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Acknowledges

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for developing this manual and the training program.

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MWI Mediation Training Manual

Table of Contents………………………………………………………………………… i

Section One: Introduction to Mediation

Introduction to Alternative Dispute Resolution: A Brief History………………… 1-1
Conflict Styles………………………………………………………………… 1-3
Conflict Styles Chart………………………………………………………………… 1-4
Dispute Resolution Methods and Roles……………………………………… 1-5
Defining Mediation: Principles for Practice…………………………………… 1-7
The Principles of Mediation……………………………………………………… 1-8
The Role of the Mediator………………………………………………………… 1-9
Advantages and Disadvantages of ADR A Comparison……………………… 1-10
Styles of Mediation……………………………………………………………… 1-12

Section Two: The Mediation Process

Overview of the Mediation Process……………………………………………… 2-1
Structure and Stages of Mediation ……………………………………………… 2-2
Intake, Screening, and Convening: Factors to Consider………………………… 2-4
Preparing Parties for Mediation………………………………………………… 2-6
Sample MWI Convening Letter………………………………………………… 2-7
The Mediator's Opening………………………………………………………… 2-8
Sample Mediator’s Opening Statement………………………………………… 2-10
Sample Agreement to Participate Form………………………………………… 2-11
The Initial Joint Session………………………………………………………… 2-12
The Mediator's Caucus………………………………………………………… 2-18
Early Private Sessions…………………………………………………………… 2-20
Later Private Sessions…………………………………………………………… 2-25
Final Joint Session……………………………………………………………… 2-31
Writing Mediated Agreements………………………………………………… 2-35
Closing the Session……………………………………………………………… 2-38

Section Three: Negotiation Theory and Mediation Practice

The Seven Elements of Negotiation with Guidelines for Mediators……………… 3-1
Negotiation in Mediation Preparation Checklist………………………………… 3-9
Mediator as Negotiation Consultant…………………………………………… 3-10
Mediation Note Sheet…………………………………………………………… 3-11

Section Four: Mediation Skills

Interactive Listening Skills: The Listening Triangle……………………………… 4-1
Reframing: Redefining the Conflict……………………………………………… 4-9
Using Neutral Language………………………………………………………… 4-12
Managing High Emotion………………………………………………………… 4-13
Dealing with Difficult Behaviors………………………………………………… 4-15
Overcoming Barriers to Agreement……………………………………………… 4-18

Section Four: Mediation Skills (*continued*)

Note Taking…… 4-20
Effective Use of Visual Aids…… 4-22
Co-Mediation: The Perils and Pleasures of Teamwork…… 4-24

Section Five: Special Issues in Mediation

When a Mediator Becomes Stuck…… 5-1
Power Imbalances in Mediation…… 5-3
Transmitting Information in Private Sessions: Best Practices…… 5-3
Managing Mediator Bias…… 5-7
Role of Agents and Legal Representatives…… 5-8
Use of Interpreters and Accommodations…… 5-10
Multi-Party Mediations…… 5-11
Meeting Space and Seating Arrangements in Mediation..... 5-13
Multiculturalism and Cultural Literacy…… 5-15

Section Six: The Practice of Mediation – Laws, Rules, Ethical Issues, and Credentialing

Confidentiality and Privilege in Mediation…… 6-1
Uniform Mediation Act…… 6-3
Massachusetts Confidentiality Statute…… 6-7
Confidentiality and Privilege: A National Perspective FL, CA, RI and CT…… 6-8
Federal Rules of Evidence, Rule 408…… 6-16
Ethical Standards - Uniform Rules on Dispute Resolution, Massachusetts …… 6-17
ABA/ACR Model Rules of Conduct…… 6-21
Ethical Dilemmas in Mediation …… 6-29
ABA February 2002 Resolution on Mediation and the Unauthorized Practice of Law..... 6-31
Mediator Certification and Credentialing …… 6-35
MBA Opinion 85-3 …… 6-38

Section Seven: ADR Resources

National and International ADR Organizations…… 7-1
Recommended Reading in Print…… 7-2
Online Resources…… 7-4
University Courses of Study on ADR…… 7-6
ADR Email Lists and Listservs…… 7-7

Section Eight: ADR Career and Marketing Information

Overview of Careers in ADR…… 8-1
Mediation Career and Marketing Resources Online and in Print…… 8-4
Best Business Practices for the Professional Mediator…… 8-5

Tables

Conflict Styles……..……..……..……..……..... 1-4
The Role of the Mediator …..……..……..……..……..... 1-9
Advantages and Disadvantages of Alternative Dispute Resolution: A Comparison……..… 1-10
Structure and Stages of Mediation…… 2-3
Sample Mediator's Opening Statement..... 2-10
The Dynamics Involved in the Initial Joint Session……. 2-12
Mechanics of the Joint Session……. 2-13
Dynamics of the Early Private Sessions …….. 2-21
The Dynamics of the Later Private Sessions…….. 2-25
The Dynamics of the Final Joint Session…… … 2-31
Mediator as Negotiation Consultant ……..……..... 3-10
Emotions in Negotiation Concerns……. 4-13
Acknowledging Emotion…….. 4-13
Mediator Traps…….. 5-1
Transmitting Information…….. 5-5
Diagram of Seating Arrangements..... 5-14

Samples

Sample MWI Convening Letter…….. 2-7
Sample Agreement to Participate Form…… 2-11

Section One:
Introduction to Mediation

Introduction to Alternative Dispute Resolution: A Brief History……... 1-1

Conflict Styles……. 1-3

Conflict Styles Chart..... 1-4

Dispute Resolution Methods and Roles……. 1-5

Defining Mediation: Principles for Practice…… 1-7

The Principles of Mediation…….. 1-8

The Role of the Mediator…….. 1-9

Advantages and Disadvantages of Alternative Dispute Resolution:
A Comparison……..... 1-10

Styles of Mediation……. 1-12

Introduction to Mediation

Introduction to Alternative Dispute Resolution: A Brief History

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

Sandra Day O'Connor

Mediation is a form of alternative dispute resolution, popularly known as "ADR". The term "ADR" describes a vast array of mechanisms for resolving disputes and differences outside the court. Although ADR has existed for centuries throughout the world in a variety of forms, during the 20th century social and cultural forces conjoined to produce the modern ADR movement, a revolution in the way people and institutions address conflict. The last 50 years have witnessed the meteoric rise and broad popular acceptance of ADR in the U.S. and throughout the world.

What were the forces that gave rise to ADR as we know it today? ADR was the product of a confluence of events and social movements. Its early roots sprang from the U.S. labor movement and the enactment of federal laws such as The Wagner Act of 1935 which protected the rights of workers to form unions and engage in collective bargaining to negotiate terms of employment and workplace conditions and promoted the speedy resolution of disputes between labor and management through peaceful means such as mediation and arbitration.

Meanwhile, the civil rights movement of the sixties and seventies, the push for consumer rights and advocacy, and the urban unrest affecting many cities in the U.S. led to the growth of community-based conflict resolution centers to promote citizen participation. Community activists and others perceived mediation as a means of empowering ordinary people to address and create solutions for the issues that affect individuals and neighborhoods.

As the 20th century advanced, federal and state courts grappled with a crisis in justice and public dissatisfaction with legal institutions. In response, Supreme Court Chief Justice Warren Burger invited Professor Frank Sander of Harvard Law School to present a paper at the Roscoe Pound Conference of 1976, a historic gathering of legal scholars and jurists brought together to discuss ways to reform the administration and delivery of justice. Sander's paper, "The Pound Conference: Perspectives on Justice in the Future", profoundly influenced and transformed both ADR and the American legal system.

In his paper, Sander reminded conference participants of the limitations of traditional litigation with its "use of a third party with coercive power, the usually 'win or lose' nature of the decision, and the tendency of the decision to focus narrowly on the immediate matter in issue as distinguished from a concern with the underlying relationship between the parties." He urged conference participants to envision alternatives, a "rich variety of different processes, which, I would submit, singly or in combination, may provide far more 'effective' conflict resolution." He also spoke of "the central quality of mediation," particularly "its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship,

a perception that will redirect their attitudes and dispositions toward one another." Sander's paper influenced the growth and development of what came to be known as "the multi-door courthouse", where litigants could gain access to the form of dispute resolution that best fit their need and the underlying conflict. Its descendants, court-connected ADR programs, can be found in courthouses throughout the U.S.

Just a few short years later, 1981 brought the publication of a modest volume titled, *Getting to Yes: Negotiating Agreement Without Giving In*, written by Roger Fisher and William Ury, of what was known then as the Harvard Negotiation Project. This book described a new model for bargaining or addressing conflict which the authors called "principled negotiation", representing a significant departure from traditional modes of bargaining. This model of negotiating contemplated that negotiators focus not on positions but on underlying interests; work toward mutual gains wherever possible; utilize fair and objective standards; and de-escalate conflict by focusing on problems not people. This influential work has since been published into more than 20 languages and used as the basis for negotiation and mediation training programs around the globe. The principles for negotiation described in *Getting to Yes* today are the lingua franca of the mediation world, giving professional mediators around the globe a common language for their practice.

Today, ADR, and mediation in particular, is broadly available and accepted. Widely institutionalized, ADR is now available in federal and state courts throughout the U.S. and other countries. Virtually every college, university, and business or law school in the U.S. offers at least one course in dispute resolution or negotiation. Corporations, elementary and secondary schools, universities, prisons, and the military have adopted mediation to address disputes. Meanwhile, agencies like the United States Agency for International Development have trained mediators to alleviate the strain on legal systems in developing nations around the world and to increase public access to justice. Taking ADR into the 21st century, mediation is even used to resolve disputes in cyberspace, with digital technology as the fourth party at the negotiating table.

Over the course of a relatively short period of time, the mediation field has produced several models of practice, a vast body of scholarship, and numerous laws and judicial decisions regarding mediators, mediation, and mediation communications. Movements within the profession have contributed to the development of ethical rules for practitioners and produced guidelines for the training and education of mediators. Specializations have emerged within the field with corresponding practice standards for those specialty areas. Meanwhile professional associations for mediators and other dispute resolution professionals abound that promote best practices and actively work to advance the field.

Conflict Styles

In the 1970s, two psychologists, Kenneth W. Thomas, Ph.D., and Ralph H. Kilmann of the University of Pittsburgh, developed the Thomas-Kilmann Conflict Mode Instrument, a psychological instrument used to identify conflict styles and how people behave in conflict.

Participants score their test responses to identify their dominant conflict style among five different modes - competing, avoiding, compromising, accommodating, and collaborating - to gain understanding of the impact those styles may have on workplace or personal interactions. Although individuals do demonstrate a preference for one style versus another depending upon the setting, the participants, and the issues at stake, a greater awareness of these five different modes allows individuals the ability to choose strategically among these styles to select the one that best fits the situation.

Thomas and Kilmann's studies hold special relevance for mediators, whose work by definition involves assisting individuals in conflict. Gaining awareness of the dynamics of conflict and recognizing the different styles that come into play are useful for mediators as they assist parties in addressing issues and exploring resolution. Ideally, mediators should understand their own conflict styles, since that style may affect or impede a mediator's ability to assist others in addressing disputes. Cultivating self-awareness is critical for effective and ethical mediation practice.

The chart on the following page sets out the five conflict styles. They are arranged on a graph that shows the tension between two concerns: the substance of the conflict and the relationship between the parties, depicted as two axes. The five styles are depicted as coordinates along these two axes, conveying the relative importance and role that each of these concerns plays.

CONFLICT STYLES

When to use which style?

SUBSTANCE

Competing: "hard bargaining"
Often Appropriate When:

- An emergency looms;
- You're sure you're right, and being right matters more than preserving the relationship;
- The issue is trivial and others are not invested in the outcome.

Often Inappropriate When:

- Collaboration has not yet been attempted;
- Buy-in from others is important;
- Used routinely for most issues;
- Long-term gains and relationships are a priority.

Collaborating: "two heads are better than one"
Often Appropriate When:

- Issues and relationships are significant;
- Cooperation is important;
- An integrative, mutually beneficial outcome is important;
- Reasonable hope exists to address all concerns.

Often Inappropriate When:

- Time is short;
- The issues are unimportant;
- The goals of the other person are unjustifiable;
- The relationship is of secondary importance;

Compromising: "splitting the difference"
Often Appropriate When:

- Cooperation is important, but time or resources are limited;
- When finding some solution, even less than the best, is better than a complete stalemate;
- When efforts to collaborate are not met with reciprocal interest.

Often Inappropriate When:

- Finding the most creative solution possible or building the relationship is essential;
- When "getting half of the pie" is unacceptable.

Avoiding: "leaving well enough alone"
Often Appropriate When:

- The issue is trivial;
- The relationship is not important;
- Time is short and a decision not necessary;
- You have little power but still wish to block the other person;

Often Inappropriate When:

- You care about the relationship and the issues involved;
- Used habitually;
- Negative feelings may linger;
- Others would benefit from a productive confrontation.

Accommodating: "closure through self-sacrifice"
Often Appropriate When:

- You really don't care about the issues;
- You seek harmony or credits toward a more important issue.
- Your safety is challenged
- When you realize you are wrong.

Often Inappropriate When:

- You are likely to harbor resentment;
- Used habitually in order to gain acceptance;
- There is an opportunity to collaborate.

RELATIONSHIP

Dispute Resolution Methods and Roles

During the 20th century and into the 21st, the needs of individuals and institutions and the demands of the market have led to the development and refinement of numerous methods of ADR. Different disputes and disputants pose different challenges and arrive with different needs, and it is crucial, as early ADR pioneer Professor Frank Sander once observed, to "fit the forum to the fuss".

The following are the most common kinds of ADR, although many more exist, some of which are hybrids or variations of the processes described below. Note the differing roles neutrals play across a spectrum of processes.

Arbitration

Arbitration is a form of private adjudication. Pursuant to law or by agreement of the parties, the parties submit their dispute to an arbitrator or panel of arbitrators. The arbitrator or the panel conducts a hearing in which the parties present evidence and then renders a decision which is usually final and binding upon the parties. Except under limited circumstances, such as bias on the part of the arbitrator or fraud, the parties can not appeal the decision of the arbitrator. Arbitration is typically utilized to resolve labor or commercial disputes and is increasingly common in consumer and employment contracts.

Case Evaluation

Case evaluation is a non-binding process that provides parties with an assessment of the strengths and weaknesses of their case in a dispute. The parties present a summary of the case to the case evaluator, a third-party neutral who will provide a non-binding assessment of the settlement value of the case, as well as an opinion about the likelihood of success at trial. Case evaluation can be used to address impasse in negotiation or mediation.

Facilitation

In facilitation, a facilitator, someone familiar with group dynamics and processes, helps groups prepare and plan for a meeting; define, prioritize, and discuss issues and goals; develop and evaluate solutions; constructively address concerns; reach decisions; create an action plan to implement solutions; and conduct follow-up and assessment. Facilitation can be used for many kinds of groups and in numerous settings, including corporate, non-profit, governmental, family, academic, and more.

Mediation

Mediation is a voluntary and confidential process in which a mediator assists parties in defining issues and exploring options for settlement or resolution. The mediator lacks power to impose a decision on the parties; the parties themselves, who at all times in the process exercise autonomy, define the terms of any agreement that is reached.

Ombuds

Many organizations - companies, universities, hospitals, non-profits, and governmental agencies - utilize an ombuds. An ombuds is a neutral person who informally assists employees or others in addressing concerns or disputes. Integral to the role of the ombuds are the principles of confidentiality, impartiality and the ability to operate independently of ordinary line structures. The ombuds may be external to the organization, providing services by contract, or operate within the organization. An ombuds maintains strict confidentiality (except where there is a serious threat of harm) and does not keep records on individuals but does provide management with reports on trends and other information that would otherwise not be available to management.

Out-of-Court Settlement

Charles Bragg

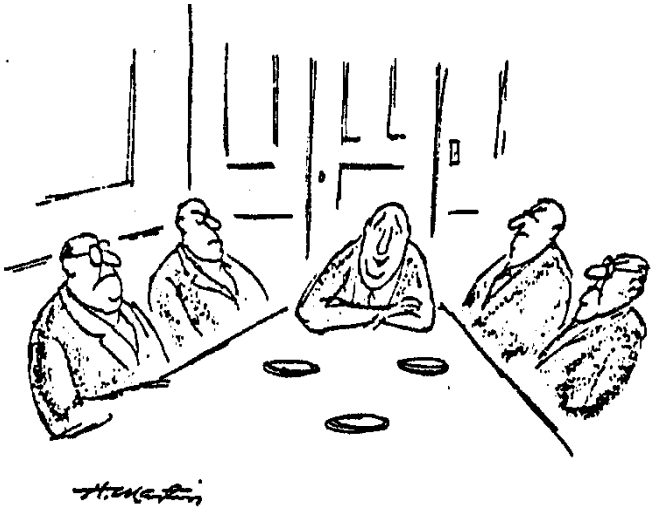
Defining Mediation: Principles for Practice

Mediation is a discussion involving two or more people, conducted with the help of an impartial third party, a mediator. An informal and non-adversarial process, mediation is often described as "assisted negotiation", facilitated by a mediator who assists parties as they engage in a joint search for agreement. All decisions - from the initial decision to participate in mediation to the terms of the agreement that may result - are entirely in the hands of the parties. The mediator, who possesses no authority to impose a decision on the parties, helps the parties identify interests, explore the range of options available to reach resolution, consider alternatives if agreement is not reached, and weigh decisions.

Unlike adjudicative processes, which focus on the substantive rights under law of the parties and the legal remedies available, and in which one party will prevail, mediation utilizes techniques that aid parties in producing a workable plan that will meet the underlying interests of all parties.

The idea that conflict and its resolution are not simply a zero-sum, win/lose game comes to us from the work of Mary Parker Follett, an early 20th century pioneer in the field of human relations who coined the term "conflict resolution". Follett wrote, " We should never allow ourselves to be bullied by an 'either-or.' There is often the possibility of something better than either of two given alternatives." Her work anticipated the ADR movement, and texts such as Roger Fisher and William Ury's classic work on principled negotiation, *Getting to Yes*, bear the imprint of her influence.

A combination of core principles distinguishes mediation from other dispute resolution methods. They are discussed in the following section.



"Gentlemen, instead of trying to mediate this thing, why don't you just slug it out?"

The Principles of Mediation

The following five principles are central to the practice of mediation and form the basis for standards of practice and ethical rules promulgated by dispute resolution professionals and organizations around the globe:

1. **VOLUNTARY** is the principle that acknowledges the parties' right to freely enter both the mediation process and any agreement reached in that process. The parties have a right to withdraw from mediation at any time.

2. **INFORMED CONSENT** is the principle that affirms the parties' right to information about the mediation process, their legal rights and legal and social service options before consenting to participate in mediation or to the terms of any agreement reached in mediation.

3. **SELF-DETERMINATION** is the principle that recognizes that parties to a dispute have the ability and right to define their issues, needs and solutions and to determine the outcome of the process without advice or suggestions from the mediator. The parties have the final say as to the terms of any agreement reached in mediation.

4. **IMPARTIALITY / NEUTRALITY** is the principle that affirms the parties' right to a process that serves all parties fairly and equally. This principle also applies to mediators, who must refrain from perceived or actual bias or favoritism, either by word or deed.

5. **CONFIDENTIALITY** is the principle that the mediator will not disclose the information received from the parties, in order that parties will feel free to candidly discuss the issues and potential solutions. Any exceptions to this guarantee shall be made clear to the parties prior to their consent to participate in mediation.

The Role of the Mediator

The parties and the mediator each play key roles in mediation. The parties are responsible for the outcome - the solutions they create, the decisions they must make, and the agreement they reach. The mediator is responsible for the process - the steps and stages that unfold along the way.

The mediator's role is to manage three dynamics: the mediation process itself; the interactions between the parties; and the issues and decisions facing the parties. The following chart describes these three spheres of responsibility and influence:

The Process	*The Interactions Between Parties*	*The Issues and Decisions Parties Face*
The Mediator · Sets the stage · Builds trust with parties · Explains process clearly · Provides focus and structure · Creates smooth transitions from one stage to the next · Sets tone conducive for discussion · Responds to requests for ground rules from parties · Shows respect for parties · Demonstrates sensitivity to parties' needs · Honors confidentiality · Keeps track of issues, options, and areas of agreement · Remains patient and encouraging	The Mediator · Helps parties discuss difficult issues · Responds to and manages strong emotions and conflict · Separates parties when necessary · Acknowledges shared interests to promote understanding · Encourages recognition of other viewpoints · Transmits information between parties · Supports communication · Explores barriers · Models collaboration by working cooperatively with co-mediator · Terminates mediation if in the best interests of the parties	The Mediator · Tracks issues as they are identified · Recognizes interests within positions and demands · Asks questions to elicit interests · Ensures parties have opportunity to obtain information or seek advice from experts or counsel · Reframes information to help parties see issues in new light or gain understanding · Asks questions that encourage brainstorming · Asks hard questions with diplomacy and tact · Engages in reality testing · Prepares parties to negotiate face to face · Helps parties weigh decisions

Advantages and Disadvantages of Alternative Dispute Resolution: A Comparison

The following outlines the advantages and disadvantages of traditional litigation and two forms of ADR - arbitration, an adversarial process, and mediation, a non-adversarial one.

LITIGATION

Advantages:

- Provides a remedy under law for wrongs or injury; redresses social injustice
- Advances the rule of law by applying judicial precedent
- Provides a public forum for the resolution of disputes
- Proceedings conducted by qualified public official appointed or chosen to serve as result of public participation
- Court is a democratic institution serving as check against other two branches of government
- Right to appeal provides oversight and safeguards against errors

Disadvantages:

- Parties limited to remedies allowed by law
- Time-consuming; delays often result
- Appeals from judicial decisions can further delay final resolution of issues
- Litigation costs can be substantial
- Parties give up direct control over outcome: decisions are placed in hands of judge, jury

ARBITRATION

Advantages:

- Avoids delays of trial and saves parties time and legal costs, critical when commercial interests at stake
- Parties select the arbitrator or panel
- Private adjudication, avoiding disclosure of trade secrets or other sensitive information
- Proceedings generally conducted by subject matter expert
- Arbitration awards are final, meaning no further delays resulting from appeals
- Efficient, thereby reducing legal costs

Disadvantages

- Arbitration can be as complex as trial and therefore be costly; paying not just for lawyers but for arbitrator, too
- Arbitrator chosen as matter of private agreement not as result of public process
- awards are final and cannot be appealed except under limited circumstances
- Critics argue that private adjudication undermines common law tradition and development of case law
- Disputes resolved in private outside of public scrutiny or oversight

MEDIATION

Advantages:

- Saves parties time and money
- Allows parties to resolve disputes in accordance with own preferences
- Confidential, private forum for addressing sensitive issues and exploring settlement
- Parties control selection of mediator
- Parties retain control over outcome; can end mediation at any time
- Allows for creativity and flexibility in generating options; leads to solutions tailored to meet parties' interests

Disadvantages:

- May not result in resolution
- Favors "private peace" over "public justice"
- Imbalances in power, including access to resources, may produce unfair outcomes
- Concern that women and minorities may be disadvantaged in negotiation because of implicit bias and institutional discrimination
- Critics argue mediation thwarts the rule of law and ignores public interests

"Mom, Dad, this is Kevin, our new ombudsman."

Styles of Mediation

As the field of mediation has evolved during the 20th century and into the 21st, distinct models of practice have emerged. Each of these defines mediation differently, envisioning a different role for the mediator and parties to play. Below is set out a brief description of the best known of these models: facilitative, evaluative, transformative, and narrative.

Facilitative, Interest-Based Mediation

One of the most commonly utilized models of mediation practice, the facilitative approach focuses on the interests of the parties - the needs and goals that concern each of them. Based on *Getting to Yes: Negotiating Agreement Without Giving In*, the seminal work of Roger Fisher and William Ury that described a principled basis for negotiating to achieve mutual gains, this approach contemplates that the parties play a direct and active role in determining the issues to be addressed and developing mutually satisfactory options. Its broad focus on interests rather than a narrower one on legal rights alone allows for a fuller range of issues to be addressed - both legal and non-legal ones - and for greater flexibility in crafting outcomes responsive to parties' needs.

Evaluative Mediation

In evaluative mediation, the mediator focuses on the legal rights of the parties and the remedies available at law. The evaluative mediator evaluates the merits of each party's case, engages in litigation risk analysis, and predicts the likely outcome of trial. The mediator will also propose a solution to the parties. Evaluative mediators usually possess substantial, directly relevant subject matter expertise and are most often judges, experienced litigators, or otherwise well-versed in the subject of the dispute. Evaluative mediation is usually conducted through "shuttle diplomacy", as the mediator meets the parties privately in separate rooms, and mediators may exert pressure on parties to settle or "close the deal".

