 20 minutes in advance)*

INITIAL JOINT SESSION

- ✓ Mediators' Introduction
- ✓ Ask who would like to begin? | Let other party know they will have equal time | Mediator 1 asks for Party A's perspective
- ✓ Party A speaks | Mediator 1 thanks Party B for waiting and summarizes Party A's interests
- ✓ Mediator 2 asks for Party B' perspective | Party B speaks | Mediator 2 thanks Party A for waiting and summarizes Party B's interests
- ✓ Mediator 1 asks each party what they hope to achieve in mediation | Listen and summarize

MEDIATORS' BREAK — *LESS THAN 5 MINUTES*

- ✓ How are you doing? | How are we doing as a team? | What do we know about each party's interests? | What do we do next and why?

PRIVATE SESSIONS (*EARLY AND LATE*)

- ✓ Meet with each party | Define added layer of confidentiality: contents of session can be kept private - mediators will ask at end what should be held in confidence
- ✓ Ask, listen and summarize interests | Inquire for options to meet interests
- ✓ Explore objective standards to generate/evaluate options
- ✓ Overcome barriers: ask to define BATMA | Reality-test positions | discuss positive impact of any agreement

REACHING CLOSURE

- ✓ Welcome back | Identify progress and remaining challenges | Summarize common and individual interests
- ✓ Ask parties to define substantive and process commitments | Help parties fill in Agreement for Judgment and/or Mediation Memorandum | If no agreement: thank parties for trying mediation
- ✓ Fill in ADR Referral Form | Make copies for parties and MWI | Return file with original forms to court

AFTER THE MEDIATION

- ✓ Debrief with your co-mediator | Return scanned copies of forms to MWI via email

MWI Mediation Training

Handout #9:

Sources of Protection for Confidentiality in Mediation

Sources of (*and Gaps in)* Protection for Confidentiality in Mediation

FEDERAL	STATE
Constitution *SUPREMACY CLAUSE* *6TH AMENDMENT*	Constitution *STATE ANALOG OF 6TH AMENDMENT*
Statutes (Regulations) ADRA, EEOC, OSHA *IRS; US ATT'Y; OTHERS* *MISPRISION STATUTE*	Statutes (Regulations) CONFIDENTIALITY STATUTE (MGL 233 23C) *MANDATED REPORTING STATUTES*
Common Law AGREEM'T TO MEDIATE *TORT LIABILITY* *3RD PARTY SUBPOENAS*	Common Law AGREEM'T TO MEDIATE *TORT LIABILITY* *3RD PARTY SUBPOENAS*
Evidentiary Rules Settlement Negotiations RULES 408 (settlement offers), 501 (privilege)	Evidentiary Rules COMMON LAW PRIVILEGE
Federal Court Rules	State Court Rules
Local Court Rules REFERRAL TO MEDIATION	Local Court Rules REFERRAL TO MEDIATION
Ethical Codes - ABA, ACR, OTHERS *PROFESSIONAL CODES OF ETHICS (e.g., LICSW'S)*	

- David Hoffman - www.bostonlawcollaborative.com

MWI Mediation Training

Handout #10:

Article – "How We Mediated the Microsoft Case"

HOW WE MEDIATED THE MICROSOFT CASE

Author(s): ERIC D. GREEN AND JONATHAN B. MARKS **Date:** November 15, 2001 **Page:** A23 **Section:** Op-Ed

MEDIATORS NEVER KISS AND TELL. BUT WITHIN THE BOUNDS OF APPROPRIATE CONFIDENTIALITY, LESSONS CAN BE LEARNED FROM THE THREE-WEEK MEDIATION MARATHON THAT LED TO MICROSOFT'S SETTLEMENTS WITH THE DEPARTMENT OF JUSTICE AND WITH AT LEAST NINE STATES.
Federal District Judge Colleen Kollar-Kotelly took over the case in July after the Court of Appeals partially affirmed the prior judge's findings that Microsoft had violated antitrust laws.

Neither the mediation nor the settlements would have happened if Kollar-Kotelly not acted to suspend litigation and order settlement negotiations. The judge's Sept. 28 mandate was blunt: "The Court expects that the parties will . . . engage in an all-out effort to settle these cases, meeting seven days a week and around the clock, acting reasonably to reach a fair resolution." Kollar-Kotelly gave the parties two weeks to negotiate on their own, ordering them to mediation if they couldn't reach agreement by then. The court bounded its "24/7" timetable by ordering the parties to complete mediation by Nov. 2. Tight timetables command attention. In mediation, just as in negotiation, time used tends to expand to fit time available. A firm deadline gets the parties to focus, even though it sometimes results in the hours before the deadline resembling the last two minutes of an NBA final game.

We are both mediators with 40 years of combined experience. We have mediated many antitrust and computer cases. We are avid computer consumers. But we are not experts in the applicable law or the disputed technology.

Even had we had such expertise, our objective would not have been to try to craft our own settlement solution and sell its merits to the parties. We believed that the only chance of getting all or most parties to a settlement was for us to work intensively to help them create their own agreement. Our "job one" was to facilitate and assist in the gestation, birth, and maturing of such an agreement. We had to be advocates for settlement - optimistic and persistent - but not advocates for any particular settlement.

Reaching a settlement required working with adversarial parties with very different views about a large number of technologically and legally complicated issues. When we arrived on the scene, the parties had begun exchanging drafts of possible settlement terms. There were issues concerning whether certain matters should be included at all, about the scope of acts to be mandated and proscribed, and about the words that should be used to capture the complex reality that would have to be regulated in any settlement.

After initial separate briefings, we moved the process into an extended series of joint meetings, involving representatives of the Anti trust Division, the state attorneys general and their staffs, and Microsoft. No party was left out of the negotiations. The bargaining table had three sides.

Throughout most of the mediation the 19 states (through their executive committee representatives) and the federal government (through the staff of the antitrust division) worked as a combined "plaintiffs" team. We worked to ensure the right mix of people, at the table and in the background.

The critical path primarily ran through managing and focusing across-the-table discussions and drafting by subject matter experts - lawyers and computer mavens - with knowledge of the technological and business complexities gained through working on the case since its inception. The critical path also required working with senior party-representatives who could make principled decisions about priorities and deal breakers.

Our objective was a global settlement. As the mediation ended last Tuesday, most parties had agreed to the proposed Final Judgment that will be reviewed by Judge Kollar-Kotelly over the next several months. But the

attorneys general of several states decided they preferred continued litigation to what they saw as an in adequate settlement.

Even as settlement advocates, we have no quarrel with the partial settlement that was achieved. Our most important measures of a successful mediation don't turn on whether all - or any - parties settle. Successful mediations are ones in which mediators and parties work to identify and overcome barriers to reaching agreement. Successful mediations are ones in which all parties engage in reasoned discussions of issues that divide them, of options for settlement, and of the risks, opportunities, and costs that each party faces if a settlement isn't reached. Successful mediations are ones in which, settle or not, senior representatives of each party have made informed and intelligent decisions. The Microsoft mediation was successful.

Perform a new search

MWI Mediation Training

Handout #11:

Article – "What is Conflict Costing Your Company? The Value of a Comprehensive Employment Dispute Resolution System"

What is Conflict Costing Your Company? The Value of a Comprehensive Employment Dispute Resolution System

By Chuck Doran and Tad Mayer

How is conflict managed at your company? What do employees do when they feel dissatisfied, harassed, discriminated against or just plain frustrated? How much does unresolved conflict cost your company? It's probably more than you think. This article takes a close look at the costs of conflict and explores how a comprehensive employment dispute resolution system can improve employee morale and increase productivity.

Costs of Conflict to Companies

Companies have reported spending between $10,000 and $50,000 just to prepare for a discrimination case.[i] In the last four years, The average award for an EEOC complaint that went to litigation was $296,361.[ii] (https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1997-through-fy-2019) (The largest verdict in EEOC history totals to $240 million against Hill County Farms (doing business as Henry's Turkey Service) for disability discrimination.[iii]) Defending an average employment claim has been shown to cost approximately $ $200,000. [iv]The average time for a civil suit to go to trial is 2½ years.[v]

Unresolved disputes in the workplace produce distraction and frustration. Distraction impedes an organization's capacity to meet its business objectives and frustration erodes morale. The result is increased absenteeism and turnover. It has been shown that poor morale increases absenteeism and the annual cost of absenteeism to employers is $225.8 billion or an average of $1685 per employee.[vi] Fifty percent of departures are linked to conflict, and turnover costs for an employee can be as much as 33% of their annual salary.[vii]Companies with healthy corporate workplaces have turnover rates 35% lower than those who do not.[viii] Additional costs of conflict include sabotage, health costs such as stress and depression, sub-optimal decision making, and an inordinate amount of time spent on managing disputes (managers spend an average of 30%[ix] of their time on conflicts).