Narrative Mediation

The narratives that all of us construct about our lives, the people in them, the roles we play, and the events that have led us to where we are today, are critical to our sense of identity, place, and purpose, giving meaning to our lives. Each of us has a different story to tell and how we tell those stories shapes how we see and make sense of the world around us. Narrative mediation helps people in conflict deconstruct and tell anew their narratives, so that new realities and opportunities for understanding and positive change emerge. Considered revolutionary in its approach, narrative mediation grew out of the work of mediators in Australia and New Zealand and has gained a following here in the U.S. and elsewhere. To learn more about this model of mediation practice, read *Narrative Mediation: A New Approach to Conflict Resolution* (2000), a text written by two of its founders and leading proponents, John Winslade and Gerald Monk.

Transformative Mediation

Transformative mediation is based upon the framework described in *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994), by Robert A. Baruch Bush and Joseph P. Folger. Bush and Folger developed a model that focuses on the human interaction that lies at the heart of conflict and focuses on two core principles that come into play, empowerment and recognition. The authors describe empowerment as "The restoration to individuals of a sense of their own value and strength and their own capacity to handle life's problems." Empowerment is the ability of people to gain clarity about their needs and understand the choices they face, to weigh those choices, and make decisions consciously. The authors explain that recognition is "the evocation in individuals of acknowledgment and empathy for the situation and problems of others." Recognition signifies the ability to step into someone else's shoes and see things from their perspective. In transformative mediation, the mediator helps parties find the balance between these two and realize each of them fully. Transformative mediation places emphasis on the relationship and the dynamics between people rather than on problem solving or settlement.

Understanding-Based Mediation

Championed by pioneering dispute resolution professionals Gary Friedman and Jack Himmelstein, who are founders of the Center for Mediation in Law, understanding-based mediation rejects the use of private sessions or caucusing. Instead, it enables parties in conflict to work together to make decisions and address their differences. This model of mediation focuses on the interconnectedness of the parties because of their relationship to each other and to the underlying dispute. It recognizes their joint responsibility for determining whether and how the dispute will be resolved, supporting parties in crafting solutions that are the product of fully informed deliberation. It seeks to help parties understand their own interests and other perspectives more completely through direct dialogue.

Judith sensed that the mediation would take more time than the half-day that it had been scheduled for.

c.07CharlesFincher09.03 Scribble-in-Law at LawComix.com

Section Two:
The Mediation Process

Overview of the Mediation Process……..... 2-1

Structure and Stages of Mediation..... 2-2

Intake, Screening, and Convening: Factors to Consider……. 2-4

Preparing Parties for Mediation…… 2-6

Sample MWI Mediation Convening Letter…..…… 2-7

The Mediator's Opening…… 2-8

Sample Mediator's Opening…… 2-10

The Initial Joint Session……..... 2-12

The Mediator's Caucus…….. 2-18

Early Private Sessions…….……..... 2-20

Later Private Sessions…….. 2-25

Final Joint Session……. 2-31

Writing Mediated Agreements…….. 2-35

Closing the Session……... 2-38

Overview of the Mediation Process

Mediation can be depicted as a timeline, stretching from the past through the present day to the future. When the mediation begins, parties are typically focused on the past events that have produced the dispute. As the mediation progresses, the mediator helps the parties shift their attention from the past to the present and the future as they identify and prioritize interests and develop ways to meet those interests going forward:

Past	Present	Future
The underlying events	Parties' interests: needs, hopes, goals	· Options that meet interests · Commitment to an action plan

This process unfolds through a series of stages, each critical to the parties and the underlying issues. The parties gather information about the mediation process to become knowledgeable consumers and active participants; work with the mediator to address the dispute; with the mediator's assistance, identify the core issues and define the parameters of the problem they face; strategize ways to address these problems meaningfully; make informed decisions; and either reach closure through mediation or move forward to the next step. On the following page is an overview of these stages.

Structure and Stages of Mediation

Stage	Purpose	Format
Screening and Intake	· Ensure "forum fits the fuss" · Provide information · Identify issues involved and necessary parties · Screen for abuse · Check for potential conflicts · Make referrals if necessary	Phone calls and/or correspondence with parties or their representatives prior to mediation
Preparation	· Ensure parties are ready to negotiate effectively in mediation · Mediator is informed about issues	Guidelines and/or questions provided to parties in advance Mediator to review submissions
1. Defining an Agenda	· Identify issues to be addressed · Opportunity for parties to hear from each other · Allows for exchange of information	Usually done jointly with all parties. In some cases may need to be done with parties separately.
2. Identifying Interests	· Identify parties' goals, needs · Reframe positions to interests for problem solving · Prioritize interests	In caucus with parties separately, or jointly
3. Generating Options / Analyzing Alternatives	· Develop options to meet interests · Assess whether what each party can do their own is better than current options	In caucus with parties separately, or jointly
4. Making Decisions	· Evaluate alternatives in the event no agreement is reached · Address impasse, barriers to agreement · Evaluate options · Reach decisions · Prepare to reach agreement or end the mediation	Usually done in caucus with parties separately.
5. Reaching Closure	· Define agreement · Confirm next steps · Alternatively, end mediation	Usually done jointly with all parties. May need to be done with parties separately.
Evaluation and Follow-up	· To determine if the parties saw the mediator and process as fair · Determine agreement compliance	Post-mediation written evaluations and phone calls with parties or their representatives after the mediation

The outline above depicts mediation as a series of progressive stages. Mediation, however, must be flexible. The stages above track the progress of a dispute from intake and convening to information gathering, but they are not intended to depict a rigid series of steps that a mediator must strictly adhere to. Mediators should be ready to adapt the process to meet the needs of the parties and to follow them at the pace that best fits their rhythm.

After all, conflict can be years in the making or flare suddenly. Regardless of its history, addressing it can take time. To craft effective resolutions, disputants must make quantum shifts in their understanding of a dispute and their own connection to it. They may be weighing decisions that will influence their lives for years to come. Each dispute and mediation is different, requiring its own pace.

Parties may seem ready to generate options, yet as they do so, more issues emerge that need to be defined more fully. Parties may start evaluating the choices before them, which unexpectedly sparks fresh ideas to solve problems.

Meanwhile, the mediator may work with all parties in the room at once, helping them grapple with the problem together. At times the mediator may need to hold separate meetings with parties individually to address sensitive issues, prevent strong reactions from derailing the negotiations, or encourage candid discussion. The mediator may need to do much of the work through caucusing. Yet if parties are able to work together productively, the mediator may need to caucus with the parties only briefly. It depends very much upon the dispute and the disputants.

The mediator provides structure and direction but should also be ready to improvise or change course if the circumstances demand it. Focus and purpose are balanced against flexibility; at bottom, mediation is not a linear process but a multi-dimensional and fluid one.

THATCH by Jeff Shesol

Intake, Screening, and Convening: Factors to Consider

Goals

- Ensure that the "forum fits the fuss"
- Educate parties about the mediation process
- Clarify the mediator's role
- Identify the subject matter of dispute and necessary parties
- Ensure a good match between parties and mediator
- In certain kinds of cases, screen for substance abuse or physical or emotional abuse
- Determine whether accommodations for disabilities will be necessary for any of the parties
- Disclose fees and discuss payment
- Help parties prepare for mediation
- Schedule the mediation

Overview

Intake provides the first opportunity for contact between the parties and the mediator or the mediation program. Intake may result from:

- Referrals by
  - Courts or governmental agencies
  - Employee assistance programs
  - Attorneys, therapists, or other professionals
- Recommendations
  - Previous clients
  - Other mediators
- Marketing
  - Advertisements and directory listings
  - Promotional materials: web sites, brochures, etc.
  - Public speaking, published articles

Dispute resolution service providers typically utilize dedicated staff to conduct intake, which eliminates the risk that one-sided discussion with a party could inadvertently influence a mediator's perception of the parties and the dispute. It also frees up the mediator to focus on providing services rather than performing administrative tasks.

Many mediators in private practice conduct their own intake. The advantage this provides is the opportunity to establish trust and credibility with someone who may become a client. This direct contact also allows the parties to decide whether the mediator is the best fit for them. Either way is considered acceptable practice.

Intake is an information-gathering process for both the mediator and the parties:

Information for Mediator	**Information for Parties**
· Who are the parties? Who else should attend? · What is the dispute about? · What potential conflict of interests might there be or other ethical issues that could arise? · What special needs do parties have? Are accommodations necessary so all can participate? · Is mediation the best fit for this dispute and the parties?	· What is mediation and how does it work? · Who is the mediator and what role will he/she play? · What is the mediator's style? · What will my role be in this process? · How long will it take? Cost? · What do I need to do to prepare? · Is mediation the best fit for this dispute and for me?

Practice Tip

- Mediators who wear other professional hats must be aware of the ethical implications that can arise in conducting intake. Therapists, social workers, attorneys, health care providers, and other professionals should clarify up front the role they are to play so that parties are in no way confused about the services the mediator will provide. Mediators must make clear for parties that mediation does not constitute legal services or therapy or serve as a substitute for such services, and that the parties must obtain independent advice should they require it to aid them in decision making. Mediators should consult with the rules of conduct for their profession of origin for further information.

- If the mediator is in direct contact with one party during the intake stage, such as in a divorce case, contacting the other party is advisable to provide balance and to avoid the appearance of favoritism.

- When a mediator conducts his or her own intake, the mediator must take precautions to avoid creating the impression that the mediator favors one side or the other or has lost neutrality. Parties sometimes use intake to gain the mediator's sympathy or try to manipulate the mediator.

Preparing Parties for Mediation

Goals

- Ensure parties are prepared to negotiate
- Increase likelihood that parties will resolve their dispute
- Parties educate themselves in advance about their interests and those of their counterpart
- Save parties time and money
- Give parties the opportunity to gather necessary information in readiness for mediation

Overview

Numerous studies of negotiation have documented the value of preparation and its relationship to effectiveness at the negotiating table. The better prepared negotiators are, the greater their likelihood of success. Since mediation is assisted negotiation, the same principle applies. Mediators therefore may ask parties to take time in advance to prepare with care for mediation. This preparation can include such tasks as:

- Gather all information, documents, or physical items relevant to the subject matter of the dispute

- Articulate goals, not simply bottom lines

- Identify one's own interests as well as the interests of their counterpart

- Develop ideas that would contribute to a resolution of the dispute

- Identify objective criteria for evaluating the fairness of proposals, including applicable laws, industry or other standards, custom, business practice, market value, technical specifications, and so on

On the following page is a sample letter Mediation Works Incorporated sends in advance to its clients to aid them in getting ready.

Sample MWI Convening Letter

Date

via e-mail

Ms. Attorney, Esq.
Law Offices of Ms. Attorney
123 Main Street
Any Town, MA

Mr. Attorney, Esq.
Law Offices of Mr. Attorney
123 Commercial Street
Any Town, MA

Re: ABC Construction Mediation with XYZ Construction

Dear Counsel:

It is my understanding that, by agreement, the parties to the above matter agree to use mediation to resolve the dispute between them. The parties also agree to MWI as the provider of mediation services. In that regard, the mediator for this dispute will be Ms. Mediator, as agreed to by the parties.

This letter serves to confirm the logistics for the mediation as follows, unless we are told otherwise: Friday, June 19, 20XX at MWI, 10 Liberty Square - 4th Floor, Boston, MA 02109. The mediation is scheduled for a minimum of six hours. The parties will convene at MWI by 9:00am.

Professional fees for pre-mediation and mediation time will be billed at $400 per hour, split between the parties. The minimum fee of $2,400 is due prior to the scheduled date of mediation. Travel will be billed at half the hourly rate ($200 per hour) plus mileage at the current federal rate. Should the mediation proceed beyond the scheduled time, the parties will be invoiced subsequently. Administrative costs such as FedEx or call conferencing will also be invoiced subsequently.

In the event of a cancellation outside 14 days prior to the scheduled mediation, the parties are reimbursed all monies except for the case administrative fee, any non-reimbursable expenses and mediator time to date. For a matter that cancels on or within 14 days prior to the scheduled mediation, the standard postponement and cancellation policy of MWI is in effect and is discussed on a case-by-case basis. Unless we are told differently, the canceling party is the billable party.

As discussed on the conference call, please submit a short mediation statement by Friday, May 29, 20XX directly to me via email at <xxxxx@mwi.org>. The mediation statement may be accompanied by any back-up documents you wish to submit. We will exchange submissions upon receipt of the other party's submission.

Further, as also discussed on the conference call, if either or both parties would like an optional private session for about an hour with Ms. Mediator prior to the scheduled mediation date, please let us know. In addition, please let us know also whether there is a bond claim in this dispute and, if so, whether the bond or insurance matter is part of the mediation.

The Parties agree that the entire mediation process, including all written submissions and communications in advance of the mediation, is confidential pursuant to M.G.L. ch. 223, § 23C. Please see the attached sample Mediation and Confidentiality Agreement, which will be signed by all attendees *at the mediation*. Unless the parties agree otherwise in writing, nothing in this Agreement shall prevent any party from offering an executed settlement agreement or signed memorandum of understanding resulting from the mediation to a court of competent jurisdiction for purposes of enforcement. Further, there shall be no stenographic record of any meeting.

Feel free to contact me with any questions. You can reach me at 617-973-9739 or <xxxxx@mwi.org>.

The Mediator's Opening

Goals

- Introduce the mediator and parties
- Honor the principle of informed consent
- Establish trust with the parties
- Clarify the roles of the mediator and the parties
- Obtain buy-in from parties
- Confirm authority to negotiate
- Establish first area of mutual agreement by parties
- Gain consent from parties to participate
- Execute necessary forms and agreements

Overview

The mediator's opening educates the parties about the process of mediation, providing them with sufficient information so that they can give informed and knowing consent to participate in mediation. The opening clarifies the roles that the mediator and the parties each play in the process, as well as the responsibilities and choices that each has.

The opening is not simply for informational purposes. It serves social functions as well, also important. It may be the first time the parties have met each other in person, or it may be the first time the parties have met the mediator. Consequently, the opening serves as introduction not just to the process but to the participants, too.

The opening also establishes the tone for the conversation to follow: it sets the parties at ease, creates a sense of optimism at the outset, and helps the mediator reassure the parties about a process that for many may be wholly unfamiliar. It can also get parties accustomed to the idea of working with each other.

In addition, the mediator’s opening presents an opportunity for the mediator to confirm the authority of those present to negotiate or make decisions. It also elicits the first commitment the parties will make - namely, to participate in the process together in an effort to address the issues that they face.

What information should the mediator cover in an opening statement? Typically the mediator's opening statement will cover:

The Process of Mediation	Information about the process and how it differs from other means of resolving disputes such as trial. A road map of the process, including an explanation of joint and private sessions.
Principles of Mediation	Information about the aspects of mediation that are relevant to the parties and their conversations with each other and the mediator: · Voluntariness · Confidentiality · Party autonomy This emphasizes the control the parties have over the process and the decisions they will make, as well as the private nature of their discussions.
The Roles of Those Participating	A explanation of the roles and responsibilities of: · Mediator(s) · Parties · Non-party participants (attorneys and so on)

Practice Tips for the Mediator's Opening Statement

- **Be professional.** To gain the parties' confidence in you and in the process and to demonstrate your professionalism, be completely familiar with the information you will cover in your opening. Avoid reading your opening to the parties. Commit the opening statement to memory.

- **Be conversational.** To set the parties at ease, review the information you will cover in your opening as if you were having a conversation with them. Be natural and pause from time to time to allow for questions or check for concerns.

- **Share the opening with your co-mediator.** If you are co-mediating, identify the information you will cover in your opening statement and then divide up the responsibility. Sharing the opening statement makes it clear for the parties that you are working together as a team.

- **Keep it short.** Although covering all information thoroughly and answering questions are important, keep your mediator's opening statement concise. Parties may have difficulty absorbing too much information and may be too nervous or upset to listen closely. They may be silently rehearsing what they plan to say when you have finished. Do not be surprised if later you need to repeat what you have said, particularly about your role.

Sample Mediator's Opening Statement

STAGES	SUGGESTED WORDING
1. Welcome	· Welcome parties · Introduce mediators · Check on preference for names (first names? more formal?)
2. Explain process and roles	Mediation is an opportunity for both of you to discuss and address the issues that brought you here today. As mediators, our role is not to judge or advise but rather to help both of you explore possible options for resolution.
3. Voluntary	Mediation is a voluntary process. If you feel at any point that you would not like to continue, please let us know. If the reason for your wanting to stop the mediation cannot be remedied, the session will end.
4. Confidentiality	We will hold all information in confidence with the following exceptions: a planned commission of a crime or harm to self or others. Also, we cannot be called to testify for or against any party should this matter later go to court.
5. Neutrality	We're going to work to be perceived as neutral by each of you. If you think that we are conducting this mediation in a biased manner, please let us know your concerns so we can address them.
6. Structure of mediation	Describe process and let parties know mediation is flexible: · Initial meeting together · Mediators' break (if co-mediating) · Private sessions (separate caucuses) · Later joint meetings *On notetaking:* You'll notice that we (the mediators) will be taking notes. We encourage you to do the same, especially if one of you wants to say something while the other is speaking. We plan to throw out our notes at the end in order to fulfill our commitment to confidentiality.
7. Agreements	If you reach an agreement, the terms will be determined by you, the parties. We (the mediators) can assist you if you would like to have your agreement put into writing. (*if in court*) Any agreement you reach will be written and filed with the court. A mediated agreement will have the same weight as a judgment of the court.
8. Confirm Participation / Questions	Are the decision makers at the table? *or* Do you have to check in with someone else before signing? Any questions before we begin? Do you have any time considerations? (Be prepared to answer questions such as:) How long will this take? What happens if we don't reach an agreement? What happens if the agreement is broken? Ask - are you willing to try mediation? If yes, have parties sign the agreement to participate in mediation form. Attorneys, observers, or others who are present must sign as well.

MWI
Find your solution

AGREEMENT TO PARTICIPATE IN MEDIATION

We, the undersigned parties, hereby agree to have mediation services provided by Mediation Works Incorporated (hereafter MWI) in accordance with the following terms:

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 in the course of the mediation concerning abuse or the planned commission of a crime.

ROLE OF MEDIATOR: We understand the mediator(s) is/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.

In consideration of the foregoing, the parties have set their hands and seals this _____ day, of _____, 20_____.

_____ _____
date date

_____ _____
MWI Mediator date date

The Initial Joint Session: Defining the Agenda

Goals

- Build trust in the mediator
- Encourage communication and allow expression
- Identify and understand basic issues from the perspective of all parties
- Provide opportunity for information new to the parties to emerge
- Define an agenda

Overview

The next phase of the mediation process is known as the joint or public session. After the mediator concludes the opening statement and the parties have executed the agreement to mediate, the mediation can formally begin. The parties are now ready to explain to the mediator and to each other the events that brought them to the point they are at today and what resolution or outcome they seek. The focus of the joint session is on defining and gaining a basic understanding of the underlying issues as each party sees it and to ensure that all parties have the opportunity to speak. The joint session is also a first step toward establishing shared responsibility for solving the problems that have brought the parties to the table in the first place.

The following chart describes the dynamics involved in the initial joint session:

Objectives	**Skills and process choices by mediator(s)**
Build Trust and Credibility	· Provide balanced treatment of parties · Ensure all parties have "air time" and chance to speak · Use appropriate eye contact and body language to demonstrate attentiveness · Address parties in a courteous and respectful tone of voice
Model Positive Communication and Collaboration	· Interactions with co-mediator · Neutral language
Encourage Communication and Show Understanding	· Listen actively by summarizing interests, goals, concerns · Allow expression of emotions while ensuring atmosphere remains constructive · Empower parties to establish own ground rules for addressing interruptions · Normalize conflict by reassuring parties and expressing optimism about process
Help Parties Define Issues and Develop an Agenda	· Note-taking to keep track of key points · Focus discussion

Mechanics of the Joint Session: In a co-mediation, the process may unfold as follows:

Steps in the Joint Session	Mediator Action or Response	Explanation
Joint Session Begins	Mediator 1 invites the parties to begin. "Who would like to speak first? Both of you will have plenty of opportunity to talk about why you're here." Mediator 1 lets Party B know that they will have a chance to speak after Party A is done.	· Let parties decide who speaks first where possible. · Reassure parties that each will have an opportunity to speak. · Encourage parties to write down where they disagree (vs interrupting)
Party A speaks	Mediator 1 thanks Party B for waiting and summarizes Party A's interests to confirm understanding "Let me make sure that I understand what you've told us..." Mediator 2 summarizes any additional points from Party A if needed and invites Party B to speak. "Thanks for your patience, we'd like to hear from you now."	· Confirms understanding. · Limit follow-up questions since the other party is waiting their turn; objective is not to draw out every detail but to ensure that all parties have an opportunity to speak. · Important for both mediators to have an opportunity to interact with each party
Party B speaks	Mediator 2 thanks Party A for waiting and summarizes Party B's interests to confirm understanding "So, from your perspective..." Mediator 1 summarizes any additional points if needed.	· Confirms understanding with second party. · Limit follow-up questions to ensure that party "air time" is balanced.
Open Discussion	Mediator 2 asks each party, "If today's mediation was successful, what would you leave with?" Mediators 1 and 2 both take an active role to: · Listen actively and summarize interests · Ensure both parties have a chance to speak · Manage interruptions	· Allows parties to provide additional information or respond to each other · Clarifies further the mediators' understanding. · Demonstrates teamwork since both mediators are active participants, interacting with all parties

The mediators can continue the joint session so long as discussions remain productive. Some mediators, in fact, work jointly throughout the mediation with the parties and do not caucus with the parties individually. However, it is good practice to meet in private with the parties at some point during the mediation, since it can provide the safety necessary for parties to candidly discuss concerns, explore interests more fully, or develop options with the mediator without the pressure or anxiety that the presence of the other party can produce.

Practice Tips for the Joint Session

- **Who goes first?** With some kinds of cases, follow convention. For example, in some court-connected mediation programs, based on long-established custom, the parties will expect that the plaintiff (the person who has filed the complaint in court) will speak first. Otherwise, leave this decision up to the parties. Reassure them that the order in which they speak matters little and that they will all have plenty of opportunity to discuss what they need to.

- **Encourage listening.** Some mediators encourage parties to make the most of joint sessions, pointing out that they are likely to hear information they may not have heard before that can make a difference to their understanding of the dispute. This is their opportunity to persuade not the mediator but each other. Let them know that the direct communication that takes place during the joint session can save time.

- **What about ground rules?** During the initial joint session when tempers flare and parties angrily interrupt each other, imposing ground rules can seem like a sensible way for a mediator to regain control. But not all mediators agree that ground rules are the best way to anticipate or minimize interruptions. On the one hand, some mediators view ground rules as a means of setting a respectful tone from the start, establishing expectations upfront, and avoiding unproductive argument. For other mediators and for parties, too, the imposition of ground rules can seem patronizing and may thwart the healthy expression of emotions or of conflict itself - which is antithetical to the purpose of mediation as a tool for addressing disputes and their causes. Those mediators typically do not set ground rules at the beginning but instead seek ways to encourage parties to create their own ground rules as need arises. By enabling parties to create their own ground rules, mediators can help parties reach agreement incrementally on smaller issues as they build their way toward the larger ones. It also places decisions about how the parties will interact with each other in the hands of the parties themselves.

- **Linking or mutualizing interests.** Ultimately if the parties are able to reach resolution, they will need to define the terms of that resolution together. Therefore, if possible, listen for shared interests and point it out to parties as you summarize what you hear them say. Conflict can polarize parties to such a degree that they may not have realized that they have issues in common. (Mediator: "Both of you want this business to remain within your family's control. And you have both expressed hope that your children will one day take the reins from you and run the business together.")

- **When co-mediating, connect with all parties.** The joint session is an opportunity to build trust with all the parties, not just one. That is as true when you are mediating solo as when you are co-mediating. When co-mediating, make sure that both co-mediators have the opportunity to interact with each of the parties in the joint session. Otherwise parties may be left with the impression that each co-mediator works with only one side.

Challenges for the Mediator

Mediators, particularly those new to practice, should be on the alert for the following challenges.

- **Note taking.** Note taking is obviously an important tool which mediators use to keep track of the flow of information that emerges during conversations with the parties. Mediators may rely on their notes to summarize accurately or to provide structure and focus to the discussions. However, whether recorded with paper and pen or with a laptop, too much reliance on notes may interfere with the ability of a mediator to listen well to the parties. Remember to maintain eye contact with the parties as you take notes - a skill that takes practice for a mediator to acquire. For more information on note taking effectively, please read Section Four: Mediation Skills – Note Taking.

- **Whose agenda is it anyway?** One of the cornerstones of mediation is self-determination, a principle which affirms that parties at all times control and have responsibility for decisions made during mediation. The principle of self-determination extends to the development of an agenda at the beginning of the mediation. By drawing out parties' concerns and issues, the mediator helps them define an agenda for the mediation session. Therefore, the agenda is based on what each of the parties has identified as important and not what the mediator thinks is important.

Listening In: An Initial Joint Session

Listen in on the following conversation between a mediator and two parties when one party repeatedly interrupts the other, resulting in a flare-up.

Sara: I'm the one who's done all the heavy lifting in our business in terms of rainmaking. I was the one doing the cold calling or spending time courting prospective clients, and it's because of me that the business managed to thrive at all.

Paul: [interrupting]: That's bull***! It's because you were so effective at marketing that you handled that side of things. It was always our understanding that I was the one responsible for delivering the services that you were able to sell and keeping clients happy, not to be responsible for marketing. You weren't the only one working hard.

Sara: Do you mind? It's my turn and I'm talking, Paul. [back to the mediator] You know, I'm the one that this business is most identified with, not Paul, and it was through my hard work that we were able to brand ourselves so well. The whole time we worked together, he basically rode my coat tails...

Paul: [interrupting again]: That's not true, and it's not fair! The deal was that you'd handle marketing, I'd work directly with clients delivering services. And I worked long hours, keeping those clients happy. Delivering quality services is just as much about brand-building as marketing is. You can't change the rules in the middle of the game, Sara.

Sara: Hey, do you mind? I'm not done talking here. You said I could go first, and now you won't shut up and let me talk. You'll get your turn in a minute.

Mediator: [stepping in]: Let me just stop for a moment here if I could, since you both have said things I want to make sure I understand. Sara, you evidently take a lot of pride in your talent for marketing and invested a lot of hard work in building your business's brand. Paul, you also take pride in your contributions in the delivery of quality services to clients. It seemed clear to you that you were primarily responsible for delivering services rather than making sales. You also mentioned the importance of fairness as you both talk these things through. For both of you there's some question about how clear those lines of responsibility were.

Sara, you also made a request. You said you want to speak without interruptions and you want both of you to have a turn to say what you need. Is that right?

Sara: Sure. He'll get his turn. But it's mine now.

Mediator: Thanks, Sara. Paul, what about you? What do you need from this discussion to help make it a productive one?

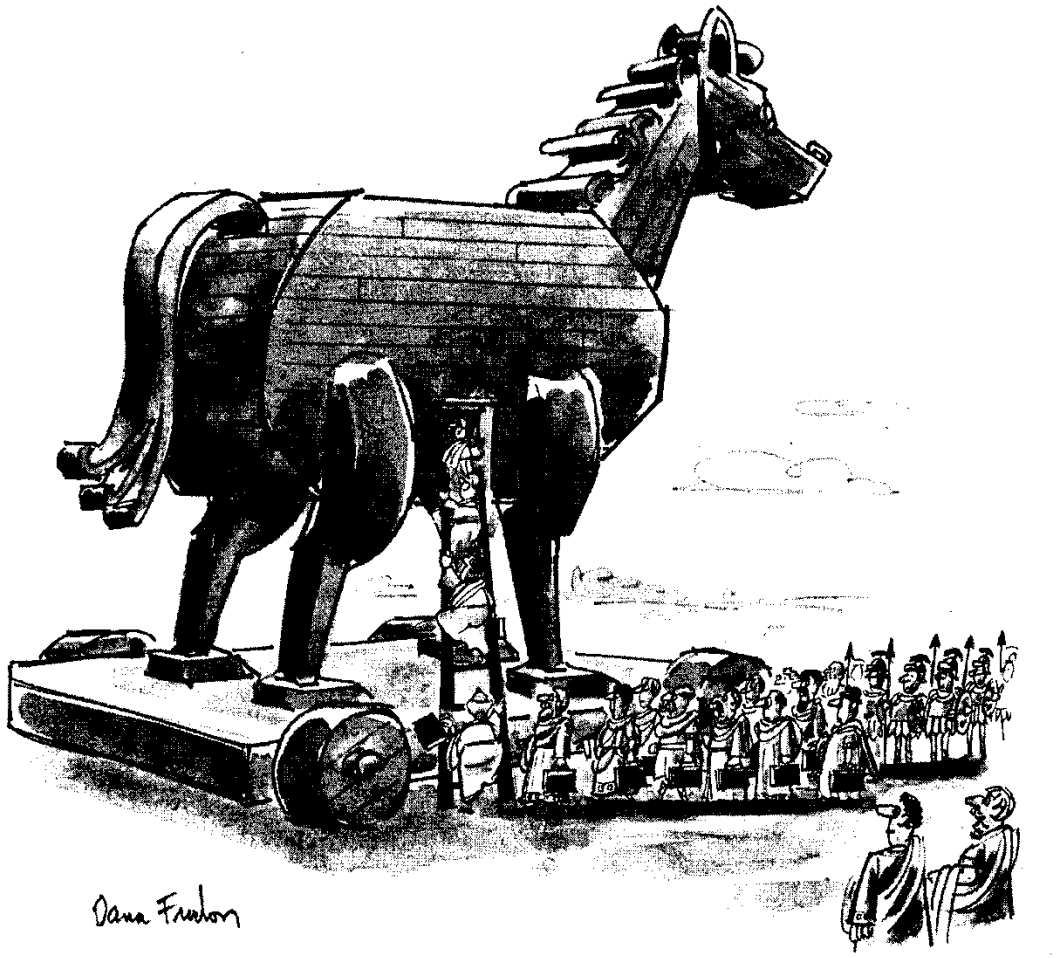
Paul: I don't know. She's saying things that I totally disagree with. It's hard to listen to her, and I'm really getting angry. [Pauses to collect himself.] Okay, look, I'll wait my turn. I expect her to do the same for me though.

Mediator: Listening to things that you don't agree with can be tough. In fact, it may be hard for both of you to hear things that you disagree with. [Sara nods.] Look, if you agreed with each other, you wouldn't need my help. But what both of you say

you'd like to do is to give each other the chance to talk without interruptions, knowing that each of you will have a turn. Does that work? [Both nod.] Is there anything else either of you need?

Sara and Paul: No. I'm fine. Let's just keep going.

Mediator: Okay, sounds like you want to move ahead. Sara, why don't you finish telling us what's on your mind, and then, Paul, you'll have a chance to tell us how you see things.



"We're going to try to negotiate first."

The Mediators' Caucus or Break: Enhancing Teamwork

Goals

- Check in with co-mediator
- Address bias
- Resolve problems between co-mediators
- Formulate a strategy to assist parties
- Make decisions together on how to proceed
- Give parties and mediators a break

Overview

Mediating conflict can be challenging, difficult work. Taking short breaks is advisable and benefits both mediators and parties. When mediators use a co-mediation model, the mediators' caucus fulfills several purposes. The mediators' caucus can build camaraderie and develop stronger teams, by giving mediators a chance to let off steam or get moral support or encouragement from their partner when a session has been especially difficult. The caucus is also an opportunity to compare notes and fill in gaps in each mediator's understanding of the dispute. The mediators' caucus provides time for mediators to address disagreements or differences between mediators to improve teamwork. These breaks can be used to strategize, make decisions about how best to structure the process, or discuss how to deal with a challenging situation.

If you are working with a co-mediator, request a mediators' caucus whenever you need to, and be ready to respect a co-mediator's request for a break. Even if you are not working with a co-mediator, remember to take a break when you mediate solo. You can use a break to regroup following a difficult session with one or all parties or to take a moment to review the information you have gathered so far and strategize what steps to take next. A break for you is also a break for the parties; it can mean a short cooling-off period for them or a chance to weigh decisions.

Mechanics of the Mediators' Caucus

The following four questions are designed to help you make the most of your first mediators' break, the one immediately following the initial joint session:

Question	Reason for asking
1. How are YOU doing?	· Build rapport · Acknowledge challenges · Allow opportunity to discuss and address mediator bias · Let off steam, nervous tension .
2. How are WE doing as a team?	· Strengthen the team · Address problems between co-mediators · Improve communication between co-mediators

Question	Reason for asking
3. What do we know so far? · Interests of each party · Options if any · Dynamics between parties · Other?	· Review information gathered so far · Identify gaps in mediators' understanding of the dispute and issues involved · Get mediators on the same page · Lay foundation for next steps
4. What do we do next and why? · Joint session or private? · If private, which party do we meet with first? · Which tasks will each of us be responsible for? (Reminding parties about confidentiality; asking a party a difficult question, etc.)	· Plan how to proceed, including who to meet with first and why · Divide tasks between mediators including who will explain confidentiality with the parties

Practice Tips for the Mediators' Caucus

- **Watch the clock.** Keep your break with your co-mediator short and pay attention to time. The parties are waiting and may grow impatient if too much time passes. Use your time efficiently.

- **Adjust seating arrangements if necessary.** The mediators' caucus is a time to recalibrate. Seating may be something you will need to adjust, particularly if you and your co-mediator have had difficulty maintaining eye contact with each other or with one of the parties

Deciding Who to Meet with First: Early Private Sessions

To decide which party to meet with first in private, consider the following factors:

- Was one party more emotional than the other?

- Did one party dominate the discussions or interrupt frequently, preventing the other from speaking?

- Was one party noticeably quiet or withdrawn during the joint session?

- Was one party more reticent about discussing their interests?

- Do the mediators have more information about one party than the other?

- Did the mediator offend one of the parties or make some other misstep in the joint session and need to regain their trust?

- Is there a potential power imbalance? For example, does the dispute involve a supervisor with an employee? Is one party represented by counsel, while the other is not?

- Will your neutrality be impacted by your decision? For example, are both co-mediators and one of the parties women, while the remaining party is a man? What inference might the man draw from your decision to meet in private with the woman first?

  For suggestions on building your capacity to co-mediate, review Section Four: Mediation Skills, Co-Mediation: The Perils and Pleasures of Teamwork.

Early Private Sessions: Identifying Interests

Goals

- Create safety
- Separate parties when conflict escalates and prevents constructive discussion
- Allow venting
- Encourage candid exploration of interests
- Promote creativity and brainstorming to generate options

Overview

Private sessions, or caucuses as they are also known, afford parties the opportunity to candidly discuss a range of topics and concerns with the mediator.

"Early private sessions" refer to the first meeting that each party has individually with the mediator or mediators. "Later private sessions" refer to subsequent private sessions. As one might imagine, the dynamics in each are very different.

Private sessions fulfill multiple functions, which can include:

- Provide for honest discussion and full exploration of goals and interests, as well as risks and concerns
- Allow parties to safely let off steam or vent without the negative fallout that might result otherwise
- Enable mediators to continue to build trust with a party or regain trust if something occurred in an earlier session
- Separate or manage angry or emotional parties
- Give parties a break from each other in particularly stressful cases
- Give mediators themselves a break, since conflict can create stress not just for parties but for mediators as well
- Permit parties to creatively explore the full range of potential options for settlement or resolution

Mechanics of the Early Private Sessions

Stages of the Early Private Session	Mediator Action or Response	Explanation
Welcome	"Thanks for waiting so patiently. Please have a seat."	· Builds trust; honors the mediator's obligation as host for the process. · May want to check in as well to see how party is doing if something transpired earlier
Remind party about added layer of confidentiality	"If anything comes up that you do not wish me to share with [name of other party], let me know, and I'll keep it confidential."	Encourages party to discuss candidly concerns, interests, or other issues.
Open up discussion; allow venting	"What else would you like us to understand?"	· Allows party to set the agenda and discuss what is important to them · Allows for candid expression · Provides emotional outlet
Ask for and listen for **interests**	"You need to be able to count on all members of your staff to work as a team, particularly during this critical time of year. What else is important?"	· Encourages party to focus on present interests, rather than past wrongs · Initiates critical first step toward problem solving · Confirms understanding
Ask for and listen for **options**	"Honoring your commitments to your customers is important. At the same time, you need to handle this in a way that will be cost effective and get this resolved quickly so you can take care of other customers. What ideas do you have to get there?"	· Invites party to consider solutions that will meet interests. · Encourages party to think creatively.
Summarize to wrap up	Sum up in bullet points the interests identified, together with any options the party was able to generate, as well as any other relevant information	· Gives party a sense of progress made. · Confirms mediator's understanding.
Give homework	"While we meet with the other person, we invite you to think about other ways to meet the goals you outlined for us."	Encourages party to use time productively between meetings with mediator
Check confidentiality	"Is there anything you want us to keep private?"	Affirms that mediators will honor confidences.

Practice Tips

- **Sharing information.** One of the goals of mediation is to encourage parties to communicate directly with each other, particularly if they have an ongoing relationship that requires them to work or interact together in the future. For that reason, mediators share information strategically and purposefully, with the aim of promoting direct communication whenever possible. Mediators may elect to share information to:

- **Give parties a sense of optimism about the process**. ("Like you, she's wondering whether mediation will work, but at the same time she's committed to finding a way to work things out with you.")

- **Point out shared interests to promote joint problem solving.** ("You both care about the reputation of your business and finding better ways of serving your clients. You've talked about how important it is to recession-proof your business, and that's something she's told us is important to her as well.")

- **Help parties understand each other's interests.** ("One of the big concerns that still remains is the issue of trust. He's described it as 'the elephant in the room'.")

- **Let parties share *options* directly.** While transmitting interests from one party to the other can be helpful, if possible, encourage and prepare parties to discuss their ideas for resolution with each other directly. This is a more efficient approach that also reduces the likelihood of error that can occur when the mediator is conveying messages back and forth, shuttle-diplomacy style.

- **Each party benefits from the early private session.** Afford each party the same opportunity to vent, if necessary; explore interests fully; and identify options. Otherwise, parties may not be receptive to moving forward or considering other viewpoints. All parties need time to think through their objectives and consider the issues they are facing. Take this into account as well before sharing information; timing is critical.

Challenges for the Mediator

Managing wait times. Remember that one party is waiting outside the mediation room while you meet with the other party. They may grow impatient or be concerned about the length of time you are taking to meet with their counterpart. The following are ways to anticipate or address this issue:

- Alert parties in advance of the mediation or at the beginning of the mediation that there may be down time during the mediation so that waiting periods will not come as a surprise
- Give one party "homework" - identifying goals or brainstorming possible options - while you meet with the other party so that she is able to use that time productively
- During a particularly lengthy private session, take a break to check in on the other party to reassure them that you will be meeting with them soon

Listening In: An Early Private Session

Listen in on the following early private session between a divorce mediator and one party. The mediator is using open-ended questions and reframing to identify interests.

Mediator: Annie, thank you for meeting with me. As I mentioned at the beginning, this is a private meeting between the two of us. Often, people feel more comfortable sharing information in private when the other person is not in the room. So, if you tell me something that you do not want me to tell Jerry, just let me know and I won't share it with him. Do you have any questions?

Annie: Yes. Will you tell me what he says during his private meeting with you?

Mediator: Only those things he has given me permission to discuss with you, just like I'll be doing with you. Any other questions, Annie?

Annie: No [shaking her head].

Mediator: Since you don't have any additional questions, let's start. What else would be helpful for you to tell me?

Annie: Well, there are a couple of things you should know. He keeps on saying that "I haven't worked", which means that I'm somehow less deserving of my fair share, just because I haven't worked outside the home. That really bugs me – I worked hard at home, taking care of our twins who are now 18 and in college. How can he say that what I did as a mother, raising our two boys, isn't really work?

Mediator: You want him to understand that while he was working and pursuing his career, you were working and contributing in important ways, too - raising the twins and making a home – and you want to know that those contributions are valued.

Annie: That's right, my contributions to our family do matter.

Mediator: What else is important to you, Annie?

Annie: The other thing is that I really want to stay in our home, at least for now while our sons are in college. They just went off to college this year, it's their first time away from home, and staying in the house means my kids have a place to come home to during college break. I don't want this divorce to disrupt their lives.

Mediator: It's important to you that your sons can return home while they are in college to give them a sense of continuity and connection to their family. You also want to minimize the impact of the divorce on them.

Annie: Yes, I love my kids and they should be able to come to the same home they grew up in.

Mediator: Annie, what else is important here? You want your contributions as mother and homemaker to be valued and taken into account as you and Jerry consider how to divide your assets, and you also want to shield your sons from the impact of the divorce and for them to have a familiar home to come back to at least while they're in college. What else is important?

Annie: Look, I need to make sure I leave with money today. I don't have any and need some to. And I hate asking him for money every time I need it – it's really embarrassing.

Mediator: So you'd like to use some of our time today to discuss your current financial situation and to see about regular support payments to avoid the awkwardness of the current situation. What specifically do you need financial help with, Annie?

Annie: Well, he's already covering the mortgage, but I need help with groceries and the electric, phone and cable bills. The boys are coming home for their semester break, and there's no cash in our current account for food. I also don't want to have to ask him for money every time I need it – it's humiliating. I started my new job on Monday but won't get my first paycheck for a month. It would be great if Jerry could just give me a weekly check for a certain amount.

Mediator: Congratulations on the new job, Annie. Sounds like it would help if the two of you could identify a specific sum per week to help you pay utility bills and buy groceries, particularly with your kids coming home and your long wait for your first paycheck. Jerry's covering the mortgage for now, but you need additional help. What amount would make sense?

Annie: That's something Jerry and I need to talk about today. I brought all the bills with me and I've pulled together a budget for the household expenses. I really want to be fair about this.

Mediator: So you'd like to use your time in mediation today to come up with a suitable and fair amount for support, and you've got the figures ready so you can talk it through. Is there anything else, Annie?

Annie: [Pause.] Look, this is confidential, right?

Mediator: Yes, of course. Is there something you'd like me to know?

Annie: I told Jerry I want a divorce because after 23 years of marriage I don't love him anymore. What he doesn't know is that I had an affair with one of his friends. I'm just afraid that if he finds out, he'll refuse to pay me any support at all, or really make my life difficult when it comes to me staying in the house. How am I going to live and afford the house without his money?

Mediator: What you've just told me is obviously sensitive and something that you want me to keep private between us. You're concerned about the impact your involvement with Jerry's friend might have on his willingness to pay you support you'll need to meet monthly expenses. Is there anything else you'd like me to keep confidential?

Annie: No, that's it. Just that. He'd be so angry and wouldn't give me a cent. Yes, please don't tell Jerry about the affair.

Mediator: Annie, thank you for talking with me, and I can assure you, what you have just told me about your relationship with Jerry's friend will remain between the two of us.

Annie: Well, thank you for speaking with me alone.

Mediator: You're welcome. While I meet with Jerry, please think about how to discuss the question of support with him and be ready to show him the bills and the budget you sketched out.

Later Private Sessions: Making Decisions

Goals

- Develop, refine, and evaluate options under consideration
- Evaluate alternatives in the event no agreement is reached
- Address impasse
- Make decisions
- Prepare to reach agreement or end the mediation

Overview

As the mediation progresses, the focus shifts. The mediator must demonstrate great sensitivity, tact, and patience as parties weigh difficult decisions, confront harsh realities, face roadblocks to settlement, and prepare to either reach resolution or end the mediation to pursue their alternatives.

During the later private sessions, the mediator can:

- Ask questions to help the parties brainstorm options to address their interests
- Promote collaboration by pointing out mutual interests and areas of agreement
- Deploy diplomacy and tact to explore reasons for impasse or help parties face difficult truths
- Play devil's advocate to challenge parties to see the issues in a different light
- Transmit information to help parties understand their counterpart's perspective or to digest unexpected news in private
- Explore alternatives to agreement when parties are unable to generate options
- Weigh options on the table against the best-case alternatives to a mediated agreement
- Act as negotiation coach to prepare parties for face-to-face discussions in the final joint session

The Dynamics of the Later Private Sessions

During the later stages of the mediation process, to build on earlier successes or jumpstart stalled negotiations, the mediator has an array of process choices to utilize in response to the dynamics in the room. The following table depicts the choices available to the mediator as a typical private session unfolds in these later stages:

Stages in the Later Private Sessions	**Mediator Action or Response**	**Explanation**
Welcome and reminder about confidentiality	"Welcome back, and thanks again for waiting. We just want to remind you that our conversation here can be kept confidential."	· Expresses appreciation to the party · Encourages candor
Check on homework and explore options	"While we met with [name of other party], we asked you to think about some ideas that will resolve the issues you discussed."	Holds the party accountable for coming up with options to resolve problems

Transmit information	"It sounds like you're seeking some reassurance about his level of commitment to mediation. It's interesting, because he spoke to that issue when we met with him just now. Like you, he shares your regret that neighbors of 30 years who were friends for so long have ended up in court. He also said that he sees mediation as an opportunity for a fresh start and is committed to working things out here." "She gave us permission to tell you that when her brother died last year, she became the sole caregiver for her 90-year-old father. It's made demands on her she never anticipated." "He has brought with him today an audio recording of his interaction with your sales manager. It differs substantially from your manager's accounting of events."	Can serve several purposes: · Offers hope · Provides an incentive to collaborate · Invites perspective-taking · Allows parties to digest unexpected or painful revelations in private to save face
Address barriers to agreement	"In light of your past, trust continues to be an issue. What safeguards can you build in to ensure that both of you will be able to honor your commitments?"	· Pushes parties to confront and remove roadblocks
Test reality	"Given last year's deep losses, what impact will further litigation have on your company's financial health and on investor confidence?"	· Serves as check against errors in judgment · Honors duty to principle of informed consent
Examine alternatives	"If you go to court, what are the costs – financial and otherwise – you'll be looking at?" "What if you don't reach agreement here today? Walk me through what that means."	· Ensures that parties make informed decisions by considering alternatives
Make decisions	"On the one hand you say the principle's so important that you're willing to spend the next few years in litigation to fight it. But you also said that this has so badly affected your physical and emotional health that you just want to put this behind you and move forward with your life. Court or closure – what makes most sense?"	· Invites parties to consider whether options or alternatives best meet their interests
Get ready for face-to-face negotiation	"You've said that communication has long been a problem. When we bring you back together in just a moment, you'll have a chance to get that	· Puts ownership of solving the problem directly into the hands of the parties.

	communication back on track. What do you want to say and how can you say it to get the result you want this time?"	· Supports direct communication between parties
Prepare for resolution or end the mediation	"I'm now going to bring you back together to discuss the ideas that you each came up with..." or "At this point, you've both come as far as you can. Before you leave, we're going to bring you back together one last time to let you both know where things stand."	· Puts parties in a collaborative frame of mind to discuss options and reach agreement or · Alerts parties that one more chance awaits to address impasse and reach closure
Check confidentiality	"Is there anything you want us to keep private?"	Affirms that mediators will honor confidences.

Practice Tips for the Later Private Sessions

- **Be direct but diplomatic.** Mediators must ask difficult questions. Ask them using neutral, nonjudgmental language but be willing to help parties face their choices head-on. Once you ask a question, particularly one that demands reflection, stay silent and give them time to weigh your question and respond.

- **Offer encouragement.** Mediation is hard work for parties. Give them encouragement and thank them for their effort. However, be honest as well. Offer encouragement when it can be honestly given, not when it is unmerited. Acknowledge actual progress only. Insincerity will cost you their trust.

- **Show patience.** The later stages of the mediation process are perhaps the most sensitive and most critical. Parties face tough choices and must consider them carefully. Much rides on these decisions; at stake could be substantial sums of money, important business or personal relationships, or professional reputations. These decisions may have long-term consequences for non-participating third parties such as children or other family members, shareholders, investors, neighbors or communities, or the general public. Avoid pressuring them; give them time.

- **It's their decision.** Mediators often measure their success by the number of cases they are able to get to settlement. Parties, too, typically come to mediation with the expectation that they will close the deal, settle a case, or resolve a dispute. Sometimes, however, parties choose to pursue their alternatives, since doing so serves their interests better than the options on the table. Although mediators have a responsibility to ask the hard questions to be sure that parties have thought through all decisions with care, mediators should refrain from pressuring or coercing parties to settle. In the end, the choice lies in the hands of the parties to decide for themselves what outcome makes the most sense for them.

- **Share information purposefully.** The danger with shuttle diplomacy – a type of mediation commonly practiced particularly with litigated or commercial cases in which the mediator shuttles back and forth between separate rooms, conveying

offers and counteroffers – is that it thwarts one of the important benefits mediation confers – the ability for those most intimately familiar with the details and history of a dispute to be directly involved in its resolution. Shuttle diplomacy also risks transforming the role of the mediator from neutral to advocate for the parties. There is also the danger that the mediator may inaccurately convey information. Direct communication between the parties, particularly during the problem-solving stages, can be the most productive and efficient way to reach resolution. However, parties do benefit from working in private with the mediator to candidly discuss the parameters of their problems and consider the benefits and costs of various solutions. Mediators must therefore exercise care when sharing information between parties, using it strategically to encourage collaboration or assist in decision making. For recommendations on sharing information between parties in private sessions, please see Section Five, Special Issues in Mediation.

Listening In: A Later Private Session

Listen in on a later private session between a mediator and a business owner and his attorney. This case involves a corporate franchisor who is seeking payment (or the termination of a contract) with a business owner (the franchisee) who, from the franchisor's perspective, has not met the terms of the franchise agreement. Counsel for the franchisor is in a separate room preparing to meet with the mediator. This has been a particularly difficult mediation given that the business owner believes that he would win his case in court.