How to Reduce Costs Associated with Conflict

After implementing a comprehensive employment dispute resolution program, Brown and Root reported an 80% reduction in litigation fees in the first year. [x] Utilizing arbitration, the costs of disputes against a sample of Fortune 500 companies were less than one-half the average costs of suits defended before

their dispute resolution programs were adopted.[xi] Establishing a dispute resolution program before it is too late has been the advice offered by major companies including Anheuser-Busch, Johnson & Johnson, Shell Oil, and the United States Postal Service.[xii]

A comprehensive employment dispute resolution program offers a proactive and structured system to address and resolve conflict quickly and amicably. It provides employees with opportunities to resolve conflict more quickly and less expensively than through litigation. Disputes that went through a typical dispute resolution program were resolved in an average of just 97 days, instead of the over 200 days it takes for cases to go through an investigative process[xiii]
A systematic program reduces the uncertainty of what to do when in conflict, clearly outlines options for resolving the dispute, minimizes lost productivity and reduces litigation costs. Dealing quickly with the conflict mitigates the decline in morale and the growth of distraction and frustration. Allowing the parties to work together to resolve the problem creates an amicable, collegial atmosphere that reduces workplace tension and builds trust.

How an employment dispute resolution program works

Drawing from programs implemented by leading corporations such as Shell, Halliburton and Coca-Cola Enterprises, the following overview describes an effective dispute resolution system that provides a variety of dispute resolution options to employees. Employees are provided with a choice of options to either resolve disputes themselves; tap into existing employee support programs to help them find a mutually beneficial resolution; utilize a third-party neutral to either facilitate a productive conversation through mediation or render a binding resolution for them in arbitration.

- *Option One: Encouraging employees to communicate and resolve conflict directly and proactively*

  Often overlooked, encouraging and preparing employees to talk with one another directly can be the most cost-effective way of managing conflict. In this option, employees receive dispute resolution training to enable them to effectively prepare to communicate directly and work out their issues without the assistance of a neutral third party. Direct communication uses few resources and addresses the conflict at the time that it occurs.

- *Option Two: Utilizing existing support systems* - Organizations often have existing support programs that can be effective at helping parties resolve their disputes. Some examples of programs that are often already available at organizations include Human Resources, Employee Relations Office, Employee hotlines, Employee Assistance Program, and access to

multiple levels of management. A dedicated dispute resolution program serves as a platform to promote existing support programs as options to resolve conflict.

- *Option Three: Ombuds Office* - The Office of Ombuds serves as an internal (or external) complaint handler. An ombudsperson is an impartial individual who works independent of ordinary line-and-staff structures to assist an organization and its members in resolving internal problems in a productive manner. An ombuds provides confidential and informal assistance to address concerns and help to identify additional resources. The Ombuds provides a "barrier-free" and neutral perspective for employee concerns and acts as a confidential and informal sounding board to discuss options for handling particular dilemmas.

- *Option Four: Mediation* - Mediation is a process in which parties agree to work together, with the assistance of a trained neutral, to define their respective interests and generate options for resolving their dispute. Mediation can be used for many types of disputes from simple misunderstandings to complex employment matters. The mediator helps facilitate communication and has no power to impose a resolution. Mediation is a flexible process that allows the parties to discuss in confidence any issues they choose to address and determine the outcome for themselves.

- *Option Five: Arbitration* - Arbitration is a process in which parties explain their dispute to a trained neutral who, after hearing from both sides, makes a final and binding decision to resolve the dispute, much like a judge would do in court. Arbitration is utilized for disputes needing a binding decision involving an employee's legal rights and responsibilities. While similar to the court process, it is not as formal and takes less time than court. All substantive rights and remedies available in court are also available in arbitration.