Mediator: I'd like to start by thanking both of you for waiting while I met with counsel for the company. As before, this private session is an opportunity for you to discuss issues that you would rather not bring up to the other side. At the end of our private meeting, I will ask you what you've told me that I should keep private. Any questions before we go forward? [Parties shake heads.] Ok, let's start with anything else that you'd like to bring up since our last private session.

Counsel for Franchisee: I'd like my client to talk directly to you about some of his concerns.

Mediator: Ok. What would you like to discuss?

Franchisee: I'm not sure why I should continue with this mediation. My attorney says that I should take their offer, but I say no! This case is about justice.

Mediator: Please know that you should only continue with the mediation if it is helping you meet your goals. Help me understand what you mean by "this case is about justice".

Franchisee: I'm sick and tired of being pushed around by the company. I should be given some extra time to get this business on its feet again. If I take their offer, I'm a failure in my eyes and in the eyes of my family

Mediator: So let me see if I understand you correctly, and please, let me know if I miss something. Being successful in this business venture is important to you and it's important that you are successful in the eyes of your family; one option to meet this goal is for the company to give you more time to revive the business and meet this goal. Lastly, if you continue your working relationship with the company, you need the relationship to change for the better. Did I miss anything?

Franchisee: That's it. Also, the company doesn't want to go to court against me. I'll be judged by a jury of my peers, and they'll rule for the little guy. This is where I'll get justice.

Mediator: This is helpful to understand where you are coming from. In addition to the goals you've stated of being successful, and the possibility of continuing and reviving the working relationship with the company, you feel confident about winning in court.

Franchisee: Yes.

Mediator: Before we continue, I want to remind you of something I said at the beginning of the mediation. I mentioned that I would be asking you some "tough questions" that might sound as if I'm challenging you. My job is to help you and the company reach an outcome that meets your needs and theirs. Ok? (Franchisee nods in agreement). There are three areas that I'd like to cover: 1) how your and the company's interests overlap and diverge; 2) going to court – the risk factor and the cost, even if win; 3) defining success for you – what you need to leave with an outcome that meets your and your family's needs.

Franchisee: I'm listening.

Mediator: I've heard that both you and the company would like to resolve this in mediation if possible. Both of you have also said that you're prepared to go to court, and spend whatever resources are necessary to achieve your ends. Despite this, I'm encouraged that both parties are still at the table. Given that mediation is a voluntary process, neither side is mandated to stay and you're both here anyway. That's hopeful. I also need to let you know that while the company is committed to trying to work out a resolution in mediation, they do not want to continue working with you. This is based on the report [mediator passes it to Franchisee] that shows that you have not made the required sales for 10 of 12 months last year. Furthermore, they claim you're in violation of the franchisee contract for not maintaining accurate financial records.

Franchisee: But if they would just give me another chance.

Mediator: I hear that you would like them to give you another chance. I will bring any message to them or bring you two together to discuss possible options at your request. My job as a mediator is to make sure that both sides are fully informed about their own and the other side's perspective so both of you can make informed decisions. The challenge is that I raised this option before at your request, and they are unwilling to extend the contract. What they did say is that they would buy back your original investment and both sides would walk away from your working relationship. While I understand that you do not like this proposal, I suggest that we identify what works and doesn't work for you concerning the buy-out option with your attorney. I'd also like to better understand why it would be in Corporate's interest to provide you additional time to revive the business. Perhaps our discussion will lead to some additional ideas for resolution that you haven't considered.

Franchisee: Sounds good.

The later private session continued for another 45 minutes. The mediator helped the Franchisee clarify and confirm what it is that he wanted to achieve (his interests), whether he did so with an option by agreement (additional turnaround

time or buy-out, for example) or if he went with an alternative (e.g., take the Franchisor to court). During this later private session, the mediator checked in with the Franchisor every 20 minutes to let them know that they needed additional time to meet.

In the end, the parties reached an agreement that involved the Franchisee receiving a buy-out in an amount larger than his original investment. In addition, both parties found ways to meet their shared goal of changing the status quo and enabling both parties with the freedom to pursue their separate business plans.

"It's not enough that we succeed. Cats must also fail."

Final Joint Session: Reaching Closure

Goals

- Encourage direct negotiation between parties
- Support joint problem solving
- Assist in trouble-shooting and managing remaining differences
- Confirm commitments

Overview

The primary goal of the concluding joint session is to enable the parties to sit down face-to-face to address and resolve their problems. As unobtrusively as possible, the mediator continues to facilitate discussion and play a role in keeping negotiations focused and on track, but the ownership for problem solving rests squarely with the parties.

The Dynamics of the Final Joint Session

The concluding joint session might unfold as follows:

Steps in the Final Joint Session	**Mediator Action or Response**	**Explanation**
Setting the stage	Welcome the parties back and express appreciation for the progress they have made. "Thank you both for your efforts and hard work here."	Striking a positive tone influences the discussions to follow
Focus on shared and individual interests	State first the interests that the parties share. "Both of you want to resolve this today so that you can each move forward." State individual interests next. "In addition to these shared concerns, there are goals that each of you have as individuals..."	Identifying shared interests encourages joint efforts Focusing on interests, rather than positions, provides a productive framework for problem solving
Encourage collaboration.	Invite parties to share their options with each other. "Each of you has come up with ideas to get you where you want to go. Who'd like to begin?"	The invitation to discuss options gets the parties speaking directly to each other.
Problem-solve remaining differences.	Step in to address problems or to prevent impasse from derailing negotiations.	The mediator's role here is most critical, since small differences can completely destroy hours'

	"It sounds like that won't work. What's missing?" "You've tackled the major issues and reached agreement on all of those – and they were tough. Now you're stuck on this one point – how come?"	worth of progress if unaddressed. The mediator must work hard to focus parties on constructive problem solving, reminding them of the progress made so far to create incentive for reaching resolution.

Practice Tips

- **Let the parties talk.** If the parties are talking directly to each other and those discussions are productive, the mediator should resist intervening. Step in from time to time to recap progress or to stop an argument from escalating, but allow them the room to tackle the problem together directly.

- **Intervene to stay on track.** Too much progress has been made at this point to allow bickering to derail discussions. If tensions escalate, stop and ask questions to help them diagnose and troubleshoot. Keep them focused on solving the problem. ("You have both reached agreement on the marital home, your vacation property, your children's college fund, the stocks and pensions, and the art collection. The only thing left to address is this single piece of furniture that both of you say has only sentimental value. Do you really want to call it quits now when you're both so close?")

- **Focus on progress.** Sometimes talks in these final stages can stall out. People have worked hard and may be growing tired. If that happens, remind the parties of the progress made so far by recapping the areas of agreement. In addition, try breaking down problems into more manageable chunks. ("You both agree that as part of the business dissolution you need to sell the apartment building. Gayathri, you're concerned that there's still a lot to be done to get it on the market. What are those things? Please walk us through the steps.")

Listening In: The Final Joint Session

This is a condominium dispute that involves the two tenants (John and Martha) who own the two units in the building. They have owned the property jointly for years and the list of issues and disagreements finally became overwhelming. They chose to go to mediation to try to resolve their issues. Going into the mediation, Martha was thinking about selling (which was not known by John).

The parties have been working with the co-mediators through multiple private sessions. In those sessions, the parties identified their interests, including that they want to resolve the dispute and move forward (this took significant discussion of BATNA by the mediators, especially with Martha). The mediators have helped the parties focus on the issues that are critical to reaching resolution. At this point the parties want to develop options to work through the list of issues and create closure.

Mediator 1: Thank you for waiting. In this session with you together, we are going to list the things that you have both told us are important to you. We are then going to ask you about options to create a plan to move forward.

Mediator 2: There are many things that are important to both of you:
- To resolve the issues in a fair way;
- To deal with the maintenance and repair of the building;
- To organize the billing administration for the building;
- To meet all legal obligations of a condo association;
- To finalize all issues relating to the cat;
- To make an agreement that is durable

Is there anything else?

Martha: We need to set up a condo account so that we can meet the legal requirements of a condo association.

Mediator 1: So you want to make sure that all legal requirements are adequately met, and setting up a condominium account is a step in that direction.

Martha: That's right.

John: I also want to meet the regulations, but we will have to tie up a fair amount of money to create the account.

Mediator 2: You also want to meet all legal requirements, and you also anticipate that this could place demand on your financial resources.

John: You got it.

Mediator 1: Are there any options that either of you want to share with the other to find ways to get what is important to you?

Martha: There was a lot on that list. I'm not sure where to start.

Mediator 1: Let's write them down on this flip chart to create a list and you both can decide in what order you want to work through them.

[Mediator 2 writes them down, checking with the parties about the wording of each.]

John: Let's talk about the maintenance and repair of the building.

Mediator 2: Martha, how do you feel about starting with that?

Martha: That's as good a place as any. I understand that there are some repairs that are needed, but Jack is asking for some that just aren't necessary or are unfair for us to split. Like the roof – it needs some patching, but not a whole new roof! If Jack wants a new roof, he has to pay for most of it.

John: Wait a minute – the roof covers both of our units and the roofer told me that we need a new roof.

Martha: Of course he did – what business is he in? He sells ROOFS! I don't believe it.

John: Well then, we have a problem.

Mediator 1: OK, you both want it to be repaired – the issue is the extent of the repairs and how to get an objective determination. Are there any ways that you can think of that you can both agree on to determine the appropriate course of action?

John: I told you, my roof guy is an expert. He said it needs to be replaced. What else do you need?

Martha: I know a contractor – he might be able to help us.

John: If we're going to listen to her contractor, I want my roof guy there.

Mediator 1: OK, so it sounds like you are proposing that both the contractor and roof guy look at the roof and make a joint recommendation about what to do. What do you both think?

Martha: That works for me.

John: Me too.

Mediator 2: OK, what's next?

John: We have to talk about the electricity. You have the two kids and do all that laundry and cooking. You should be paying at least 2/3 of the bill.

Mediator 1: So we are moving from repairs to billing issues – is that what you want to do?

John: Sure.

Martha: Fine. You do laundry also, and turn on your lights, etc. Why should I pay more? You have friends over all the time.

John: That's not the same.

Mediator 1: So you both want to find an equitable way to divide up the electrical bill.

Martha: Yes. If Jack had split the meters years ago like he was supposed to, we wouldn't have this problem.

John: It was going to cost $1,000. You didn't want to pay for it either.

Martha: Don't we have to split it to meet the requirements of a condominium?

John: Yes, we do. And now it will probably cost $1,500. Ouch.

Mediator 2: So it is important to you to share the electrical bill fairly and you both want to be compliant with condo regulations. What do you want to do?

Martha: Jack?

John: I'm not sure we have a choice but to split the meter when you put it like that.

Martha: That would be great.

Mediator 2: Anything else to discuss about the electricity?

[MJ & JOHN both shake their heads.]

Mediator 1: OK, what's next?…

Drafting the Mediated Agreement

Goals

- Review and confirm parties' understanding of solutions, exchanges, and agreements
- Memorialize the understanding between the parties
- Define with specificity the commitments of each party
- Create a durable agreement with commitments that are realistic and achievable
- Anticipate and address future contingencies
- Meet the interests of all parties
- Ensure the agreement is the product of informed decision making
- Confirm next steps

Overview

The mediated agreement typically represents the culmination of substantial effort and hard work on the part of the parties and the mediator. It gives parties the opportunity to capture the agreement points they have reached and memorialize it in writing.

A mediation can result in any of several possible outcomes:

- Parties reach agreement on all issues
- Parties reach partial agreement, with remaining issues to be addressed in another forum
- Parties do not reach agreement

In the event that parties reach agreement in whole or in part, the mediator should determine what role the parties wish the mediator to play in assisting them in putting that agreement into writing. The parties may:

- Request the mediator to draft the agreement for them
- Request the mediator to draft the agreement for them, to be reviewed by legal counsel later prior to executing it
- Request the mediator to prepare a written summary or report of the mediation, identifying areas of agreement and mutual exchanges proposed, to serve as the basis for a formal agreement drafted by parties' attorneys later

- Decline the mediator's offer to assist and instead arrange for drafting by their lawyers
- Elect to rely on an oral agreement (may occur in family or community-based mediations where parties do not wish for more formal resolution)

Elements of an Effective Agreement: A mediated agreement ideally should:

1. Drafted in the parties' own words so that the parties are able to understand and implement the terms
2. Address the interests of all parties involved in the dispute
3. Contain terms that are workable, realistic, and can be implemented by the parties
4. Be clear, precise, and specific to avoid potential disagreements between the parties later regarding the meaning of terms:

✓ **How** payment should be made (check, cash, money order, type of currency, etc.)

✓ **When** actions should be taken or deadlines met (date, time, time zone)

✓ **Specific** (i.e., not "each weekend" but "from 6 p.m. Friday through 12:00 p.m. Sunday")

5. If written by hand, be legible to ensure that the parties will be able to read it later
6. Specify how breach of any of the terms of the agreement will be addressed
7. Plan for contingencies or build in mechanisms for addressing disputes arising out of the implementation of the agreement
8. Be reviewed and confirmed with the parties once all terms have been crafted
9. Reviewed by attorneys or other advisors prior to signing if the parties elect to do so
10. Does not bind non-participating parties

Practice Tips for Drafting the Mediated Agreement

- **The devil is in the details.** Agreement drafting is a crucial and sensitive stage, since it requires an attention to details that parties, tired from their efforts, may have difficulty commanding. If possible, encourage parties to stay to complete the work of ironing out the details of agreement while their efforts remain fresh in their recollection. Time spent now saves time later on, when memories can fade and misunderstandings grow as a result. Emphasize the importance of this stage for parties.

- **Ensure informed decision making.** Informed consent stands as a fundamental principle of mediation. To honor this principle, mediators should encourage parties to have their agreement reviewed by attorneys or other advisors before executing it. A signed mediation agreement is a legal contract after all, and parties will benefit from expert advice before signing on the dotted line.

- **Allow for information gathering.** Parties may need to gather information, obtain valuations, produce documents, or consult with experts before committing to final terms. Ask parties how they wish to proceed once they obtain this information and what specific steps each will take to finalize their agreement.

- **Avoid the unauthorized practice of law.** The practice of mediation does not constitute the practice of law. However, in some jurisdictions, drafting a mediate agreement may constitute the practice of law – an activity in which only attorneys qualified in that jurisdiction may engage. Engaging in the unauthorized practice of law is a serious matter, since those who do may be subject to fines, prosecution, or civil liability. Other jurisdictions permit mediators to draft agreements when the mediator acts only as a scrivener who merely records the language the parties dictate. Other jurisdictions permit broader latitude to mediators. Each mediator must ascertain the limits on mediation practice, if any, for the jurisdiction the mediator plans to practice in.

Closing the Session

A mediation may end in several ways:

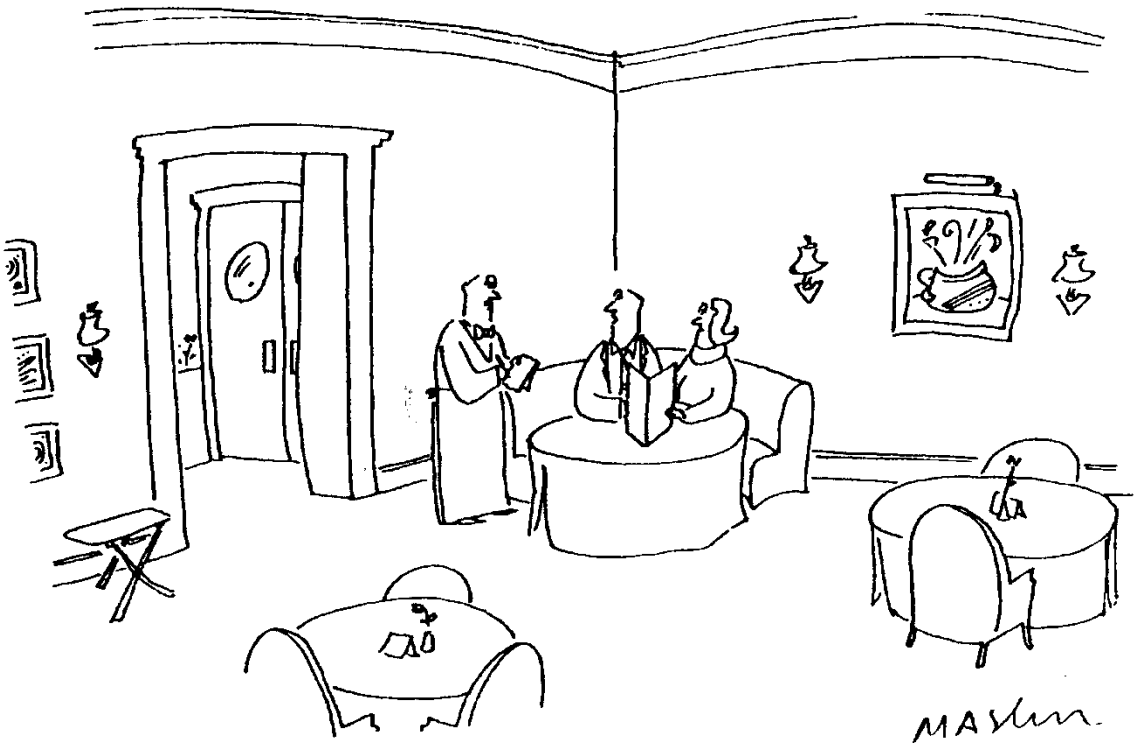
- The mediation ended in agreement in whole or in part, either written or oral
- The mediation ended without agreement and the parties are now going to pursue their alternatives
- The mediation ended because either the mediator or one or more of the parties withdrew
- An additional session has been scheduled
- The parties want to take a break and make some decisions about whether to continue or end the mediation

At the end of mediation, the mediator should provide the parties with the following:

- Clarification of next steps so all parties leave with a shared understanding
- Clarification who is doing what, when, and how. For example, if the mediator is going to draft a document for the parties, when will that draft be completed? Nail down specifics.
- If the session ended in agreement, be sure that the parties understand their responsibilities under the agreement. Each party should have a clear picture of what the action steps are under the plan they created.
- If a next session will be convened, schedule it then while the mediator and all parties - and their calendars - are in one room.
- Check that parties have information or know where to go for resources they may need.
- Homework for next session, if one is scheduled. If another session has been scheduled, be sure that parties are clear about what information they need to get and from whom. Help parties think about what they plan to use subsequent sessions to accomplish—invite them to create an agenda or identify one particular issue to focus on if there are numerous issues to address.
- Thanks and acknowledgment for hard work and progress made.
- Thanks anyway even if no progress was made and the session ends.
- Materials to take home or back to the office with them. For example, in a divorce case, this could include financial forms for completion. Also be sure to include your brochure or business cards.

After the parties depart and the session is formally over, the mediator should

- Complete any administrative paperwork that is necessary to conclude the mediation
- If co-mediating, debrief with the co-mediator to discuss lessons learned
- Destroy notes from the session if that is the mediator's practice, or alternatively update the case file with notations regarding the session
- Contact the case coordinator if applicable to provide the status of the case
- Fill out time sheets or invoices; keep records of hours
- Invoice the clients if payment was not received at the end of the mediation session
- Follow up with the parties to thank them in writing
- Complete any commitments, such as drafting a meeting summary or a memorandum of understanding, or to send information, photocopies, or other material.



"I believe we finally have something for you to put in writing."

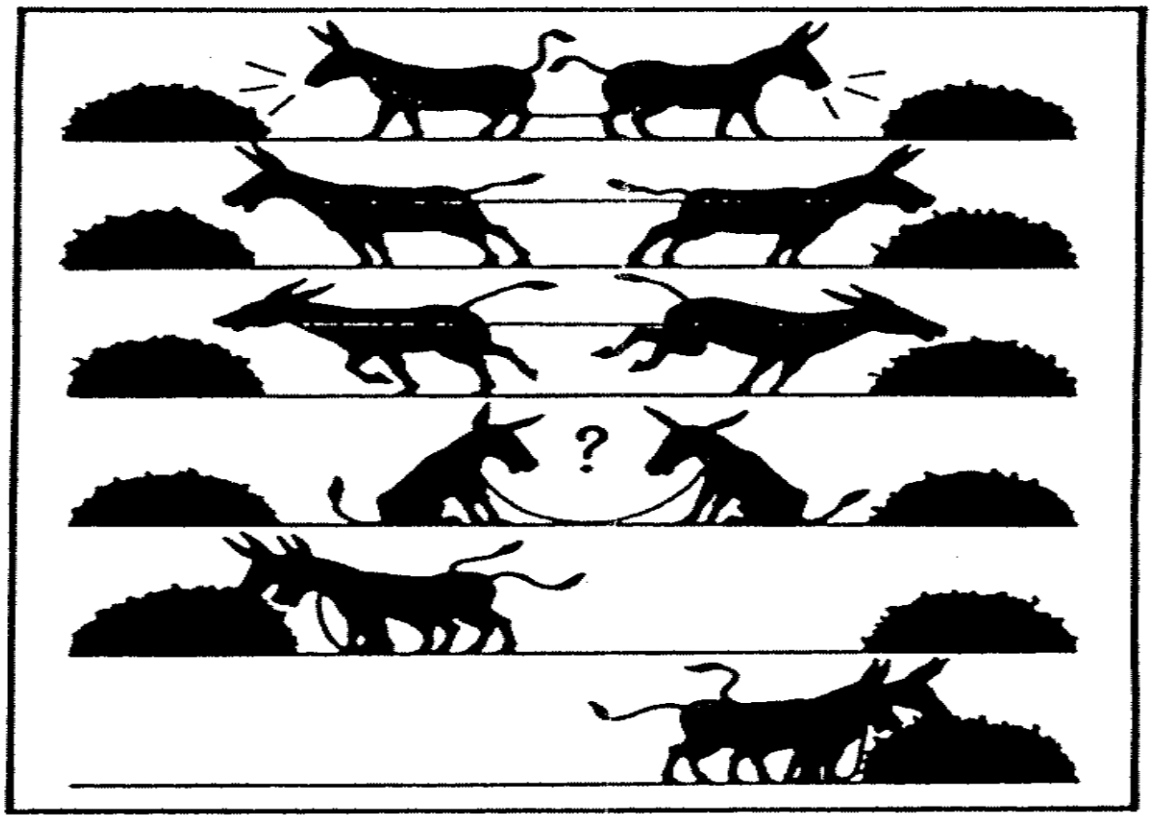
Section Three:
Negotiation Theory and Mediation Practice

The Seven Elements of Negotiation with Guidelines for Mediators……... 3-1

Negotiation in Mediation Preparation Checklist……. 3-9

Mediator as Negotiator…….. 3-10

Mediation Note Sheet..…….. 3-11



Negotiation Theory and Mediation Practice

Introduction/Overview

Negotiation involves two or more people or groups who try to reach an outcome that will meet their respective interests. Ideally, this outcome should be better than what either side could do on their own.

Mediation has been defined as "assisted negotiation." How does negotiation theory and mediation practice intersect? Parties who have been unable to work out a resolution on their own, have, in effect, proven themselves unable to negotiate effectively and would benefit from the assistance of a competent mediator who has the skill to assist them in their negotiation. The value the mediator brings to the table is an ability to assist the parties to manage the negotiation process effectively.

Defining mediation as "assisted negotiation" provides practitioners with an opportunity to approach the mediation process systematically. Roger Fisher's and William Ury's bestseller *Getting To Yes* gives the reader, and the mediator, a proven framework for negotiating systematically and effectively. Interestingly, the ideas found in *Getting To Yes* first appeared in a paper written by Fisher and Ury called "International Mediation: A Beginner's Guide", which was written for mediation practitioners. In what was most likely a "win-win" negotiation, the authors and the publisher decided to make the ideas accessible to anyone who engages in negotiation, from the grade school student to the corporate CEO. *Getting to Yes* remains a top seller and has been featured on BusinessWeek's "Long-Running Bestseller" since it was originally published in 1982.

The Seven Elements

The ideas in *Getting to Yes* were generated by Fisher and Ury and their colleagues at the Harvard Negotiation Project (HNP) at Harvard Law School. One of the many contributions HNP scholars have made to the field of negotiation theory and practice is the introduction of the "Seven Elements of Negotiation Theory" or the "Seven Elements" for short. The Seven Elements provide negotiators with a framework to prepare, conduct and review negotiations systematically.

This section of the manual defines each of the Seven Elements and shows how each Element can assist the mediator (to assist the parties) at each stage of the mediation process. Following each definition is a working assumption; an example of a problem that a mediator might face; the potential cause of the problem; and possible approaches and guidelines to deal with these challenges.

1. Interests

In traditional, hard-bargaining negotiations, negotiators stake out positions, making demands upon each other. A position specifies one way in which a party has determined their interests can be met. By definition, positions are fixed and inflexible; they evoke only limited response: acceptance, rejection, or perhaps incremental movement toward compromise. Positions offer little room for creativity, leaving parties' real interests largely unmet.

Fisher and Ury, after studying and participating in thousands of negotiations, identified a way to get around the self-limiting nature of traditional bargaining. By getting people

instead to explore interests–the needs underlying their positions–whole new avenues of ways to meet those interests open up. Interests are what each party hopes to achieve in mediation, describing the goals, hopes, and needs behind a party's involvement in mediation. The mediator's role is to help parties define and understand their own interests and the interests of the other party. Once this is done the mediator can help the negotiators (i.e. the parties) jointly problem-solve and develop an agreement. The better an agreement meets the parties' interests, the stronger the agreement.

- **Working Assumption:** Behind every position is a set of interests. Focusing on interests enables the parties to engage in creative problem-solving and find solutions that work for both parties.

- **Problem: Parties Focus on Their Position Rather than Their Interests and Seek Concessions:** Parties often recognize only one solution to their problem and advocate for that single solution (i.e., their position). They often build room for concessions into their initial offer in order to seem reasonable. Their goal is often to "win" by making fewer concessions, drawing more concessions from the other party, or coming to resolution closest to their initial offer. Even if this approach is "successful," value is left on the table and, often, the relationship is harmed in the process.

- **Cause: Parties Are Used to Win-Lose Bargaining:** Parties often assume they are at odds with the other party in mediation. They therefore strive to "win" and, sometimes, for the other party to "lose." Because most parties come to the table with opposing positional offers, they will assume that their interests are opposed. With a competitive approach, parties often damage the relationship in the process. The mediator's role, therefore, is to help the parties understand their own individual interests and point out shared interests where "common ground" exists.

- **Approach: Use Interest-Based Bargaining to Achieve Win-Win**: Carefully deciphering interests from positions will enable parties to recognize shared interests and opportunity for mutual gain. Recognizing interests helps parties understand why they are making their initial demand (position) in the first place. Once interests have been identified, the mediator can help parties think individually and together about possible options to satisfy each party's interests.

Guidelines for Mediators

- Refocus the conversation from positions towards interests. Be explicit about what you are doing as a mediator, i.e., that you would like to understand the goals, fears, hopes and needs of each party in order to help them meet those interests.

- Keep in mind that parties might be unclear about the concept of positions versus interests at first. Be sure to summarize the interests they have expressed early on such as "wanting this to be over" or "to be compensated fairly for the work performed" so the party gets a better idea of their interests.

- Also keep in mind that parties may need time to trust you as mediator and the mediation process before they share their interests. Parties often hesitate from sharing their interests for fear that this information will be used against them later. Earn the parties trust first by demonstrating active listening, adherence to confidentiality and demonstrate consistent behavior over time.

2. Options

Options are possible solutions that will meet both parties' interests. The mediator's role is not to generate options for the parties but rather to work with the parties to generate their own ideas for resolution. Having the parties generate their own options creates self-determined outcomes, which leads to more durable agreements between the parties. When discussing options, the mediator's role is to help the parties separate option generation (often called "brainstorming") from option selection. Options can be best generated and selected when all parties are clear about their interests.

"Options Are Formed on the Table."

- **Working Assumption:** Options should meet all parties' interests. Generating multiple options will give parties more to choose from and create the most gain for each party.

- **Problem: Value is Often Left On the Table:** Parties often accept or reject an initial proposal before fully exploring all possible options. Exploring options creates opportunities to expand the terms in a way that becomes even more attractive to both parties. Without option generation, parties lose the opportunity to explore solutions that might increase mutual gain at little cost to the other.

- **Cause: The Process Seems Unnecessary:** When parties are at odds, generating options can seem like a pointless task. Similarly, when agreement has been reached, parties often stop seeking additional options because they conclude they are "done".

- **Approach: Separate the Process:** When exploring options, it is essential to separate the process into two distinct phases for the parties.

  Phase I: Option Generation - Once the parties have defined their interests, parties should brainstorm as many options as possible without evaluation. Options, even those that seem far-reaching, might lead to additional ideas that are appropriate and add value to an agreement. It is essential that evaluation be held for a later time in this process. If parties begin to evaluate in the brainstorming process, remind them that there will be time for evaluation at a later point. Be explicit and transparent with the parties about this process.

  Phase II: Option Evaluation - Parties can now begin to discuss the merits of each idea, evaluating the pros and cons. Specifically, the evaluation should focus on how each option meets or does not meet the parties' interests. Encourage the parties to work together to bring the aspects of each viable option into a well-crafted agreement. Keep in mind that when a party says "no" to a particular option it is because the party believes that the proposal does not meet their interests. Ask them how they would change the option to meet their interest more effectively.

Guidelines for Mediators

- Continue the option generation process even after it seems you have found grounds for agreement. Ending the process before fully exploring options might leave value on the table.

- If necessary, consider selecting an alternate space for option generation. The purpose is to encourage parties to approach the mediation with a different frame of mind. This is might take the form of meeting in a separate room or taking a walk outside with the parties.

- You might want to ask the parties to serve a "consultants" to their own dispute. This activity involves asking each party (usually in private session) to pretend that they have been brought in to provide advice to the parties in dispute. What advice or suggestions would they give (to themselves) that might resolve the situation?

3. Alternatives

Alternatives define courses of action a party can take either by themselves or with a third party, if agreement is not reached with the other party in mediation. A critical component of a successful mediation is asking both parties to research what they will do should they not reach an agreement in mediation. Any agreement should be better than what they can do on their own, i.e., BATMA- Best Alternative to a Mediated Agreement).

"Alternatives are Formed away from the Table."

- **Working Assumption:** Parties who know their Best Alternative To a Mediated Agreement (BATMA) will help parties asses what they should or should not agree to in mediation.

- **Problem: Parties Fear that They Might Do Better Elsewhere:** Regardless of whether this is actually true or not, parties often feel this way during the mediation process. Without exploring one's alternatives prior to the mediation, it can be hard to know what the party will do if there is no agreement.

- **Cause: Agreement is Reached Without Knowing What Else was Available:** With nothing to compare the current proposal to, it is hard for parties to know what to say yes to and what to walk away from. Both choices (agreeing or rejecting the deal) are made out of fear when parties do not know what they could do if they do not reach agreement.

- **Approach: Mediators Can Encourage Parties to Research Their Own and the Other Parties' Alternatives:** Knowing one's alternatives (and the other party's alternative) before entering a mediation provides a benchmark for what each party should or should not agree to. Parties should never agree to something that is worse than their BATMA.

Guidelines for Mediators

- Ask each party what they will do if they do not reach an agreement in mediation. This is often done later in the mediation during a private session.

- If possible, ask each party to research and enhance their BATMA prior to the mediation.

- If one party threatens another party with their BATMA (e.g., suing them, going public with information, etc.), ask the party (in private session) how going to their alternative best suits their needs and interests. Keep in mind that they are in mediation in the first place because they have hope they will create a better outcome for themselves with the other party in mediation. Also be prepared to ask them why they are in mediation if their BATMA is so strong?

- Explore with them whether going to their BATMA really is the best thing for them. Remind them that mediation is an opportunity for them to "trade hope for certainty."

4. Objective Standards

Objective standards are external measures that help both parties determine a point, or at least a range, of fairness in mediation. Objective standards can be: market value, outside expert opinion, law, precedent, industry regulations, etc. Mediators ask parties to define objective standards in order to generate and evaluate options and alternatives. Objective Standards can also serve as options for parties to consider.

- **Working Assumption:** Referring to objective standards can create a sense of fairness, grounding options within standards outside of the control of either party.

- **Problem: Parties Make Proposals Based on Subjectivity Which Often Turn the Negotiation Into a Contest of Wills:** Without consulting external standards for fairness, parties will not be able to determine the true value of the issue in dispute. The problem is that a mediation becomes a contest of will rather than a search for a fair agreement. Without objective criteria, parties are vulnerable to tactics such as pre-planned demands or concessions.

- **Cause: Parties Focus on their Own Desires, Forgetting About Others' Need to be Treated Fairly:** Parties often forget that the other party wants to be treated fairly in mediation as well. Mediations fail when parties neglect to review objective standards with one another, grounding the basis for their proposals in a legitimate source outside of their control. No one wants to feel "taken."

- **Approach: Utilize Objective Standards to Ground the Discussions:** It is important to for the mediator to raise and address objective criteria explicitly in mediation. Parties can refer to standards to either push back on an unfair proposal or to defend their own. Using external standards can introduce a range that can help parties reach agreement while strengthening the relationship based on fair conduct.

Guidelines for Mediators

- If possible, ask parties to research and bring in objective standards for discussion in the mediation. Examples of Objective Standards include: law, precedent, regulation, industry standards, external evaluations, etc.

- The use of objective standards themselves must often be discussed in mediation. Parties may find that objective standards provide them with some possible options for agreement, such as what other parties in the same industry to resolve similar disputes.

- Mediators should encourage parties to make decisions based on the objective standards, not pressure. Ask each party what objective standards they can reference to justify how their proposal is fair to both parties. Ask how they would justify the decision that they are asking the other party to make.

5. Communication

Communication is the exchange of thoughts, messages or information by speech, signals, writing, physical cues or other actions between the parties. Communication should be effective, efficient and authentic. The mediator's role is to assist the parties to listen well and send messages that are received in a manner that was intended and vice versa. The mediator's job is to help parties communicate effectively by using such skills as reframing, clarifying, and summarizing.

- **Working Assumption:** Parties who communicate well have the opportunity to clarify interests and intentions, and increase the chance that their proposal will satisfy the other party's interests.

- **Problem: Parties Fail to Fully Understand One Another:** Parties often do not reach agreement because they do not understand the other party's interests and the proposed options. Parties often have a difficult time listening to one another, especially in a situation where there is a perceived conflict. Parties often assume they understand the other party's point of view and intentions when this is rarely the case.

- **Cause: Parties Focus More on Speaking than Listening:** Parties often conclude that the other party does not agree with them because they did not explain their point clearly. In this case, neither party fully hears or understands the other—in a typical conversation, people actually hear two voices- the other party's and their own internal voice deciding what to say next.

- **Approach: Utilize Active Listening Skills:** Ask open ended questions and give each party time (and some more time) to answer. When they are finished, before responding, take the opportunity to reframe what you heard in a way that articulates to them that you've understood them. This enables them to feel heard and recognized, provides them with the opportunity to correct you if you misunderstood them, and keeps the conversation moving forward, because they will be less likely to repeat themselves. When a party expresses an interest in the other and portrays a clear understanding of what the other is saying, the mediator's need to facilitate communication between the parties will be less immediate.

Guidelines for Mediators

- Your role as mediator is to facilitate and encourage communication between the parties. Model active listening skills throughout the process. Help the other party understand that you are committed to understanding their point of view, including their interests, proposed options and alternatives to resolution. It will likely be reciprocated and practiced within the mediation between the parties.

- Encourage the parties to listen to and understand each other. Talk with parties about the following ideas and solicit their input:

    - Listening is not the same as waiting for the other person to stop speaking so you can say something.
    - You can indicate understanding without agreement—be explicit about this
    - Try to speak only for yourself- how you felt, what you observed, etc. Do not make accusations or attribute motives to the other party
    - Think about what you want to say before you say it. Consider the different ways your message can be interpreted and ensure that your message, and your intentions, are clearly understood

6. Relationship

Relationship refers to the state and quality of interaction between parties. It is the mediator's job to ask the parties what they want to do about the working relationship and help the parties chart a course toward continuing or ending the working relationship.

- **Working Assumption:** Separating the people from the problem helps both parties improve both the outcome and define their working relationship (whether the relationship continues or ends).

- **Problem: A Negative Relationship Impacts the Mediation Process and the Outcome:** An unhealthy relationship between the parties will negatively impact the mediation process. When trust, open communication and patience are missing, parties will seek to end the process as quickly as possible. If they meet again at a later date for a separate issue, chances are they will revert to the same hasty and inefficient process as before.

- **Cause: Parties Often Combine Substance and Relationship:** When parties disagree with one another, they often make that disagreement personal. Attacking the party along with the problem results in poor communication, resentment, and a process where neither party feels comfortable or is willing to spend the time to reach the best possible agreement.

- **Approach: Address the Importance of a Good Working Relationship:** A mediator's job is to encourage the parties to be hard on the issues and soft on the people. The mediator should ask the parties what they want to do with relationship – should it continue or end? Clarifying this will help the parties work towards a common purpose. The mediator should encourage both parties to view the other side a collaborator, working together or "co-laboring" toward a shared solution.

Guidelines for Mediators

- Ask the parties to describe their *current* relationship. Also ask them what a *future* (ideal) relationship might look like. Follow-up by asking what they can do to close the gap between their current and future relationship.

- Listen carefully to what the parties want to do about their working relationship. Even if they want to end their relationship, remember that this is a shared interest that might be leveraged toward the parties reaching an agreement in the end.

- Even if the parties want to end their relationship, ask them about the value of treating this relationship as long-term—this is a small world.

7. Commitment

Commitments are statements of what each party will or will not do both at the beginning and end of the mediation. Commitments should be realistic, operational and clear. Commitments may range from: how the parties agree to conduct themselves during the mediation, a written contract at the end of the session, a verbal agreement, an agreement to continue discussions, or a handshake. The mediator's role is to help parties discuss and commit to process issues early in mediation and commit to substantive issues later in the mediation.

- **Working Assumption:** Parties can better ensure the quality of an agreement by postponing commitment on substantive issues until the end of the process.

- **Problem: Parties are Not on the Same Page or Commit Too Early:** Committing to aspects of an agreement before fully exploring interests and options can lock up the process. When commitment is made too early, parties can become rigid and stuck to those commitments, especially if concessions were made to get them there. An offer is often seen as a commitment—this can deter parties from making offers or generating options.

- **Cause: Lack of Communication and Limited Focus:** If parties have not explicitly expressed the degree to which they are seeking agreement at the start of the mediation, frustration from miscommunication may develop as they realize they are not able to meet one another's expectations. If they commit too early, before fully exploring interests and options, value can be left on the table, or they may be unable to accept a reasonable trade in options.

- **Approach: Discuss Degree and Postpone Commitment:** Mediators should talk with the parties about their expectations/abilities for commitment early in the mediation process to prevent miscommunication. They should also attempt to discuss all aspects of the mediation, especially interests and options in full, prior to making any commitments. Postponing commitment until the end of the process creates greater opportunity for mutual understanding and maximum gain.

Guidelines for Mediators

- Talk with parties about process commitments and substantive commitments. Process commitments include "how much time can you dedicate to the mediation process" and do you have the authority to enter into an agreement?" Substantive commitments include an exchange of resources including money, time or other items that can be measured.

- Encourage parties to commit early to process and only make substantive commitments at the end of the mediation.

- Mediator should remind parties when necessary that process commitments can be added and modified by agreement and that any options proposed during the negotiation should be considered tentative until both parties sign off on any final agreement.

Mediation Preparation Checklist

The following checklist may be provided to parties in advance of a mediation to assist them in preparing for mediation by considering the elements of negotiation.

The following checklist is designed to help you prepare for the mediation by clarifying your goals and priorities in advance of the session. Please take a moment to answer these questions for yourself.

1) *Interests* (i.e., hopes, goals, needs, concerns, motivations) - What interests are you hoping to have satisfied at the mediation? What do you think is important to the other party? Imagine the mediation was a success - what goals of yours would be met as a result?

2) *Options for agreement* - What would be considered a good outcome for you and for the other party? If you were not a party to this dispute and you were asked to suggest some options for resolution that all parties might accept, what would you propose? (These possible terms should meet the interests of both parties.)

3) *Alternatives to reaching an agreement* - What will you do if you do not reach an agreement with the other party? What do you think the other party will do if an agreement is not reached? How well do you think these separate outcomes meet your interests compared to what you might do together?

4) *Objective Standards* (examples include - laws, precedents, industry norms) - What standards of fairness apply to your situation? How do you think a neutral (arbitrator, court, administrative judge, etc...) would rule on your matter and why? What have other people in your industry done when faced with a similar situation?

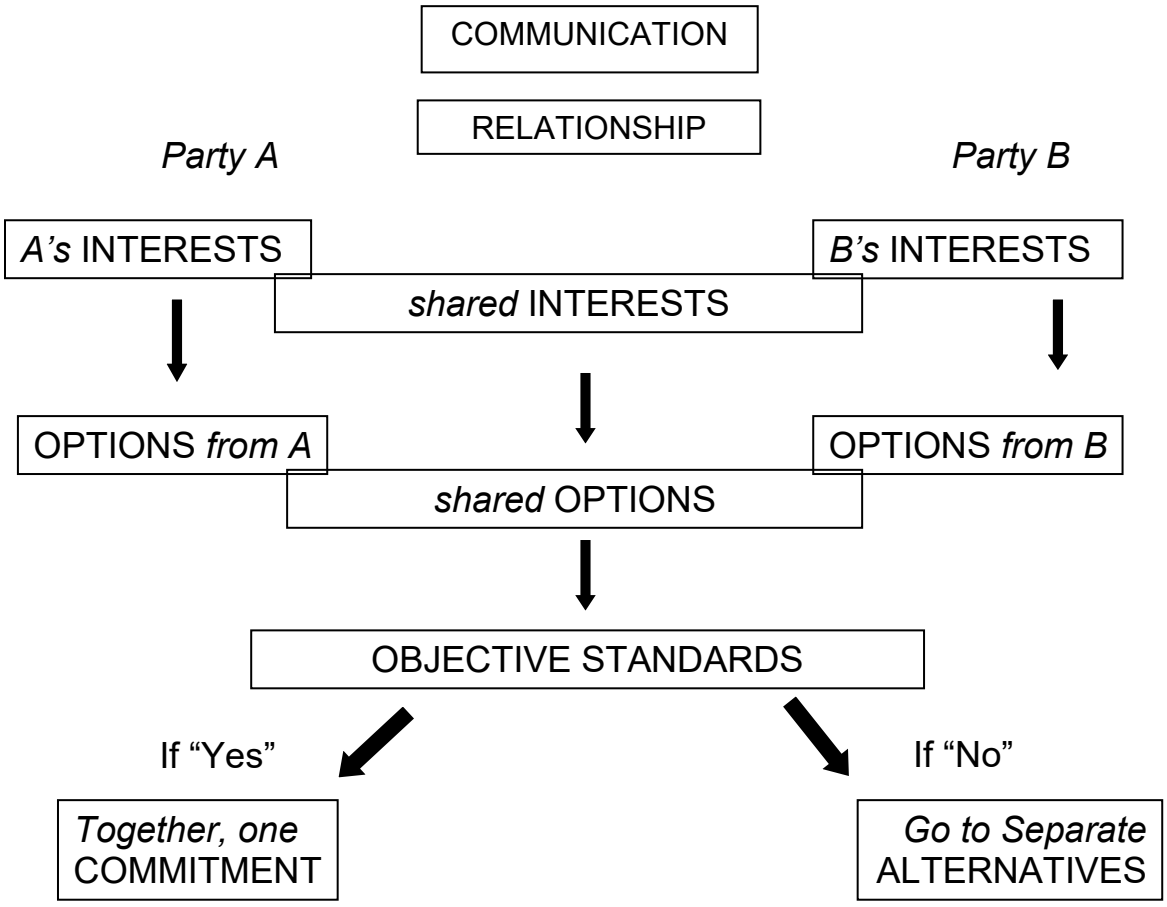
5) *Communication* - What messages do you want to send and have understood by the other party? What questions do you have for the other party at the mediation? What do you think the other party wants you to understand?

6) *Relationship* - Define the quality of the relationship between the parties. Should it continue or end? On what terms should it continue or end?

7) *Commitment* - Are you prepared to enter into an agreement? Does the agreement have to be enforceable from your point of view? Do you need to check in with anyone else before committing to an agreement?

8) *Other* - Please identify any other issues that you think need to be discussed. It's sometimes helpful to think of the mediation as a meeting and it's your job to create an agenda designed to cover the topics that you think need to be addressed.

Mediator as Negotiation Consultant



MEDIATION NOTE SHEET

INTERESTS - what motivates each party to negotiate; their goals, hopes, needs.

Party A's Interests:	Party B's Interests:

OPTIONS - what the parties could do together to meet their interests. Possible solutions.

ALTERNATIVES - what each party can do on their own to meet their interests. BATMA.

What Party A would do if no agreement:	What Party B would do if no agreement:

OBJECTIVE STANDARDS - standards of fairness recognized by both parties.

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

RELATIONSHIP - the quality of the interaction - the level of trust.

Describe current relationship:	Describe future ideal relationship:

COMMUNICATION - how messages are sent and received by parties (current/preferred)

Describe the quality of their communication:	How they would like to communicate:

COMMITMENT - what each party will and will not do. Their agreement.

Process: (e.g., amount of time at table, commitment to seek win-win outcome…)	*Substantive*: (Options in action - exchange or payment of time, money, resources, etc...)

Section Four: Mediation Skills

Interactive Listening Skills: The Listening Triangle……..... 4-1

Reframing: Redefining the Conflict..... 4-9

Using Neutral Language…… 4-12

Managing High Emotion…… 4-13

Dealing with Difficult Parties……. 4-15

Overcoming Barriers to Agreement……. 4-18

Note Taking……. 4-20

Effective Use of Visual Aids……... 4-22

Co-Mediation: The Perils and Pleasures of Teamwork…… 4-24

Interactive Listening Skills: The Listening Triangle[1]

Introduction

Communication is typically the first casualty of conflict. Once a dispute begins or escalates, communication suffers. Parties stop listening, and they stop talking.

Mediation is designed to address these communication barriers. It is an ideal mechanism for encouraging expression, bringing issues to the surface, facilitating the exchange of information, confronting misperceptions, and exploring the range of options for settlement or resolution. These opportunities arise through the mediator's ability to communicate effectively.

These communication skills break down into two main components: question asking and active listening, skills which work in tandem together. Questions invite reflection and perspective-taking, and draw out essential information. Active listening expresses understanding, offers new ways of conceptualizing a problem, builds rapport, and moves the discussion forward.

Each of these skills is essential. Without questions to consider, the parties would have difficulty considering their problems anew or weighing the full range of options. And questions alone, one after the other without pausing to consider the response they elicit, can seem more like an interrogation or a deposition. Question-asking and listening skills transform mediation from a mere process for negotiation into a conversation.

A Model for Communicating: The Listening Triangle

As process facilitators, mediators assist parties in transitioning productively from positions to interests and ultimately to options to meet their interests. This also involves a temporal shift for parties, who come to mediation focused on problems and issues that arose in the past. Through the strategic use of questioning and listening skills, mediators help people shift their focus from the problems of the past to their interests today and to develop options to produce a future-oriented agreement:

Where parties focus is ↓	↓ Mediation focuses parties here ↓	
PAST	**PRESENT**	**FUTURE**
Help parties shift focus from the past to the present. →	Support parties in focusing on the present—what do they need ***today*** to meet their interests?	Support parties in creating a future-oriented agreement that addresses interests.

To help new mediators and negotiators master the essentials of question asking and listening, MWI training faculty member Moshe Cohen created The Listening Triangle[1], a model for communication. It specifies three steps for eliciting and responding to information:

1. Ask a question
2. Listen to the response
3. Reflect back what you hear

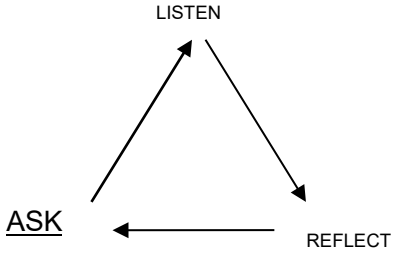
The Listening Triangle is flexible enough for use at all stages of the mediation, but it is particularly adept at identifying interests, a central focus of facilitative, interest-based mediation. It helps

[1] Copyright - The Negotiating Table, Cambridge, MA.

mediators integrate both question-asking and listening to guide parties in making the conceptual and temporal shift from past positions to present interests.

Step 1: Ask

Good questions, skillfully posed, accomplish a great deal. They can be used to:



- Draw out the background of the dispute or basic issues
- Identify interests
- Brainstorm options
- Reality test
- Encourage perspective-taking
- Weigh alternatives
- Address barriers to agreement
- Confirm commitment

Questions break down into two main types: **closed questions** and **open-ended ones**. Both have their uses in mediation.

Closed questions:

- Can be answered with one or two words or simply “yes”, “no”
- Are useful for confirming information or agreement
- Focus attention narrowly on a particular detail
- Invite brief answers when time is short
- Elicit only limited information or suggest a response by leading

Examples of closed questions:

- Do you want to give mediation a try?
- Did you communicate with them again?
- How long were you out of work?
- When did you refinance?
- How long have you owned the business?
- Do you need to contact your attorney?
- Would you like to take a break?
- How old is your daughter?

Open-ended questions:

- Begin with words such as “How...”, “Why...”, “What...”, “Could you tell me about...?”
- Can be verbal prompts that function like questions (“Tell me more about that”)
- Invite full discussion
- Produce more information
- Encourage discussion
- Allow free expression
- Are ideal for drawing out interests, generating options, addressing other elements of negotiation

Examples of open-ended questions at work:

- Draw out background or basic issues
  - “Can you tell us what brings you here?”
  - “What happened?”

- "So, please tell us why you're here."
- "Can you give us a little background?"
- "How did things change?"
- "Tell me more."