Key Elements for Success and Conclusion

A dispute resolution program relies on several key elements to succeed. These elements are essential to assure that people know about the program, feel safe using the program, understand how the program works, know what alternatives exist outside of the prescribed options, understand that costs are appropriately limited and see how the process fits with existing programs and infrastructure. The key elements include:

- Broad promotion of the program;
- Management's full commitment to the program;
- A comprehensive "no retaliation" policy;

- Agreement to utilize the program as a mandatory step in resolving workplace conflict (as opposed to litigating or avoiding the dispute);
- Program elements dovetail with existing HR infrastructure;
- A benefit that allows employees the financial ability to engage council;
- Employees trained in effective communication skills (especially for the collaborative communication option to be effective);
- All employees trained in how the program works.

A clear, well-promoted and well-understood conflict management program will prevent a majority of, if not all, disputes from ever going to litigation. Most importantly, a comprehensive dispute resolution program offers hope and resolution to employees while increasing morale, productivity and savings for the company.

Chuck Doran is a mediator and the Executive Director of MWI in Boston and can be reached at cdoran@mwi.org. Tad Mayer is a negotiation consultant and can be reached at tmayer@mwi.org. For more information about MWI, please visit www.mwi.org.

(This article first appeared in the Leadership Section *of the Northeast Human Resources Association [NEHRA] website in June 2006 and was updated in December 2020.)*

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MWI Mediation Training

Handout #12:

Article – "Mediation Marketing: Ideas for Starting Out"

MEDIATION MARKETING: IDEAS FOR STARTING OUT

By James E. McGuire

Could we have lunch sometime? I have been thinking that I would like to be a mediator, and I was wondering if you could give me an hour of your time so that I can learn to do what you do.

Every experienced mediator has fielded such a phone call on many occasions. Often the caller is an older litigation attorney who has participated in several mediations and has come to believe that mediation is better than litigation. Sometimes the caller is younger—someone who has experienced mediation through a law school course, community service, or work as a second chair in a mediation. Sometimes the caller is a person who has heard and rejected the old advice, "Don't give up your day job."

In all cases, many people want to know how to enter a profession that has no prescribed path. This article focuses on the basics—the recommended first steps for those who want to enter this field.

1. Write a short essay to yourself. Topics: Why I want to be a mediator and why anyone would employ me as a mediator. The purpose of this essay is to answer these questions for yourself. Many people muse about mediation and whether they have the right stuff and should try to be a mediator. There is no correct answer to these questions. Those who actually decide to become mediators usually have diverse reasons for doing so and varied packages of skills or experience to offer. The answers you give yourself will help shape what you then do to fulfill your goals. Continue with the next steps only if you feel a strong personal sense of commitment, even passion, about your desire to be a mediator.

2. Write your mediator bio. Take a current bio or CV, keep your name, delete all remaining text, and save as "My mediation bio." Go online to websites for mediation service providers and read 20 to 30 different mediators' bios from three or more websites. Pick the best samples and create your template. When you start to write your own bio, you will necessarily have many gaps in your training and experience. Filling in those gaps with real substance is the beginning of your training and marketing plan. For now, even if you have not mediated a case, you may have relevant subject-matter expertise based on work that you did in negotiating business deals or litigating cases in specific areas. The combination of your subject-matter expertise and solid mediation training may be enough to obtain your first engagements as a mediator. This is a profession that is built more on personal reputation than paper credentials. Honesty and a commitment to the process are the essential attributes of any successful mediator.

3. Take a basic mediation training course. All responsible, credible mediators do so. Those who think that 25 years on the bench or at the bar somehow qualifies as mediation training are wrong. Our code of ethics requires that we be trained.

4. Start reading. A trained and qualified mediator is expected to be conversant with our literature. Have you read *Getting to Yes?* Good. Have you read *Getting Past No?* That's the book you read to know what to do when the other side hasn't read *Getting to Yes.* Your training course will assume you know something about the language, the theory, the process, and the pitfalls.

5. Get connected. At the national level, you should become a member of the ABA Section of Dispute Resolution (www.americanbar.org/dispute) and perhaps a member of the Association for Conflict Resolution (www.acrnet.org) as well. At the state and local level, you should become a member of the dispute resolution group of your state or local bar association. You should also become a member of some nonlegal mediation or ADR group. You should also get a mentor or a coach. Many organizations provide matching services.

6. Pay your dues: Volunteer to mediate. The fastest way to have mediation experience is to volunteer to mediate. In most jurisdictions, court-connected mediation programs depend on volunteer mediators for small claims and lower-level trial court cases. Most mediators have provided free services, either because

> **"Honesty and a commitment to the process are the essential attributes of any successful mediator."**

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it was the right thing to do or because it was a way of getting started

7. Practice in your own backyard. If you are a member of a law firm or a member of a corporate law department, you have major opportunities to sharpen your skills, market yourself as a mediator, and help your own organization starting immediately. Most likely, your firm does not now have a well-developed ADR practice group. If it does, join that group. If it does not, create that group. An ADR practitioner should become the firm resource center for ADR. Internal educational programs are a very effective way to sharpen skills and make the firm aware of your skills as a mediator and ADR specialist.

8. Look for educational and speaking opportunities. Even in the twenty-first century, people collectively still need to know more about mediation. There is a logical link between the practice you are trying to build and the places where you want to speak. In your preferred practice area, who are the gatekeepers? Who are the people that those in need of mediation services are likely to seek out for advice? Put education first and prepare talks that offer some substance—some practical tips and advice relevant to the group. Build on the work you have done inside your own organization. Your presence and presentation (and your contact information) are still the best forms of soft and effective marketing.

9. Write something. Articles written by you on topics important to you will also find a receptive audience. Avoid the disturbing current trend of paying some organization lots of money to write and place articles that are "yours" in name only. *The Model Standards of Conduct for Mediators* provides that mediators should do things that advance the practice of mediation. Mediators may meet this obligation by "participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation."

10. Primacy and recency. People are most likely to contact the person who first introduced a useful idea or the person who most recently discussed that idea. As applied to mediation, that means marketing is an ongoing process. People who first heard about mediation or thought about using it in their future disputes because of something you said or wrote are more likely to contact you. For most mediators, the best sources of new business are contacts from old business—satisfied participants in a mediation process. So an effective marketing strategy must include some way for you to keep track of who those people are and some way to keep your name in their brain or at their fingertips so that they think of you when the actual need arises.

11. Plan your work. Work your plan. To become an effective and experienced mediator requires developing and implementing a plan to acquire the necessary training, experience, and public awareness. Those who create plans are most likely to succeed. The milestones that you create will be your best indicator of how successful you are in implementing your plan. Be realistic about how much you can do, but challenge yourself with real dates and deadlines.

12. Web awareness. In the twenty-first century, marketing any service requires consideration of the Internet for marketing and communications. GPSOLO

The best sources of new business are contacts from old business—satisfied participants in a mediation process.

FOR MORE INFORMATION ABOUT THE SECTION OF DISPUTE RESOLUTION

- **This article** is an abridged and edited version of one that originally appeared on page 4 of *Dispute Resolution*, Winter 2011 (17:2).
- **For more information** or to obtain a copy of the periodical in which the full article appears, please call the ABA Service Center at 800/285-2221.
- **Website:** www.americanbar.org/dispute.
- **Periodicals:** *Dispute Resolution* magazine, published four times per year; *Just Resolutions eNews*, an electronic newsletter published ten times per year.
- **CLE:** Annual spring conference, the world's largest ADR conference; spring and fall advanced mediation or arbitration training institutes; teleconferences.
- **Books and Other Recent Publications:** *Lawyering with Planned Early Negotiations; Judges Under Fire; Organizational Ombudsman; Mediating Legal Disputes; Challenging Conflict: Mediation Through Understanding; Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes; The Negotiator's Fieldbook; Advanced Arbitration Insight: 20/20* DVD.
- **Member Benefits:** 20% or greater discount on all Section publications; 35% or greater registration fee discounts on all CLE programs; discounted liability insurance for arbitrators and mediators; ethics guidance for mediators; professional resources and practice tips; more than 20 practice area committees.