- Identify interests
  - "What are your concerns?"
  - "What else is important to you?"
  - "Could you tell me why that bothered you so much?"
  - "What else do you want her to understand?"
  - "Tell me what else you need."

- Brainstorm options
  - "How can this be resolved?"
  - "What other options do you see?"
  - "If this were any other business problem, how would you solve it?"
  - "What ideas do you have for getting the company back on track?"
  - "In the future, how can problems like this be handled?"
  - "What else would improve communication?"
  - "What other ideas do you have?"

- Define objective standards
  - "How have others in your industry addressed this issue?"
  - "How will you both know that an outcome is fair?"
  - "What are some ways to obtain an objective valuation of the business?"
  - "What kind of standards does your field recognize?"

- Reality test
  - "What is your worst case scenario if negotiations fall through?"
  - "What are the strengths and weaknesses of your case?"
  - "What are the strengths of their case?"
  - "Given your current financial condition, how will you survive the next few months?"
  - "What will the impact be on your customers if you do that?"
  - "How will your shareholders view that course of action?"

- Encourage perspective-taking
  - "Why do you suppose she feels that way?"
  - "You say he's always stressed out and difficult. Why do you think that is?"
  - "You've helped me understand what's important to you. What do you think is important to them?"

- Weigh alternatives
  - "What happens if you don't reach agreement?"
    "What kinds of costs will you face if this does go to trial?"
  - "What will a loss at trial mean for your company's competitiveness?"
  - "How will your shareholders view the risks of trial?"

- Address barriers to agreement
  - "What's stopping you from resolving this?"
  - "What's your worry about settling this today?"
  - "I can see you're having a hard time coming up with ways to resolve this. What's going on?"
  - "Trust continues to be a big concern. What safeguards can you build in to allay that doubt?"

  - "What would it be like to be able to move forward with your life?"
  - "How would it feel to have this resolved?"
  - "Imagine a colleague came to you with this problem. What would you advise her to do?"

- Reach or confirm commitment
  - "What are you each willing to do?"
  - "What contingencies do you want to build in to prevent it from happening again?"
  - "How realistic is that timeframe given these new factors?"
  - "What else should this agreement address?"

Some guidelines for asking questions:

- **Be purposeful.** Know why you're asking the question; have a reason. What is your motive? Is it to explore interests fully? Or are you following your own agenda?

- **Be diplomatic.** Good questions, tactfully asked, build trust between mediator and party. They can function as an invitation, encouraging parties to let down defenses and discuss issues candidly.

- **Avoid judgment.** Questions can also shut parties down if they seem judgmental or accusatory in tone. If you ask a difficult question, alert them in advance that you must do so and explain that your role is to have them think through their decisions with care.

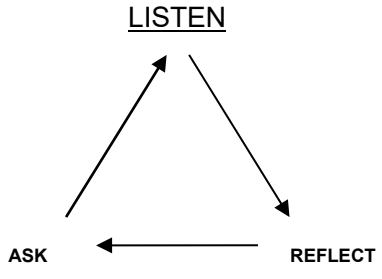
- **Allow silence.** Questions can be difficult, pushing people to confront harsh truths or make hard decisions. People need the room that silence leaves to weigh their answers carefully. Let silence sit to allow parties time to think.

- **Be curious.** Seek to fully understand parties' interests and motivations. Demonstrate interest and a desire to be helpful.

- **Keep questions short and ask just one at a time.** Questions that are too lengthy will only confuse parties. Limit yourself to one question at a time to help parties focus. Simple conversational prompts such as "Say more" and "tell me more" encourage people to speak fully, and one of the most powerful questions in the world is the one word, "Why?"

Step 2: Listen

Now that you have asked a question, you must listen carefully to the response.



Suggestions for listening:

- **Focus your attention** on what the party is saying in response to the question you just asked. Forget for a moment about the question you will ask next. Concentrate on listening to what the party is telling you.

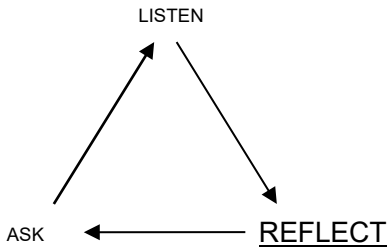
- **Listen for elements of negotiation.** As parties respond, they are revealing important information to the mediator. They may describe their interests or point to concerns about past communication or their prior relationship with the other party. They may touch upon their alternatives if no agreement is reached or throw out an option as a potential idea. Teach yourself to recognize

these elements and to understand how they work together. Train yourself to hear interests – the motivations, concerns and goals that hold meaning for the party.

- **Show that you are listening.** While you listen, use body language to demonstrate your full attention. Make eye contact and lean forward. Take notes while they speak.

- **Be ready to reflect.** The next step in The Listening Triangle is to show your understanding – to reflect back what you have heard. Listen, knowing that you will be reflecting back what you have heard in just a moment.

Step 3: Reflect



In *Challenging Conflict: Mediation Through Understanding* (2008), mediation pioneers Gary Friedman and Jack Himmelstein describe the central role that listening plays in mediation – through what they describe as "the loop of understanding". In their approach to mediating, listening is not simply about understanding a party, it is also about expressing that understanding:

> "*With* understanding as central to the parties finding a way through conflict together*, the purpose of looping is not to convince or contradict, not to take exception, nor explain away.* It is to understand*...By establishing some understanding from the start..., the mediator begins to help break the cycle of misunderstanding.*"

So passively listening to the parties' response to a question is not enough. The mediator must also take listening a step further and express understanding by reflecting.

To reflect, the mediator has three choices. The mediator can:

- Parrot
- Paraphrase
- Reframe

Parroting

Parroting means to repeat verbatim what a party has said. Parroting holds up a mirror for some honest self-reflection. Hearing your own words come back at you can be highly instructive. Although parroting has limited utility since it does little to further discussion, it can be used when parties are repeating themselves and you sense that this is because there is something you have missed. ("You have said several times, 'He's holding you back'. Help me understand what you mean.")

An example of parroting:

Party [angrily]: "You're not getting it at all! How many times do I have to say it? I'm not just a little upset, I am really infuriated with him!"

Mediator: "Okay, I get it loud and clear. You're really infuriated with him."

Paraphrasing

Paraphrasing means to restate in your own words what someone else has just said while remaining true to its original meaning. Paraphrasing shows understanding and can convey empathy. Paraphrasing is also a way of restating what a party has said in a more neutral and non-confrontational way. Like parroting, paraphrasing has limits. It acts a snapshot, capturing in that moment a party's present state of mind or their experience of a past issue, but it does not invite a different way of conceptualizing the problem.

> ***An example of paraphrasing***:
>
> Party: "He's the most infuriating pain I've ever worked for! He doesn't trust me to do my job and is constantly looking over my shoulder. It makes it impossible to get any project done on time since I have to run every little detail by him."
>
> Mediator: "It sounds like you're very frustrated. You find it really difficult to work when you're being micromanaged. You don't feel trusted to do your job and you're experiencing delays in getting projects completed."

Reframing: Listening for Interests

Mediation can help individuals in conflict gain new perspective, bringing fresh insight and understanding of each other and the underlying conflict. To enable disputants to see things differently, mediators utilize a technique called "reframing" to assist parties to redefine the way in which they understand or conceive of a problem.

In *The Dynamics of Conflict Resolution: A Practitioner's Guide* (2000), dispute resolution expert Bernard Mayer describes reframing this way: "[R]eframing is the process of changing the way a thought is presented so that it maintains its fundamental meaning but is more likely to support resolution effort." He describes the balance the mediator must strike, capturing honestly the intensity with which parties experience the conflict but also assisting parties to see the problem anew, as one capable of mutual resolution. According to Mayer, "The art of reframing is to maintain the conflict in all its richness but to help people look at it in a more open-minded and hopeful way."

To reframe:

- Restate the position as an interest – *as a problem that could be resolved*
- Restate it so that it describes a present need, rather than a demand on the other party
- Focus on the need, not personalities ("You need dependable, prompt service to keep your equipment up and running", not "You need him to stop ignoring your calls when you need your equipment repaired.")
- Restate it as an affirmative need, not a negation or a denial of a need: ("You want to be valued as an employee", not "You don't feel valued as an employee.")
- Convey the full meaning, including the emotional impact if any, but use neutral language

An example of reframing, revisiting the scenario in the paraphrasing example above:

Party: "He's the most infuriating pain I've ever worked for! He doesn't trust me to do my job and is constantly looking over my shoulder. It makes it impossible to get any project done on time since I have to run every little detail by him."

What are the interests to be reframed?
- Ability to work independently
- Feel trusted
- Complete projects on time.

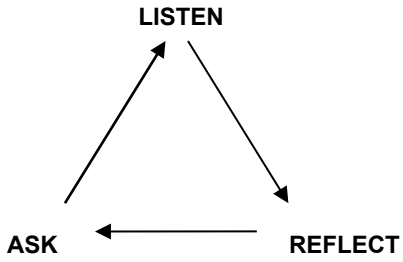
Mediator: "Work has been very frustrating for you lately, since you're finding it hard to do your job. Meeting project deadlines is really important to you, but you need trust and the space to work independently with minimal supervision to achieve that."

Another example of reframing:

Party: "He's got to stop pestering me with these stupid ideas that waste my time. I need help, not annoyance."

Mediator: "So you need ideas that will save you time and get your job done."

The Listening Triangle: Putting It All Together



To put The Listening Triangle into practice:

- Ask a question
- Listen
- Reflect back what you hear
- Ask a ***relevant***, ***open-ended*** question that draws out additional information about what you've just heard.
- Listen
- Reflect
- And so on

Ask	"Tell us what's going on."
Listen as they say	"For the third week in a row, my boss has walked into my office at 4:30 with an assignment to complete a report due on Monday morning. There's no way anyone can do a good job with so little lead time. And I'm sick of giving up time with my family on weekends just because my boss can't plan better."
Reflect	"You need more advance notice not just to complete work during business hours but so you can do the best job possible. And you want to manage your workload to assure you quality time with your family."
Ask	"Could you say more?"
Listen as they say	"The other problem is that I'm salaried! I don't get paid for working overtime. It's just not fair."

Reflect	"So you're also concerned that there's an issue of fairness – you want your compensation to reflect fairly the amount of work you perform and the hours you put in."
Ask	"What else is important to you?"

Use The Listening Triangle to identify interests or for generating options:

Ask for ***interests***

Party: "I want him to get rid of that dog. It's making my life a living hell."

Mediator: "You say you want him to get rid of his dog. Let's say he does. What will be different for you?"

Party: "I'll finally get some sleep at last without all that racket."

Mediator: "So you'll have the peace and quiet you need. What else?"

Ask for ***options***

During an early private session, the party has had a chance to vent and identify interests with the mediator's help. It's time now to shift from interests to options.

...

Party: "Look, it all boils down to this. If Olive and I are going to have to share an office, she needs to leave my stuff alone. She's not a bad person and sometimes she's given me great creative insights and critiques on projects, but she has to respect my space if this is going to work. I just don't know how to talk to her about this stuff. Every time I've tried, we've just ended up yelling, which obviously doesn't help."

Mediator: [summing up the interests and then asking for options] "Sounds like you value your relationship with Olive and appreciate her contributions. At the same time respecting each other's property and work areas is important. Although you're not quite sure how, you also want to find a better way to communicate. Given that these are your goals, what ideas do you have about sharing the office and improving communication?"

Party: "I'd like to start with the easier issue – the office. Maybe a masking tape line down the middle of the office would establish whose area is whose. But that would be temporary. Maybe we need some kind of screen or we need to rearrange the furniture to establish separate working areas in the office."

Mediator: "As far as sharing the office goes, you've identified two solutions, one temporary, one more permanent, both aimed at identifying your separate work spaces – a masking tape line; or either a new configuration of furniture or the introduction of a screen. What other ideas do you have?"

Listening well is a skill that requires constant practice to master. It demands much of us, claiming our time, our energy, and our full attention. But it is essential to the work that gets done at the mediation table. As Friedman and Himmelstein write, "By establishing some understanding from the start..., the mediator begins to help break the cycle of misunderstanding."

Reframing: Redefining the Conflict

Mediation can help individuals in conflict gain new perspective, bringing fresh insight and understanding of each other and the underlying conflict. Mediators utilize a technique called "reframing" to assist parties to redefine the way in which they understand or conceive of a problem – to recast it as an ***interest*** to be addressed.

In *The Dynamics of Conflict Resolution: A Practitioner's Guide* (2000), dispute resolution expert Bernard Mayer describes reframing as "the process of changing the way a thought is presented so that it maintains its fundamental meaning but is more likely to support resolution effort." According to Mayer, "The art of reframing is to maintain the conflict in all its richness but to help people look at it in a more open-minded and hopeful way."

Here are suggestions to help you master this critical component of the mediator's craft.

Reframing tip	**Examples**
Restate the position or demand as an interest – a need to be addressed:	"You need to have the repairs completed so you can put your home on the market for sale." "You want to have input into decisions that affect your job." "As a parent, greater involvement in your children's day-to-day lives is really important."
Begin your reframe using words that state the issue as a present need, not a recitation of past frustrations: "So what you need is..." "What's important to you is..." "What you want is..."	"You need reassurances that this time phone calls will be returned promptly." "What's important to you is cutting business costs and finding new sources of revenue as quickly as possible." "You want to be able to count on your staff and for all members of your team to arrive on time so that the store is fully staffed for your customers."
Focus on the need, not on making it personal	"You need dependable service, including calls returned promptly, to keep your equipment up and running", not "You need him to stop ignoring your calls and blowing you off when your equipment breaks down."
Restate it as an affirmative need, not a frustrated need or a negative	"You want appreciation for your contributions as an employee", not "You never feel appreciated by your boss."
Convey the full meaning, including the emotional impact if any, but use neutral language to avoid alienating the other person.	"Trust is the biggest issue here, and you need safeguards in place to ensure commitments are met", not "You feel totally deceived by his sleazy conduct and don't trust him without guarantees."
Restate it so that it describes a present need, not a demand singling out one individual	"In your company, professional attire for all employees is critical when it comes to first impressions with customers", not "You want her to stop treating every day like casual Friday and leave the pink spandex pants at home."

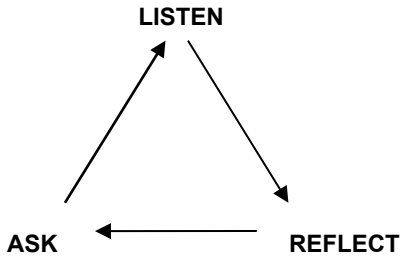
How reframing works in practice:

What the party says	**What the mediator writes in his/her notes:**	**What the mediator reflects back:**
"He's the most infuriating pain in the a---- I've ever worked for! He doesn't trust me to do my job and is constantly looking over my shoulder. It makes it impossible to get any project done on time since I have to run every little detail by him."	Interests: – Work independently – Trust – Projects done on time	"Work has been very frustrating for you lately. Meeting project deadlines is really important to you, but you need trust and the space to work independently to achieve that."
"Ever since the bakery moved in, our neighborhood has suffered! Customers block our driveways or park in spaces reserved for residents, and throw trash out their car windows that ends up in our yards. The owner never cleans up the trash that accumulates in front, and she keeps promising us change but nothing happens – like the trash cans she was going to put out for customers but never did. She's not acting like a neighbor– it's like an occupying army."	Interests: – Neighborliness – Respect – Commitments kept, action taken	"The quality of life in your neighborhood matters a lot. You want those who live and work there to treat each other like neighbors – with respect. This also means that neighbors are responsible for their guests, ensuring that they honor parking regulations or dispose of trash properly. You want assurance that these problems get addressed to make your neighborhood a good place to live again."
"Their offer's absurd–it won't begin to cover my client's medical expenses, let alone compensate her for her lost wages. They need to get real here. I'm not here to waste time with unrealistic offers, I'm here to settle this case, and I'm willing to be reasonable to do that – they should be too."	Interests: – Compensation for meds, lost wages – Reasonable, fair – Reach settlement	"You're here to work out a settlement that will fairly compensate your client for her medical expenses and lost wages. You're willing to be reasonable and you're asking the same of them."
"Look, I'm willing to work with her to settle this. But I won't pay her a dime without an independent inspection to ascertain the actual extent of the repair costs. I just can't take her word for it."	Interests: – Settlement – Verify cost	"You'd like to settle this. However, to move forward you need independent verification of the cost of these repairs."

Quick Guide to Commonly Heard Interests

You hear these words	The interest is:	You reframe as:
"unfair" "not fair" "not right"	Fairness	"You want to be treated fairly." "You want a fair resolution."
"not reasonable" "unreasonable"	Reasonableness	"You want to find a reasonable way to resolve this."
"...they never listen..."	To be heard	"You want better communication." "You want your ideas to be heard."
"...shouldn't treat me that way..." "...I've been a loyal customer for 10 years..." "...I've worked here for 17 years..."	Respect	"Respect is important to you." "You want to be treated with respect as a long-time customer." "You'd like your long years of service taken into account."

Using The Listening Triangle to reframe



To put The Listening Triangle into practice:

- Ask an open-ended question about the party's interests
- Listen
- Reflect back what you hear

Ask	"Tell me what's going on."
Listen as they say	"I want him to get rid of that dog. It's making my life a living hell."
Reflect	"Sounds like you'd like things to be more stress-free at home."
Ask a relevant question about what they just said to find out about their interests	"You say you want your neighbor to get rid of his dog. Let's say he does. How will things be different?"
Listen as they say	"It's the incessive barking all night long – it's impossible to get a good night's sleep. And I'm sick to death worrying about my kids getting attacked by the dog in their own yard while they're playing. I'm terrified for their safety
Reframe	"So you want peace and quiet, particularly at night, and you want to know that your children are safe in their own yard."
Ask a relevant question about what they just said to find out more about their interests	"Besides regaining peace and quiet, as well as peace of mind as a parent, what else is important to you? "

Using Neutral Language

For the mediator, using neutral language in mediation serves two purposes, 1) to neutralize the harmful side effects of conflict and encourage de-escalation; and 2) to uphold the mediator's ethical obligation to conduct the process impartially:

- **Neutralizing and de-escalation.** One of the tenets of Roger Fisher's negotiation classic *Getting to Yes: Negotiating Agreement Without Giving In* is "Separate people from the problem." At the mediation table, this means finding ways to help parties focus on problems rather than on personalities. Through the strategic choice of words, mediators can deploy tools like reframing to allow parties to conceptualize their problems in new ways or ask questions that can overcome defensiveness. Neutral language eliminates the accusations and blaming that can derail negotiations and creates a middle ground where parties can meet.

- **The duty of impartiality.** Mediators are known as "neutrals" for a reason. For parties to have confidence in the mediators and trust in the process, the mediator's conduct must be free from actual or perceived bias. Every professional code of conduct for mediators specifies an ethical duty to function impartially. Impartiality ensures a fair and balanced process for all parties. The words mediators choose can affect that equilibrium.

Consider the following guidelines as you master the use of neutral language:

- **Reframe, reframe, reframe.** Reframe for interests to de-escalate tensions between the parties and to keep discussions productive. Particularly in joint sessions, where parties are observing the mediator's interactions with each party closely, avoid reflecting back inflammatory language. ("You want to be treated respectfully as a valued customer", not "You feel totally insulted by the shabby way she treated you.")

- **Be direct but tactful when asking questions.** As we discussed earlier in this Section, questions can invite elaboration or shut down discussion. Use them with care. However, do not shy away from asking hard questions; it is part of the mediator's job description. Learn to ask them with tact, avoiding questions that sound accusatory or that demand justifications. ("Help me understand more about the reason for that decision", not "What on earth were you thinking when you did that?") Tone of voice matters, too, not simply the words you choose.

- **Point out shared interests.** To encourage joint problem solving and emphasize areas of agreement, mutualize interests when possible.

- **Be careful when offering encouragement.** Saying, "That's a great idea" suggests that the mediator has endorsed or approved of a particular proposal. Rather, let the party know that you have heard their options and that option generation will bring resolution to their matter.

Managing High Emotions

Emotions in Negotiation

The role of emotion in negotiation and decision making is nuanced and complex, as research from the fields of neuroscience and behavioral economics indicate. Emotions can function as either hindrance or helpmeet, and studies suggest that they are critical to our ability to deliberate, consider the future, conduct cost-benefit analyses, and assess choices. Positive emotions can motivate us to work collaboratively with another, repair relationships, work toward resolution, or show greater openness to others' ideas.

This dual aspect of emotions is the focus of *Beyond Reason: Using Emotions as You Negotiate* (2005), a book by negotiation experts Roger Fisher and Daniel Shapiro, which explores the role that emotions play in negotiation. Fisher and Shapiro identify five core concerns that are implicated in negotiation, triggering negative emotional responses or motivating us in positive ways, depending upon whether they are denied or fulfilled. These concerns are:

Appreciation: To be understood; to be valued; to feel that one's ideas and contributions have merit

Affiliation: To be treated as a team member, colleague or family member; to have a sense of connection

Autonomy: To be free to make decisions and choices

Status: To have respect and recognition for one's standing

Role: To be fulfilled by one's role

For Fisher and Shapiro, these five concerns are "a lens to understand the emotional experience of each party."

Mediation, with its capacity for defining problems broadly to encompass not merely legal or economic issues but emotional concerns as well, can prove effective in helping parties address their core concerns and the emotions that they can spark. The challenge for the mediator can be how best to respond.

Ideas for Handling Emotion

Acknowledge emotion. Whether parties are sobbing with grief, or shouting in anger, acknowledge it. Do so fully. For example:

What the party says	The mediator's response Not this way:	 But this way:
"I'm [expletive deleted] infuriated at their offer! After all I've been through, after the humiliation I've suffered, this is [expletive deleted] bull***!"	"You sound a little upset". OR "Vince, we had agreed not to use inappropriate language."	"You're incredibly angry at the offer they made – as you said, it's humiliating. You need a serious offer that recognizes and addresses all that you've been through."

[Weeping openly] "My son is dead – my only child. He's gone! Nothing, nothing is going to bring him back. And they never once told my husband and me that they were sorry – not the doctors or his nurses. Not the hospital administrators. No one. I still can't believe it!" [Sobbing now]	"Let's take a break, everybody."	"I am so very sorry for your loss, Luisa. How devastating for you and your husband to lose your son Hector. I am truly sorry." [Pause, pushes a box of kleenex toward the party] "Do you need to take a moment before we go ahead? It's perfectly okay if you do. We'll all understand." [Party shakes head no.] "For now it sounds like you want to continue. But if at some point you do need to stop, please let me know." "Luisa, it also seems as if what has made your son's loss even more difficult for you is that you had hoped for some acknowledgment of your grief from those involved with your son's medical care – that they had reached out to you and your husband."

Know your comfort level with emotional expression and conflict. Not everyone is comfortable with conflict and the strong displays of emotion it can produce, including, ironically, some mediators. Mediators who are uneasy in the presence of strong emotion will attempt to control it through the imposition of ground rules or by separating the parties the moment the shouting or tears begin.

Emotions are healthy. Emotions are a normal response to conflict, and their expression can be healthy. Venting can clear the air, allowing people the chance to get things off their chests so that they start focusing on addressing the problems they face together. The intensity with which the parties react as they discuss their situation highlights the importance of the interests at stake, educating the mediator about the nature of the dispute and the participants involved. It may help parties understand for the first time fully the impact their actions had on someone.

Watch for the other party's response. If one party is venting and verbally attacking the other party, be sure to watch out for the reaction of the other party. Be prepared to check in with that party or respond to requests for intervention. Allow the parties the opportunity to propose their own ground rules. You can ask them both, "Is this working for you? I'm guessing you don't need my help to do this. Is there a different way you want to talk to each other?"

Encourage parties to identify standards for fairness. One of the major emotional triggers in negotiation is the perception that something is unfair. In fact, often a core interest shared by all sides in a dispute is the need to be treated fairly and to reach a fair deal. Addressing this core concern can lower the temperature in the room.

Dealing with Difficult Behaviors

General Guidelines for All Difficult Behaviors

- **Be compassionate.** Conflict sometimes brings out the worst in people. Imagine how you might be reacting if you were in their situation. Consider how difficult conflict has been in your own life, and recall times when you were not at your best.

- **Remember the principles of mediation.** Mediation gives parties autonomy and choices – it is not your responsibility to fix things, the responsibility is theirs. Mediation is voluntary for everyone, including the mediator, so you can withdraw if a situation truly becomes untenable.

- **Rely on your co-mediator.** If you are fortunate to be working with a co-mediator, you are not in this alone. Take a break to strategize.

Dealing with the Angry Person

- **Allow venting.** Stay silent, allowing them to express their anger and frustration. This may be the first time they have had the opportunity to talk about the problem openly and in the presence of someone who is listening.

- **Offer them a break.** Continuing the mediation may not be productive for anyone. Give them a chance to step outside and catch their breath.

- **Show understanding and empathy.** Think back on a time when you were angry and put yourself in their shoes for just a moment. Reflect back the pent-up anger and frustration and show you understand the reason for that frustration.

- **Put control in their hands.** Often people are angry because they feel as if they have little control over the situation they face. Let them know that all decisions are ultimately theirs. Remind them that mediation is a voluntary process and that the session can end any time they choose.

- **Protect the other party.** If one party is verbally attacking the other party in anger, you will need to step in. Separating parties and going to private sessions can give everyone an opportunity to cool off.

Dealing with the Person Who Challenges the Mediator

- **Remind them that mediation is voluntary.** Let them know that mediation is their choice and they are free to leave at any time. Mediation may not be the right process for them. Let them know it's okay for them if they wish to pursue other avenues.

- **Do not take it personally.** Parties challenge mediators only rarely. When it occurs, the issue usually has little to do with the mediator and everything to do with the level of frustration the person is experiencing with the issues and the other person.

- **Confront it directly.** Be honest and direct about the behavior you observe. Sometimes personalities fail to mesh, and another mediator may be a better fit. You might say, "I notice that several times during the past hour you have asked for my credentials and commented on something I did or didn't do. If you don't want me to serve on this case, it's not a problem. We can end right now. What do you want to do?"

- **End the session and withdraw.** If a person is so difficult that you are not able to do your job or you find yourself getting so frustrated that you are no longer able to remain impartial, you may need to conclude the mediation and withdraw.

Dealing with the Person Who Is Positional or Stuck

- **Describe what you see and seek understanding.** "You keep talking again and again about all the mistakes your partner made and how it's all been his fault. What I haven't heard from you is how this gets fixed. You and your partner are both here today. You both have an opportunity to put this behind you and move forward, but it doesn't seem like that's what you want to do. What's going on?"

- **Be explicit about the purpose of the process.** "You have talked a lot today about the past – about the difficult relationship you had with your sister over the years. Unfortunately, mediation can't change the past. I wish it could, but it can't. But it can help you do something different. It can help you figure out how you and your sister, despite your shared past, can work together today to do what's right for your mom. Is that something you're open to doing?"

- **Inquire into BATNA.** Push them to think about what happens if no agreement gets reached. "What happens if you walk out without an agreement today? Walk me through that." "What kinds of costs, financial and otherwise, will you be facing if you don't resolve things today?"

- **Challenge them to explain.** "You have told us several times that you could go to court and win – a 'slamdunk' you called it. So why are you here?"

- **Make them responsible.** As you would do with the person who challenges the mediator, confront them directly and place responsibility in their hands. "You made a demand for $150,000 at the outset. You haven't moved from that figure and have rejected their offer without explaining why, even to me. They are about to walk out the door, but I told them I'd meet with you one more time. They're looking for explanations. It's now up to you. What do you want to do?"

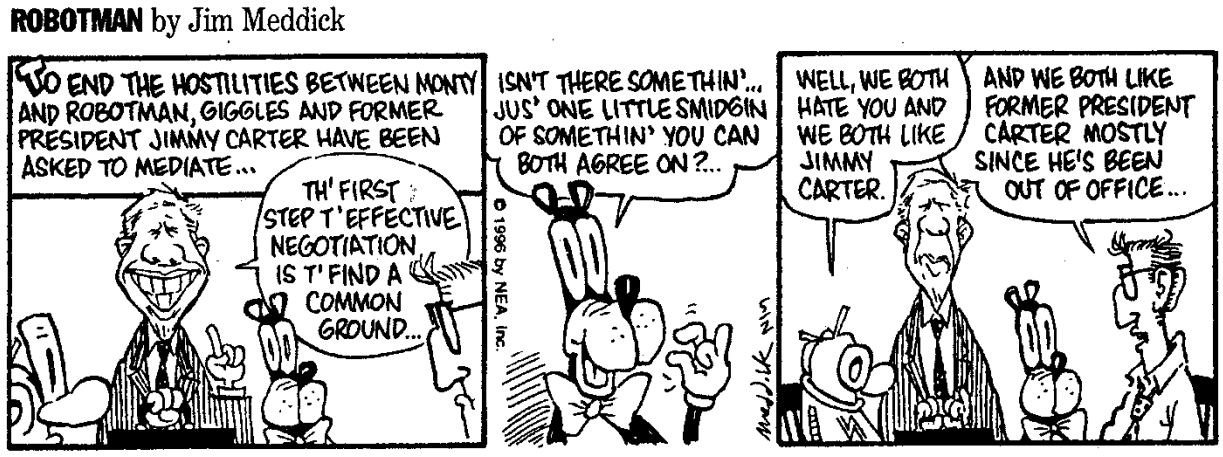
Dealing with the Person Who Is Silent and Withdrawn

- **Meet in private.** Sometimes people can become so angry or be so affected by grief or other emotion that they do not trust themselves to speak. In private, meet with the person who is remaining quiet. Remind them of the confidentiality of mediation communications and affirm that you can keep in confidence whatever they tell you.

- **Show concern.** Let them know you are concerned about their comfort level and their confidence in the process. Ask for their help. "I notice that you said very little when we all met together, and that even now you've remained quiet. Is there anything you need, or anything we can do?"

- **Remain silent yourself.** Too many questions can at times put unwelcome pressure on parties. Silence can provide space for people to open up to speak; this person may need time and a little room.

- **Empower them.** Remind them that mediation is voluntary and that any time they choose they can end the session – even now.



Overcoming Barriers to Agreement

Sometimes despite the best effort of the mediators and careful preparation in advance by the parties, people can get stuck. Issues of trust over past conduct, difficulties with communication, and other problems can halt progress. To maneuver past roadblocks, try the following tactics:

Tackle less contentious issues first. Parties facing a number of issues can be overwhelmed. To help them gain confidence and build momentum toward agreement, encourage them to begin with issues that are easier for them to address. For example, in a divorce case, where the issue of the marital home is a particularly sensitive one, starting with decisions involving other, less valuable assets may make sense.

Take a break. Everyone – parties, their counsel, and mediators all benefit from a break. Encourage parties to break for a meal or go for a walk. Parties may need a break to talk with their advisors, gather additional data that may aid them in decision making, or to reflect on their choices.

Explore BATMA – the best alternative to a mediated agreement. Parties may have not confronted the realities of the no-agreement alternative. Use private sessions or caucuses to explore with parties what inability to reach agreement means and what the cost and consequences of alternatives to agreement realistically may be.

Review the progress made so far. People can get bogged down in the details of their dispute or become exhausted from the emotionally and intellectually demanding work that addressing conflict and the problems it stems from produces. Give parties a sense of perspective and the progress made so far by reviewing points of agreement and summarizing the remaining issues to be addressed.

Be honest with parties and ask for their help. It's now three hours into the mediation. One party has remained positional, offered no ideas for resolution, and repeatedly shot down options the other side has proposed. Be direct with this individual. Describe for them what you are observing and ask them for help. "I can see that you're not showing a lot of flexibility here. You're having a tough time coming up with ideas, and you have objected to the ideas others have floated without telling us why or offering suggestions to improve on them. This mediation can't work unless you're involved. What's going on?"

Use hypotheticals to overcome barriers. Inviting parties to consider "what if" scenarios can encourage them to see the issues they face in a different light.

Mediate within the mediation. Sometimes when parties are represented by counsel, differences of opinion between the client and lawyer can impede progress. The economic interests of each may potentially be in conflict; or the lawyer may be struggling to manage the unrealistic expectations of a client heedless of the risks of trial. In the same way in multi-party mediations, there may be divisions or rivalries within a team or group, and individual interests may not align with the interests of the group as a whole. You may need to meet with individuals separately to explore and overcome these differences to move forward.

Ask parties to envision resolution. Encourage parties to imagine what life might be like if the dispute is behind them. As collaborative law and ADR pioneer David Hoffman says, invite them to "trade hope for certainty" – parties hope that they will prevail at trial, but in mediation they can trade that hope for the certainty of agreement and closure.

"You're wrong and you know it, and I'm right and I know it!"

Note Taking

Introduction to Note Taking

Mediators take notes for a number of reasons. They do so

- to aid memory
- to keep track of and organize information
- to assist them in summarizing interests, options, and other discussion points
- to create a seating chart as a tool for recalling parties' names, titles, and roles correctly
- to rely on for subsequent preparation of memoranda of understanding, meeting summaries, or other documents
- to review between meetings when mediations require multiple sessions to conclude
- as a basis for developing case studies or role plays for educational purposes while protecting the identities of the parties
- for insurance defense purposes in the unlikely event that they are sued

Depending upon the setting and jurisdiction mediators practice in, they will likely possess a duty to maintain the confidentiality of their notes and to protect their contents from inappropriate disclosure within the mediation and later when the mediation has concluded.

As a general rule, and depending upon the jurisdiction the mediator practices in, a mediator's notes are deemed to be privileged and are not admissible as evidence in court or other adjudicative proceeding. In certain jurisdictions, this privilege is limited. For further discussion of confidentiality and privilege, please refer to Section Six: The Practice of Mediation – Confidentiality and Privilege in Mediation.

Tips for Taking Effective Notes

To take effective notes:

- Remember to make eye contact. Taking notes is important, but so, too, is gaining the trust of and establishing rapport with parties.

- Continue to listen closely. Detailed note-taking interferes with a mediator's ability to listen. You may miss salient information because your focus is on your notes, not the parties.

- Write the date on your notes and number the pages so that they can be easily reordered if they become out of sequence.

- Capture relevant information in summary form, rather than recording every word verbatim.

- Use bullet points and short phrases or single words to capture interests, options, and other elements of negotiation, as well as dollar amounts and other numerical information. Use a "Seven Elements" notetaking sheet (located at the end of this subsection).

- In cases involving multiple parties, draw a diagram of the table with the names of each person clearly identified to avoid embarrassing mistakes.

- Protect your notes from unintended disclosure, and do not leave them unattended.

Destroying or Keeping Notes: The Mediator's Dilemma

Ideally mediators and organizations that provide mediation services should develop and consistently apply a policy regarding notes.

Many mediators destroy their notes once the mediation has concluded because doing so:

- Protects the confidentiality of mediation communications
- Allows the mediator to fulfill a commitment to parties and to the process to maintain the confidentiality of mediation communications
- Eliminates the burden on the mediator and the mediator's resources to store and secure notes
- Reduces the risk that the parties will subpoena the mediator later if negotiations fail, particularly if the mediator informs the parties in the agreement to mediate that he or she routinely destroys notes as a matter of practice

Other mediators make it a practice to retain their notes because:

- Due to the nature of the mediator's practice, parties may return for follow-up sessions after a period of time, and notes will refresh the mediator's recollection of the case
- Notes can be used to create case studies for purposes of mediation and negotiation training
- Destroying notes could prejudice a mediator's professional liability insurer defending a malpractice action against the mediator, potentially resulting in denial of the mediator's insurance coverage
- A mediator could conceivably be charged with destruction of evidence in a criminal or federal investigation

Some mediation programs require its neutrals to destroy notes at the close of a mediation session. If you mediate as a member of a panel for an organization or entity providing mediation services, ask what its policy is regarding notes. In addition, you may want to consult with your liability insurer for further information.

Effective Use of Visual Aids

Visual aids can be a useful addition to the mediator's toolkit. They can be as simple as an easel, pad, and markers, or as high-tech as laptops with LCD projectors or giant flat screen monitors.

Visual aids help parties keep track of new information as it emerges. They are useful for developing an agenda as the mediator writes down each party's interests to be addressed. They serve as an aid to brainstorming because they can capture ideas as they emerge, and they help participants track the progress they are making. They are also useful for decision-making to create maps or diagrams of various decisions to assess the costs and benefits involved in each. They can also be used later as a basis for the mediator to prepare a summary of the meeting.

Visual aids can be used not only to facilitate the process but also as an aid to deliberation or even as part of the mediator's opening statement. For example, using computers, large-size LCD monitors, and financial software, the parties can run through various scenarios to assess gains, risks, and tax implications of the options on the table. Some mediators have also experimented with the use of slide presentations to cover information as part of an initial consultation, or at the mediation in their opening statements to parties to highlight the information that parties need to understand the mediation process and their role in it.

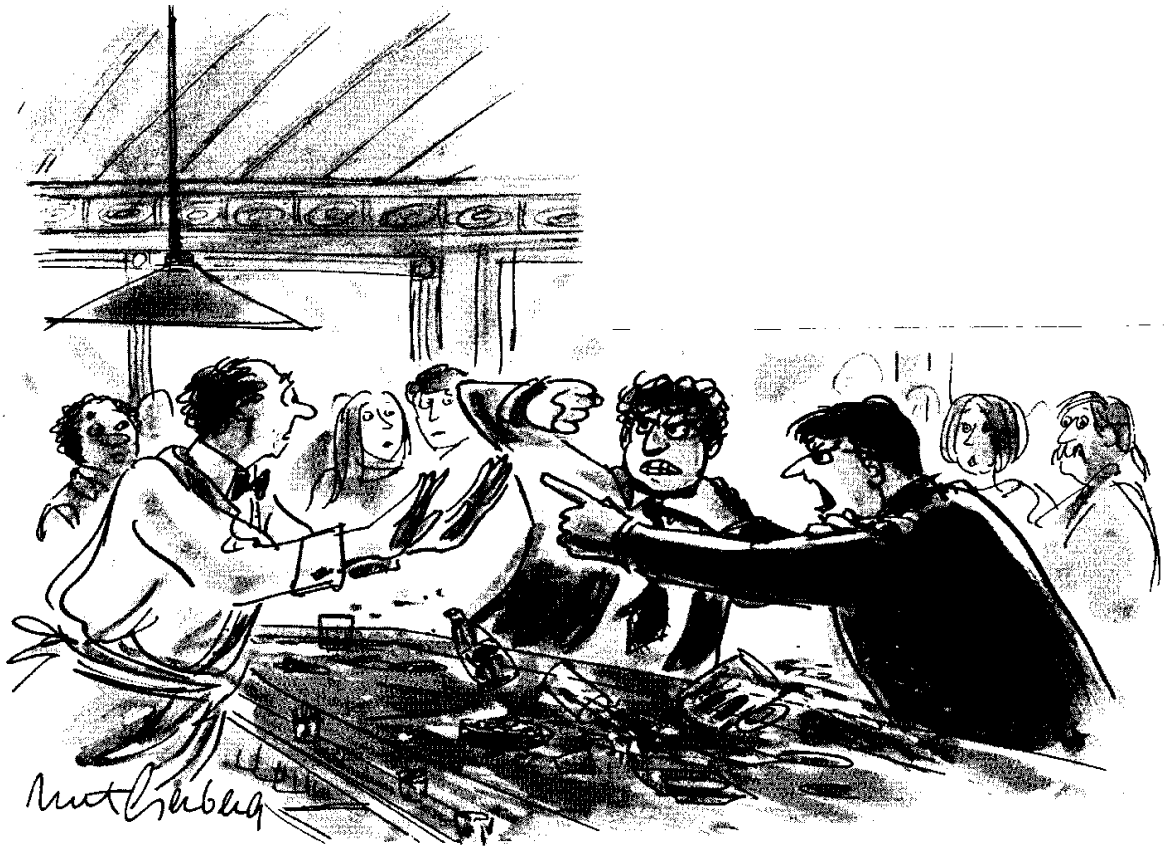
Decision trees are popular tools for aiding in decision-making in civil and commercial mediations. They are used to create models to map out the costs, benefits, and risks that each decision involves.

In using any form of visual aid effectively, consider the following suggested guidelines:

- If you plan to use visual aids, be familiar with their use, and test them and set them up in advance of the mediation to be certain that they work properly. Be sure that such aids are visible from all areas of the room wherever parties will be seated.
- Use visual aids to assist parties in focusing on interests, not positions or personal accusations.
- Capture only the information that is necessary; avoid wordiness.
- Make sure that information being recorded is fully visible. If writing on an easel and pad, write legibly and use strong pen colors such as blue or black.
- Do not allow the use of visual aids to interfere with eye contact or to create a barrier between you and the parties. This is particularly a concern with the use of laptops and other forms of digital technology which can interfere with direct communication between the neutral and the parties.
- Not all parties are comfortable with certain kinds of visual aids, and in some cases they may not be culturally appropriate.
- Take into account the special needs if any of the parties. If parties are visually impaired, or have some other disability that may affect their participation or

comprehension, be sure that the use of visual aids will not hamper their ability to take part and that you have provided accommodations.

- Visual aids are just that – aids. They should support and not distract from the mediation and your role.
- If you plan to use visual aids that rely on digital technology, have a contingency plan in place, since technology is notoriously undependable. Have an easel and pad or a whiteboard ready just in case.
- Like notes, the information you record through visual aids is confidential and should be protected from disclosure. This can be a particular risk with digital information. Ensure that all mediation work product is secured.



"Butt out, Buster! Who the hell do you think you are—Jimmy Carter?"

Co-Mediation: The Perils and Pleasures of Teamwork

Co-mediation is mediation facilitated by two or more neutrals who together assist parties in addressing issues and reaching resolution.

Co-mediation is a skill that takes time and experience to acquire and is well worth developing. Learning how to mediate solo is an easier transition for mediators familiar with co-mediation than it is for the solo mediator to learn to work in tandem with a colleague. In addition, facility with co-mediation gives a mediator greater flexibility in serving clients, since some disputes by their nature respond better to the synergy co-mediation creates.

Co-mediation typically involves two neutrals working together, although some dispute resolution service providers utilize larger teams of neutrals. For example, Mediation Works Incorporated in its automotive franchise mediation programs utilizes teams of three mediators, including one with substantial process expertise and two with industry experience whose professional roles mirror that of the disputants.

Although solo mediation is more commonly encountered, co-mediation is an increasingly familiar model of practice, utilized not only by community and non-profit mediation programs as a pedagogical tool for mentoring and developing new mediators but also in commercial cases or other complex disputes, multi-party disputes, construction cases, and divorce and family matters, just to name a few of its applications.

Co-mediation offers numerous benefits for mediators, dispute resolution programs, and parties alike. It:

- Provides a check on mediator bias.
- Increases the likelihood that mediators will be able to establish rapport with and gain the trust of the parties.
- Ensures supervision of and mentoring for newly trained mediators or mediators gaining experience in a new practice area.
- Provides opportunity for all mediators regardless of skill level or experience to receive constructive feedback from a colleague.
- Builds in sensitivity to diversity and cultural considerations since mediators can mirror the cultural identities of the parties (gender, race, national origin, age, etc.).
- Produces the synergy that results when skilled mediators work together as a team.
- Builds in support for mediators managing difficult parties or dynamics.
- Improves the mediator’s ability to facilitate complex, multi-party mediations.

- Makes available multiple skill sets when using mediators from different professional backgrounds for cases involving highly technical or complex issues requiring subject matter or other expertise.

Co-mediation can also be fraught with difficulties, which can affect the process in negative ways. These problems can include:

- Lack of focus that results when co-mediators lack a shared understanding of how to structure and guide the mediation.

- Impact on parties if differences between co-mediators are so evident and profound that they interfere with or stall out the process.

- Imbalance in teamwork if one mediator so dominates the process that the other mediator is unable to contribute or participate, which can confuse the parties and prove frustrating for the other mediator.

To leverage co-mediation and avoid these problems:

- Prior to the start of the mediation, allow sufficient time to meet with your co-mediator to discuss mediation styles and how best to work together.

- Set up seating arrangements in the room so that you can maintain eye contact with your co-mediator.

- Communicate directly with your co-mediator about process choices ("I'm thinking it's time for us to take a break – would that be okay with you?") or about other issues ("Freda, before we move on to Bob, I want to take make sure I've understood what Linda's concerns are"). It models collaborative behavior for the parties. Setting up secret signals to communicate with your co-mediator is a waste of time.

- Take a break to discuss privately sensitive issues that arise that affect your ability to work together. Be honest with your co-mediator and be constructive in your feedback, providing specific information about what you observed. For obvious reasons, don't let the parties see you argue.

- See co-mediation as an opportunity to learn and gain insights into your own practice. Be open to and be willing to request feedback from your co-mediator.

- Remember that the purpose of mediation is to serve the parties, not your own private goals or your ego. Be willing to share the stage and allow your co-mediator to contribute.

Allow time once the mediation has concluded to debrief and discuss what each of you learned – what worked well and what you each could do differently next time.

Section Five: Special Issues in Mediation

When a Mediator Becomes Stuck…….. 5-1

Power Imbalances in Mediation……... 5-3

Transmitting Information in Private Sessions: Best Practices……. 5-5

Managing Mediator Bias…… 5-7

Role of Agents and Legal Representatives…… 5-8

Accommodations and Use of Interpreters…….. 5-10

Multi-Party Mediations……... 5-11

Meeting Space and Seating Arrangements in Mediation..... 5-13

Multiculturalism and Cultural Literacy…… 5-15

When a Mediator Becomes Stuck During Mediation

Generally speaking, parties and not mediators are the ones most likely to run into a roadblock. Sometimes though mediators themselves get stuck, uncertain about where to go next. Although this happens more often with inexperienced mediators, pitfalls can await even the seasoned practitioner. There are preventive measures you can take to avoid these problems, as well as ways to get you and the parties moving forward again just in case.

To keep mediations on track, watch out for the following traps:

Prevention: missteps to avoid	**What to do instead**
Failing to listen.	Make sure that you give all parties the attention they deserve. Take the time to convey respect, summarize their concerns, and demonstrate empathy.
Ignoring parties' concerns about the process.	When parties raise concerns about the process, respond immediately. Acknowledge the concern, ask questions to understand it more fully, ask for suggestions in addressing it, and follow up later to be sure you have successfully addressed the concern.
Pushing your own agenda. Telling parties what to do.	Your responsibility is to the process, but the parties share ownership in the outcome. Allow them to shape the agenda, and then guide the discussions accordingly. Keep in mind that the parties know better than you or anyone else the full dimensions of the issues they face and what outcome they can best live with.
Asking judgmental questions.	Ask questions with genuine interest, respect, and friendly curiosity. If you have to ask a tough question, show tact and diplomacy.
Cross-examining the parties.	Rather than pushing parties to justify their demands, focus on uncovering their interests and the core needs that underlie those demands.
Pressuring or bullying parties to settle.	While parties expect the mediator's help in reaching resolution, the mediator must be careful never to coerce or badger the parties. Sometimes it may in fact be in the parties' best interests to reject a settlement and pursue their BATMA.
Stepping into your other professional role while mediating.	It can be difficult for mediators who wear other professional hats to step outside those roles while they are mediating. Remember that mediation is not a therapy session nor is it a courtroom trial. Recall your role here at the table – to serve as a neutral facilitator assisting parties to identify problems and explore mutually beneficial ways to resolve them. Stepping into a different role – such as offering legal advice - can also impact your perceived neutrality.

Prevention: missteps to avoid	**What to do instead**
Taking a case beyond the level of your competence or training.	▪ Although some mediators believe that turning a case away is an unsound business practice, you will harm your professional reputation by accepting a case that is too advanced for your skill level. ▪ Show caution and common sense in accepting cases, ensuring that they are commensurate with your experience and abilities. ▪ Bring on board a co-mediator whose expertise is an excellent match for the parties and the issues involved and who can mentor you as you build your capacity to mediate. ▪ Conference attendance, continuing education and advanced training are worthwhile investments in your professional development.

Perhaps you have been successful in avoiding the pitfalls described above. But nonetheless you find that you have reached a dead end and are unsure now which direction to head in next. Don't panic; remember that you do have some options:

What to do to get unstuck	**How to do it**
Take a break.	With their focus intent on the parties, mediators can all too easily neglect their own needs. If you're not firing on all cylinders, it will be far more difficult for you to bring the attention to the table that the parties depend on you for. Remember to take breaks to recharge. Go to the restroom and splash cool water on your face. Take a 15-minute walk to clear your head. Remember to keep yourself well fueled – take a break for coffee or a snack or have lunch. Mediators need to eat, too.
Strategize with your co-mediator, your case coordinator, or a colleague.	One of the benefits of working with a co-mediator is that you have a partner to face down unexpected challenges with. Caucus with your co-mediator to quickly diagnose why you're both stalled and work out a plan for jumpstarting the negotiations. Contact your case coordinator if available for on-the-spot tech support. If you're mediating solo, contact a trusted peer by phone and ask them for some advice.
Ask the parties for help.	If you are truly stuck, ask the parties for assistance. Say to them, "I'd really appreciate your help - there's something critical that I think I'm missing here. Both of you know this situation inside and out and have lived with it for a long time. I'm a newcomer to the challenges you're facing. Could you help me understand what I'm missing here?"

Power Imbalances in Mediation

Power imbalances occur everywhere. Disparities in economic might, education, and access to privilege, resources and information, as well as barriers to advancement for minorities and women, produce numerous examples of power imbalances that occur in day-to-day social, political, and commercial interactions. It is not surprising then that these differences in power are present at the mediation table.