MWI Mediation Training

Handout #13:

Article – "Making It As a Mediator"

MASSACHUSETTS LAWYERS WEEKLY
www.masslawyersweekly.com

Making it as a Mediator: Tips from Those in the Know

Chuck Doran, Mediator and Executive Director, MWI

I receive hundreds of calls and emails each year from members of the bar and other professionals who express interest in becoming mediators. Their calls are prompted by an assumption that mediation will have less wear and tear on their professional lives. Others see mediation as being more congruent with their personalities. Many recount successful negotiations where they skillfully produced valuable deals for their clients while experiencing a deep sense of professional satisfaction not found elsewhere in their work. Others represent clients in mediation and have concluded that they could do as good a job (if not better) than the neutral they hired.

Regardless of what motivates people to take a mediation training and find their place in the field, callers would like to know a few things – How does the mediation field work? How to get cases once trained? What has worked for other mediators over the years?

Standing on the Shoulders of Giants

I'm a big believer in standing on the shoulders of giants and learning from their vantage points. Here's a summary of "best advice" from some mediation giants in Massachusetts about the lessons they have learned during their years of experience in this field.

David Hoffman is a mediator and collaborative lawyer at the Boston Law Collaborative, a multi-disciplinary collaborative law and ADR firm that he founded in 2003. "When I first started mediating and arbitrating twenty years ago, there were a lot fewer mediators and arbitrators in Boston and also a lot less interest in ADR. One of the primary sources of referrals was from the lawyers that I had met in my law practice. I have maintained a list of those contacts over the years, and I send out a letter approximately once a year to let these colleagues know what I am doing."

Building on your experience, successes, and contacts is one of the most efficient and direct ways to stand out in a crowded and unregulated field. There are no licensing requirements for mediators, which means your experience and reputation is what will determine your success as a mediator. "ADR has become an increasingly specialized field. So, while it is essential to get trained in the general skills of mediation and arbitration, developing expertise in a specific area such as employment, construction, and divorce, is a good way to get cases, acquire visibility in the market, and build a reputation. If people are impressed with your skills, knowledge, and tenacity, they will continue to bring you cases," Hoffman advises.

What to Consider

I often ask callers to think about what factors they consider when hiring a professional. How long have they been active in their practice? What do their references say about them? Has their name surfaced

from multiple sources? Have they been recommended from by colleagues? These are the same questions that your potential mediation clients will ask about you. The question is: would you hire you as a mediator?

Jack Wofford has been an independent mediator and arbitrator since 1987. Jack mediates and arbitrates a range of commercial and contractual disputes and was appointed by President Clinton in 1999 to serve on the Federal Service Impasses Panel. Jack suggests that lawyers should "start making the transition gradually. Begin, of course, by taking a 30-plus hour training in general mediation required to invoke the state confidentiality statute (MGL 233 sec 23C), which protects the mediator from testifying or supplying documents. For transactional lawyers, your deal-making experience is useful to effective commercial mediation, so a shift in role is not difficult as long as you understand the challenges of remaining impartial. For litigators, the negotiation you have done to settle most of your cases is probably more useful preparation for being a mediator than your case preparation or trial experience. And for all lawyers, our training in issues of relevance, precedent, clarity, persuasiveness, problem-solving, and rational argument are skills I use all the time as a mediator."

Jane Juliano has been a commercial and workplace mediator and arbitrator since 1993. She is an adjunct professor of mediation and negotiation at Georgetown Law School and has been a Visiting Clinical Mediator at Harvard Law School. Jane suggests that "the most successful ways to develop mediation expertise includes practicing in the presence of others who can critique you, attending professional trainings and conferences where you can learn skills and share experiences, and teaching others. Don't let established systems discourage you. Volunteer to help in a mediation office one day a week. Look up small claims court programs that need volunteer mediators. Offer to co-mediate with a mediator you admire, particularly when your expertise would complement his or hers. Volunteer to assist with a mediation course."

John Fieldsteel of Urbelis & Fieldsteel has been an arbitrator, mediator, case evaluator, and special master with a concentration in design and construction since the mid-eighties. John was trying a lot of construction cases when he was asked by the AAA to be an arbitrator. Fieldsteel's advice to those interested in getting into the field is to "select an area where you have wide experience. When I first started, ADR was only 10% of my business. It was at that time that I made an effort to reduce my design and construction law practice while building an ADR practice. After fifteen years, 90% of my work was dedicated to ADR, which meant that it didn't make sense to practice law anymore. If you are able to concentrate your law practice on other areas from where you are building your ADR practice, you will be able to avoid conflicts while making up for lost legal work with increased ADR work," says Fieldsteel.

Jump and the Net Will Appear?

Setting realistic expectations is important when building a practice and acquiring experience and skills.

Mediation is not a field where one can expect that "if you build it, they will come." There are many factors that go into both getting the case to the table and being selected as a mediator. Is the case appropriate for mediation? Will the client consider entering into a process that will certainly require an investment of time and money and may not result in a settlement? Even if the client agrees to consider mediation, will the other side? Which mediation firm or mediator will be recommended? Who will opposing counsel want to use? The neutral who eventually sits in the mediator's seat will have cleared multiple hurdles including making the short list of recommended mediators, based on their effectiveness, strategic marketing skills, and not to mention, a little luck.

Jim McGuire of JAMS has served as a mediator, arbitrator, special master and neutral evaluator since 1989. Jim's advice to attorneys who are looking to transition into mediation include, "Write a short essay to yourself and answer why you want to be a mediator and why anyone would hire you." If the essay isn't compelling to you, it won't be compelling to your prospective clients, nor will it provide the fuel and passion to stick with your plan during difficult times. "The fastest way to grow your mediation experience is to volunteer," says McGuire. "In most jurisdictions, court-connected mediation programs depend on volunteer mediators for small claims and lower-level trial court cases." Lastly, McGuire asks, "does your firm have a well-developed ADR practice group? If it does, join that group. If it does not, create that group. An ADR practitioner should become the firm resource center for ADR. Internal educational programs are a very effective way to sharpen skills and make the firm aware of your skills as a mediator and ADR specialist."

Supply and Demand

Is the field saturated with mediators? Yes. But this is not for a lack of disputes in the marketplace. The number of disputes that would benefit from mediation is far greater than the number of mediators who offer their services. Our challenge is to raise the prospect of mediation early and often so as to create tailored and durable solutions for our clients while growing the mediation profession.

What role can mediation play in your professional practice? What is inevitable is that your clients will need skilled and knowledgeable representation at the mediation table. Your clients and your colleagues will also rely on your recommendation of competent mediators who specialize in your practice area. You also may be asked to serve as a mediator in the near future. I don't think you could receive a higher compliment.

Chuck Doran is a mediator, trainer, and the executive director of MWI, a dispute resolution service and training firm in Boston he founded in 1994. He can be reached at cdoran@mwi.org.

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MWI Mediation Training

Handout #14:

MWI Online

Mediation Protocol

MWI Online Mediation Protocol

The purpose of this document is to outline a shared protocol and a commitment by the parties and mediator to following the following guidelines when participating in online mediations with MWI. This document covers three areas:

1. Technology
2. Confidentiality and Privacy
3. Best Practices and Troubleshooting

Technology

1. **Online Platform - Zoom**. We will use the online secure platform provided by www.zoom.us to conduct your online mediation sessions. Before your first scheduled mediation session, you agree to download and install the software and/or apps from Zoom necessary for your participation in the online mediation sessions at https://zoom.us/download (vs. joining via a browser which has limited options). You will only need to register and open a free personal account. Once you have downloaded Zoom, please familiarize yourself with the operation of the platform so that you are able to operate the system and participate in your mediation sessions. Zoom has tutorials available at https://support.zoom.us/hc/en-us/articles/201362193-Joining-a-Meeting, which includes how to use the chat feature with the mediator, mute your mic, etc…

2. **Document Execution**. MWI uses Adobe Connect as a secure platform for the execution of documents required during your mediation process (more information can be found at https://adobe.com/sign). In the event that original signatures are required, then copies for execution will be transmitted to you for printing and signing and you will be responsible for returning the executed copies to MWI via mail or an overnight delivery service.

3. **Secure WiFi or Ethernet Connection**. You will need a secure WiFi or Ethernet (hard-wired RJ45 plug) connection for your computer. Please DO NOT use a public access WiFi connection, such as those available in public spaces and businesses since they are not secure and your information may be at risk.

4. **Technology Failure Protocol**. You understand that despite our best efforts, technology may fail to operate properly, and a mediation session may not start on time or may be interrupted. If that happens, please take the following steps:
    a. Log out of Zoom and log back in. This often re-establishes the connection.
    b. Call or text your case manager at xxx-xxx-xxxx immediately to let them know you are having trouble.
    c. Conference call:
        i. In the event that we cannot convene the mediation via Zoom, your case manager will issue instructions for participants to join a conference call using the Zoom conference call feature;

ii. If the Zoom conference call feature does not work, please use the following conference call information:
    1. Conference line: xxx-xxx-xxxx
    2. Conference access code: xxxxxx

5. **Caucus Failure Protocol**. At times it may be beneficial for your mediator to caucus with each side separately. The Zoom online platform allows the mediator to "transfer" certain participants to separate breakout rooms within the online mediation session. You agree that in the event that you are NOT in a private caucus with the mediator and the other party and/or you are able for any reason to hear the communication intended to be private, you agree to IMMEDIATELY terminate the Zoom online mediation session and will call or text your case manager at xxx-xxx-xxxx.

Confidentiality and Privacy

6. **Privacy and Confidentiality**. Only the people who have executed the Confidentiality / Agreement to Mediate (via Adobe Sign) may participate in the mediation. All participants and attendees in this mediation, including every person who may participate by telephone, video, e-mail, text, or other means, agree that all communications related to the mediation, and all negotiations and settlement discussions, communicated in any medium, are private and confidential.

7. **Disclosure of Other Persons in Room.** Participants agree to disclose immediately when someone else is in their room off-camera and to assure no one else can overhear any aspect of the mediation.

8. **Password Protection. The** mediation session has and will be protected by a password imbedded in the URL link provided to you by your case manager. Please contact your case manager at xxx-xxx-xxxx or xxxxx@mwi.org if you have not received a copy of the Zoom meeting ID, password, and conference call information.

9. **Absolute Prohibition on Recording**. You, or anyone on your behalf, may NOT audio or video record any mediation session or portion thereof. In the event that you learn of an audio or video recording of any session, you shall take immediate measures to destroy the recording and will not disseminate the recording to third parties. You further agree that you will not transmit a live or deferred video or audio relay of the online mediation sessions to third parties.

Best Practices and Troubleshooting

10. **Interruption Free Zone**. You agree to take all reasonable measures to ensure that you are not interrupted during your online mediation sessions. This includes arranging for appropriate childcare, notifying family and friends of your unavailability, and making appropriate scheduling choices.

11. **Technology Hiatus**. Except for the computer or mobile device upon which you are conducting your online mediation session, you agree to turn off or put on silent any phones,

tablets or computers and disable any alert announcements and/or texts for the duration of your online mediation session(s). Further, you agree to refrain from the use of social media, email and/or internet search engines, other than as may be necessary to conduct the session, during your online mediation session(s).

12. **Early Log On**. Whenever possible, please log on to the scheduled mediation session no less than 10 minutes in advance of the scheduled start time so that any technology issues can be addressed, and your mediation session can start on time. Also, contact your case manager at **xxx-xxx-xxxx** or xxxxx@mwi.org to schedule a time to troubleshoot any problems in advance of your mediation session.

13. **Waiting Room**. In order to preserve the neutrality of your mediator under all circumstances, you will enter the meeting each time you log on through a "virtual waiting room" until all parties have arrived. Once all parties are logged on and are in the waiting room, you will be admitted into the meeting by your mediator who will confirm that only scheduled parties and counsel are in attendance.

14. **Respectful Online Communication**. Due to the nature of the online forum, it is especially important to allow each participant to finish their comments or statements before responding. The audio portion of the technology will only allow one person to talk at a time. In addition, the online format can amplify and exaggerate sound so maintaining a regular speaking voice is important. Finally, please remember that the camera does not always transmit hand gestures or non-verbal cues, so it is important to verbalize all communication during an online mediation session.

Should you have questions about these online mediation protocols, please contact your case manager at xxx-xxx-xxxx or xxxxx@mwi.org in advance of your mediation session. Thank you.