Numerous scholarly articles and workshops have examined the impact of power disparities on the mediation process. Critics of ADR such as Laura Nader, professor of anthropology at the University of California, Berkeley, have charged that mediators merely "trade justice for harmony". Studies from the social and behavioral sciences have demonstrated the effect that implicit biases, stereotypes, and social conditioning have on the way men and women negotiate. And ADR expert and consultant Erica Ariel Fox has documented the injustices that can result in court-connected mediation when the disadvantaged negotiate on their own in the hallway of the American courthouse in "Alone in the Hallway: Challenges to Effective Self-Representation In Negotiation"[2].

While power disparities exist, mediation does possess safeguards to address the legitimate concerns that power can raise. These safeguards are in fact some of the foundational principles of mediation practice:

- **Voluntary.** Mediation is a voluntary, consensual process and not a coercive one. Parties are not required to reach agreement and can terminate the mediation whenever they wish. Mediators can also terminate the mediation if continuing it would not be in the best interests of either or both of the parties.

- **Informed consent.** The mediator has a duty to ensure that all parties have the opportunity to gain information to aid them in making decisions. Information can be a leveler; parties who inform themselves fully about their circumstances and the alternatives available can improve their ability to negotiate effectively.

- **Self-determination.** The parties have the right to define the issues that matter most to them and to reach their own decisions without coercion.

Other issues for the mediator to keep in mind:

- **Be wary of drawing conclusions about power and who possesses it.** Teenagers can be more powerful than their 40-year-old parents in a family dispute. A party represented by counsel might be getting poor legal advice from an unprepared lawyer, while the party who attends the mediation pro se has a thorough grasp of the issues and the legal and financial implications. The party who has fewer economic resources may have a stronger BATNA than their wealthy counterpart on the other side of the table.

- **The more powerful party is mediating for a reason.** If they could get their needs met some other way, they would have done so.

[2] 1 Harv. Negotiation L. Rev. 85 (1996)

- **Mediation cannot change the power balance.** The parties arrived with their differences; they will leave with them. Mediation cannot change that fact. However, mediation can ensure that despite those differences all parties are able to define the problems to be addressed and to shape the solutions that will resolve those problems.

"You say, 'off with her head,' but what I'm hearing is, 'I feel neglected.' "

Transmitting Information in Private Sessions: Best Practices

As we discussed in Section Two, private sessions, also known as caucuses, can be useful for many reasons. They give parties a necessary break from each other, allow the opportunity for candid discussion of interests and alternatives, create a less inhibiting environment for option generation, and provide privacy for digesting bad news or for deliberation and decision-making.

However, when mediators rely exclusively on private sessions through shuttle mediation, they thwart direct communication between the parties. Private sessions should therefore be used judiciously and strategically. After all, the parties share responsibility for the outcome of the mediation and joint development of the terms of the agreement they ultimately reach – more efficiently achieved through direct discussion.

This is the goal for mediators to keep in mind when transmitting information between parties in private sessions.

Here are some suggestions to guide you:

Tips for transmitting information	**Discussion**
Always be sure you have permission to share the information	Honoring confidentiality is critical; failing to do so could cost you your credibility or your career. Make sure you have confirmed what information you have permission to disclose.
Convey mutual and individual interests	Share mutual interests to encourage collaboration. Understanding one party's individual interests can provide useful insights to the other party as they generate options.
Disclose barriers to agreement, bad news, or other issues	Alerting parties to barriers to resolution gives them the opportunity to develop ideas to remove those barriers. In addition, parties appreciate having the opportunity in private to digest and weigh deal-breakers, embarrassing revelations, or other problems to help them save face or have time to consider how best to face them.
Offer hope by sharing information	Mediation can be difficult for parties, and mediators can find ways to give parties encouragement. For example, if one party expresses doubt about the other party's commitment to mediation, the mediator could share information that counters that doubt: "It seems right now you're feeling discouraged and wondering whether she's as committed to mediation as you are. In meeting with her just now, one of the things she stressed a number of times was how important you are to the department and how willing she is to work with you here to get these issues addressed. She's hoping in fact that you share her willingness."

Tips for transmitting information	**Discussion**
Encourage parties to express regrets, apologies, or positives to each other directly	Parties may ask the mediator to tell the other person they are sorry. Remind the party how much more powerful the expression of regret will be when conveyed directly.
Encourage and prepare parties to share options directly with each other	Mediation works more efficiently if parties can discuss their options with each other directly. Face-to-face discussion of options will enable them to fine-tune options and close any gaps.
Encourage direct communication	If communication has been a problem in the past, and better communication is a goal for the future, let parties know that the mediation represents their first opportunity to have the kind of communication they want to have going forward. Help them think about what they want to say and how they might say it.

Managing Mediator Bias

Virtually every code of professional conduct for mediators specifies a duty to conduct the mediation in an impartial manner. The integrity of the process and the confidence of the parties in the mediation process depend upon it.

Nonetheless, mediators are human. Like everyone else, we form judgments about others at first meeting. We react to others, responding positively or negatively. We cannot stop those reactions from occurring. We do have choices though about how we handle our responses:

- **Know yourself.** Cultivating self-awareness is the first step. Recognizing your triggers and your own personal biases is an important ability for all mediators to develop. An excellent tool for identifying your implicit biases – the biases you may not be consciously aware of – is available online at Project Implicit, a collaborative research effort among Harvard University, the University of Virginia, and University of Washington, at <http://implicit.harvard.edu>.

- **Focus on your role as a mediator and rely on process.** Use the mediation process and your role as a source of support when you are feeling challenged. Remember it's not about your opinions – it's about how well you conduct the process.

- **Seek feedback and support from your co-mediator.** Co-mediation benefits not only the parties but the mediators, since it provides mediators with a partner who can assist with problems that can arise. Caucus with your co-mediator, disclose your bias, and ask for candid feedback. Your co-mediator will help you assess whether your bias is affecting the mediation process in a negative way and then take measures to ensure that you can continue to fulfill your role, or, if necessary, to withdraw.

- **Put yourself in the party's shoes.** Remember that conflict brings out the worst in many people. Imagine what it might be like for you if you were facing the issues the party has been living with. Demonstrate the understanding and empathy you yourself would hope to receive under similar circumstances. Even people who exhibit difficult behaviors have interests.

- **Be aware of positive biases.** Negative biases can be easy to spot, since our reaction is often so visceral and strong. The positive ones are less susceptible to detection but can have as devastating an effect on the mediation process as negative ones do.

- **Look for positives.** Sometimes identifying favorable attributes will balance a negative impression (e.g., recognizing that they are participating in mediation).

- **Be curious.** Your job is to focus on the interests of the parties, not whether they have made a positive or negative impression on you. Remaining curious about their goals, hopes and needs will focus your attention on fulfilling your role and helping the parties reach a good outcome.

- **Withdraw.** If your bias affects your ability to manage the process and interact with the parties, you have an obligation to withdraw from the process.

Role of Agents and Legal Representatives

Introduction

As more courts refer litigants to mediation and businesses include it as a dispute resolution mechanism in contractual agreements, we can expect to see an increase in the number of parties who attend mediation sessions with attorneys or other advisors, or who do not attend themselves but instead designate an agent to attend and negotiate on their behalf.

Working with Representatives

Mediations that involve lawyers, advisors, agents, or other non-party participants require attention to particular issues so that parties and their agents can gain the most from their work with the mediator. As a general rule of thumb, in advance of the mediation:

- Ascertain the identities of all participants and their roles
- If intake is conducted with the agent or representative and not the party, educate the agent about the mediation process and the opportunities that interest-based mediation offers disputants, distinguishing it from adversarial processes. Encourage the agent to convey that information to their principal.
- Encourage active and direct participation by the party where possible
- Emphasize the importance of preparation for the agent/representative and for the party; if the party will attend as well, encourage the agent to have the party prepare thoroughly
- Ascertain the scope of the agent's authority
- If the agent is attending without the party, confirm that the party will be available by phone or otherwise when the time comes for making decisions
- Confirm attendance and let all participants know who will be attending

At the mediation:

- Respect the roles that the agent/representative and party have elected to play, particularly attorneys with their clients
- Provide opportunities for all to participate
- Conduct the mediation as usual – ask for and summarize interests, ask for options, explore BATMA if necessary
- Recognize that parties may be more willing to speak in private sessions rather than publicly
- Understand that agents/representatives may have their own individual interests that could be aligned with or run counter to those of their clients
- Be prepared to conduct a mediation within a mediation as parties negotiate with their agents

Working with Attorneys

A mediator might encounter several possible scenarios working with parties and their attorneys:

- The party has an attorney, appears alone at the mediation, and will contact the attorney before making any commitments or final decisions

- The party attends the mediation with an attorney and:
  - The attorney and the client both play an active role throughout the mediation, speaking during public and private sessions
  - The attorney is the primary actor in public sessions but the client speaks in private
  - The attorney is the primary actor in the mediation while the client remains silent throughout
  - The party attends the mediation with an attorney; the attorney takes a back seat and the party participates actively

- The attorney attends the mediation but the client does not

Lawyers can be invaluable assets at the mediation table. Lawyers can provide invaluable assistance by ensuring their clients make informed decisions based on a full understanding of the legal issues and ramifications. Increasingly, attorneys are familiar with mediation and appreciate the difference mediation can make for their clients. They may have had mediation training themselves, took courses in mediation and ADR in law school, and have substantial experience representing clients in mediation.

At the same time, attorneys can subvert mediation by turning a collaborative process into an adversarial contest. So what can mediators do to ensure that parties and their lawyers make the most of their time at the mediation table? Mediators can gain credibility with lawyers and clients by keeping in mind the following:

- **Build trust.** At the table, build trust and demonstrate respect by addressing both the lawyer and the client, not just the lawyer or just the client. Lawyers and clients must be able to trust the mediator so that they can candidly discuss and assess the issues.

- **Respect the attorney's ethical duties to the client.** Be aware of the unique relationship between attorney and client and the strict code of professional conduct that the attorney must adhere to in representing the client.

- **Respect the lawyer's professional standing within the bar.** The lawyer not only wants to create a positive impression on her client but also to preserve or enhance her reputation among fellow members of the bar. That includes the attorney on the other side of the table.

- **Manage the mediation within the mediation.** Lawyers may need the mediator's assistance with difficult clients who have an unrealistic assessment of their own cases and look to the mediator to engage the client in reality-testing. At the same time, clients may be eager to settle a case that their attorney is willing to take to trial. Be ready to facilitate these negotiations within negotiations.

Interpreters and Accommodation: Supporting Participation

The Use of Interpreters

Some disputes involve parties who do not share a common language. To ensure that all parties are able to participate in the mediation process and to interact with the mediator and each other to the fullest extent possible, an interpreter may be necessary.

Mediators should remember to:

- **Allow sufficient time for mediating** since the use of interpreters increases the length of time necessary to conduct the mediation. Mediators must therefore plan accordingly and conveners take this into account in scheduling.In one case, an MWI mediator conducted a mediation involving two parties who both required interpretation services, one of whom utilized an interpreter for the deaf and another who required a Spanish-language interpreter. Conducting this mediation took significantly more time because of the several layers of translation each communication among the parties and the mediator required.

- **Clarify the respective roles of mediator, party, and interpreter.** The interpreter is there to transmit the discussions accurately to the party who requires interpretation services and not to mediate the dispute or influence the outcome of the mediation. The interpreter is there to assist, but the party is the one who is responsible for participating, contributing to the discussions, and making decisions.

- **Make eye contact with and speak directly to the party.** Building trust with the party is especially critical, particularly where the mediator must depend upon the interpreter to convey his or her meaning accurately. In the same way the mediator would ordinarily do in a case without an interpreter present, the mediator should attend to body language and eye contact, and convey respect by addressing the party directly.

- **Accommodations and Capacity to Mediate**

  Under the federal Americans with Disabilities Act (42 USC §§ 12101-12213) ("ADA"), providers of ADR services have an obligation to make their services and facilities accessible to people with disabilities.

  To provide guidance to neutrals who mediate disputes brought pursuant to the ADA or who wish to voluntarily demonstrate their commitment to disability access, a national Work Group developed the ADA Mediation Standards[3], which were finalized in 2000.

  The ADA Mediation Standards stress the importance of informed consent to the mediation process and the need for neutrals and ADR service providers to assess the capacity of parties to give it when impaired capacity may be a concern:

[3] The ADA Mediation Standards can be accessed at < http://www.cojcr.org/ada.html >

In order for the mediation process to work, the parties must be able to understand the process and the options under discussion and to give voluntary and informed consent to any agreement reached. Mediators and provider organizations, therefore, should determine whether the parties in a mediation have the capacity to do so...

The ADA Mediation Standards recommend that the mediator determine that:

- The party understands:
  - the nature of the mediation process
  - who the parties are
  - the role of the mediator
  - the parties' relationship to the mediator
  - the issues at hand

- The party can:
  - assess options
  - make and keep an agreement

The ADA Mediation Standards stress that an adjudication of legal incapacity may not necessarily indicate a lack of capacity to mediate:

Capacity is a decision-specific concept. Capacity to mediate may not be the same as capacity to make financial or health care decisions, to vote, to marry, or to drive. A party with a judicial determination of incapacity may still be able to participate in mediation. Conversely, a party without such a determination may not have the ability or understanding to participate.

Multi-Party Mediations

Multi-party mediations depend upon the same principles and skills that a mediation with only two parties requires. However, as the number of participants increases, so, too, do the demands upon the convener and the mediator in managing a process well.

As a general rule, multi-party mediations demand careful planning in advance and a willingness to be flexible on the part of both the case coordinator convening the mediation and the mediator. Although the following recommendations are not intended to be an exhaustive list of the tasks to complete in convening and conducting a multi-party mediation, they outline some basic steps:

- Conduct an initial assessment to determine the appropriateness of the dispute for mediation and to identify the stakeholders involved, including groups of individuals united by or organized around common concerns or goals

- If constituencies are to be represented by an individual or individuals, confirm the identity of the representatives and scope of those representatives' authority to negotiate and reach decisions

- Clarify the role of the mediator and the structure and purpose of the mediation process, as well as the role of the parties themselves
- Contact parties who will attend as part of intake to confirm their presence at mediation
- Design an appropriate procedure in advance that will ensure productive discussion and facilitate consensus-building
- Encourage parties to spend time preparing for mediation so that time at the mediation table will be well spent
- Team up with a co-mediator to more effectively manage mediations involving larger groups
- Schedule sufficient time for the initial mediation session and plan for multiple follow-up sessions, since larger groups require more time to define and address issues
- Show flexibility in managing the process; for example, caucuses or private sessions mean that the mediator will meet with several people sharing a common interest rather than one individual at a time

Jameson, the mediator, uses his last remaining negotiating tool in an effort to break the stalemate.

Meeting Space and Seating Arrangements in Mediation

Before the parties arrive to mediate, planning ahead to create an atmosphere conducive to dialogue and resolution is essential to the mediation process. A mediation office or meeting location often serves many purposes and must be appropriate to:

- Establish an informal and comfortable but professional atmosphere
- Accommodate the needs of the different parties
- Demonstrate sensitivity and provide safety when relationships between parties are strained
- Allow privacy for candid discussion

A mediation office ideally provides the following spaces for clients to do the work necessary to reach agreement:

- A reception area for welcoming visitors

- A large conference room with sufficient space for all parties to work jointly with the mediator

- A second private break-out room or office:

  - where parties can have private discussions out of the hearing of their counterparts on the other side of the table, the mediator, and the mediator's staff; or
  - for the purpose of separating parties in cases in which parties indicate that they wish to limit or avoid contact with their counterparts

In addition, mediation meeting areas should be clean, physically comfortable, properly heated or air-conditioned, quiet, and provide adequate and appropriate lighting, including shades on the windows to prevent glare from sunlight. Although some mediators have been known to use cold temperatures or other physical discomforts to pressure parties into settling, parties rarely appreciate such hardball tactics.

When it comes to setting up the mediation meeting space, the mediator will want to ascertain in advance the following information:

- How many people will be attending? Know in advance how many people will be coming so that sufficient seating is available for all.

- Who will be attending? Will parties attend with attorneys or other nonparty participants? Seating arrangements will need to allow lawyers to sit with their clients or interpreters with parties who require such services.

- What kind of furniture or equipment will be necessary? Will the parties need to exchange and review papers or use laptops? If so, a conference table would be useful to place documents or electronic equipment. In other cases, a more informal and relaxed setting with comfortable chairs and no table may be more appropriate and less intimidating for parties.

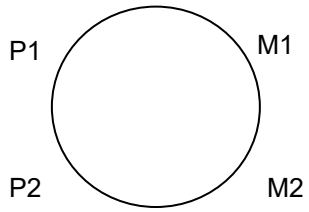
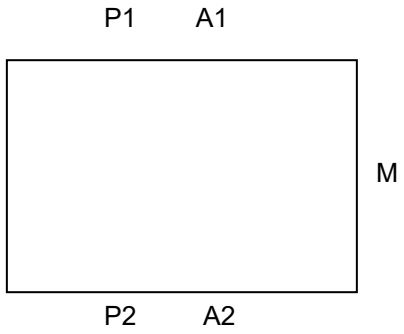
- Do any of the participants have special needs or disabilities that the meeting room must accommodate? Is the meeting location accessible to those with disabilities? Will there be sufficient space in the meeting room for a wheelchair?

- Are there cultural considerations to be honored, including differing need for personal space?

  In addition, mediators will wish to ensure that seating:

- Maximizes the ability of the mediator to maintain eye contact with all parties and to hear them all clearly
- Allows the parties to hear and see each other or be able to easily exchange documents
- In the case of co-mediation, enables co-mediators to easily work together and share or review documents and other paperwork
- Is arranged to suggest the collaborative and egalitarian nature of the process, rather than status, power, and hierarchy
- Allows parties to sit with lawyers, advisors, interpreters or others necessary for their participation

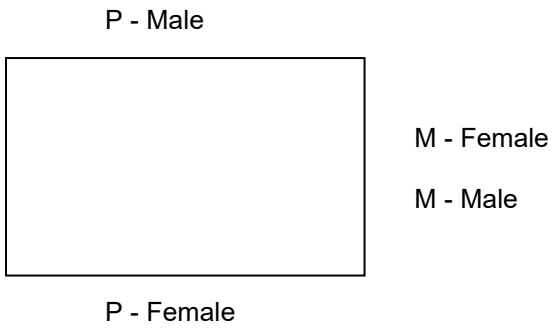
The following diagrams represent possible seating configurations at the mediation table:

Two co-mediators (M1, M2) are seated at a round table with two parties (P1, P2).	
At a traditional rectangular table, a mediator (M) works with two parties (P1, P2), who are seated beside their respective attorneys (A1, A2).	
Two co-mediators (M1, M2) are working with two parties (P1, P2), seated at a rectangular table.	

Practice Tip for Seating

In general, mediators should seat themselves in a way that affirms their role as neutral facilitator. In determining where to take a seat at the mediation table, mediators should be mindful of the identities of the participants, considering factors such as gender. For example, if a man and a woman are co-mediating a case in which a man and woman are parties, the mediators should be careful to avoid sitting in such a way that suggests that the mediator is literally on the same side of the table as the party who shares his or her gender.

The following diagram depicts one way that mediators (indicated by "M") might establish balance in relationship to the parties (indicated by "P"):



Multiculturalism and Cultural Literacy

As the world grows smaller, and workplaces and other settings where people gather and interact become increasingly diverse, our ability to connect across cultures gains in importance. Multiculturalism in the sphere of conflict resolution has gained such significance that entire trainings and conferences have been devoted to exploring it.

Although covering this topic in the depth it deserves lies beyond the scope of this 40-hour training program and this manual, we nonetheless wish to stress its importance and highlight two issues mediators should be aware of, inviting you to pursue further exploration independently, 1) diversity as a core value; and 2) cultural competence v. process competence.

Diversity as a core value in the institutionalization of ADR. Numerous federal and state institutions which have embraced mediation have established diversity as a goal that dispute resolution programs providing services under their aegis shall meet. For example, the State of Maryland's Program for Mediator Excellence specifies in The Maryland Standards of Conduct for Mediators, Standard IX, that mediators should commit to "[f]ostering diversity within the field of mediation" to further the advancement of the practice of mediation.

In New England, the Massachusetts Supreme Judicial Court has placed special emphasis on diversity and cultural sensitivity in promulgating Rule 7 of its Uniform Rules on Dispute Resolution governing court-approved dispute resolution programs:

Programs shall be designed with knowledge of and sensitivity to the diversity of the communities served. The design shall take into consideration such factors as the languages, dispute resolution styles, and ethnic traditions of communities likely to use the services. Programs shall not discriminate against staff, neutrals, volunteers, or clients on the basis of race, color, sex, age, religion, national origin, disability, political beliefs or sexual orientation. Programs shall actively strive to achieve diversity among staff, neutrals, and volunteers.

This core value is echoed in codes of conduct and professional standards for mediators and mediation programs throughout the U.S. and beyond. The mediation profession recognizes the importance of supporting diversity and improving access to quality ADR services across communities and cultures.

Cultural competence or process competence: the debate within the mediation community.

An ongoing debate within the ADR community concerns the question of cultural competence: should mediators be culturally competent to mediate certain types of disputes? Should mediators reflect the ethnicity, national origin, gender, sexual orientation or identity, or cultural background of the parties?

Some view the needs of the parties as paramount in making this determination. If the parties are more comfortable working with mediators who share and understand their cultural norms and values, then party self-determination takes precedence over other considerations. Some mediation programs incorporate this approach into their practice; for example, as a matter of policy, case coordinators will select divorce mediators to mirror the gender or genders of the divorcing spouses as a way of ensuring balance and neutrality.

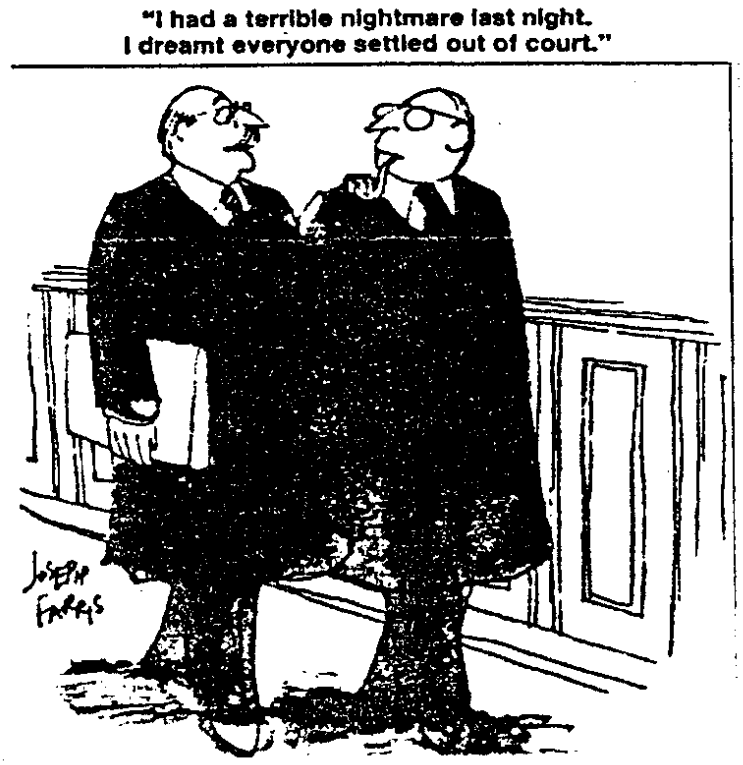
Others believe that the value the experienced mediator brings is process expertise, more relevant than subject matter or cultural expertise. They would argue that conflicts regardless of the issues at stake share dynamics that respond to the application of universal principles. They believe that the intercession of a skilled facilitator regardless of cultural background or cultural knowledge can help parties successfully navigate their differences, in the same way that ADR scholar and expert practitioner Eric Green was able to mediate the Microsoft case despite his lack of subject matter expertise in digital technology.

Regardless of which side one comes down on in this debate, many mediators believe in the importance of cultivating cultural sensitivity and awareness to work with parties across cultures. Developing this kind of awareness includes:

- The willingness to confront and address one's own implicit biases
- The capacity to avoid cognitive errors in judgment and decision-making
- Openness and curiosity to learn more about how others see and experience the world
- Demonstrating respect for parties through verbal and nonverbal communication
- Asking the parties for help when uncertain
- The humility to acknowledge an error and express regret for an unintended outcome

Further reading. The following articles published at Mediate.com, an online resource for ADR professionals and the general public, offer a closer look at the question of cultural sensitivity, including one from the perspective of deaf culture:

- "Considerations for Mediating with People Who Are Culturally Deaf", by Annette Leonard et al., at <www.mediate.com/articles/cadre6.cfm>
- "When Should Race, Gender or Culture be a Factor When Considering the Mediator?" by Fred Butler, at <www.mediate.com/articles/butler.cfm>



Section Six: The Practice of Mediation

Laws, Rules, Ethical Issues, and Credentialing

Confidentiality and Privilege in Mediation…….. 6-1

Uniform Mediation Act……... 6-3

Massachusetts Confidentiality Statute…… 6-7

Confidentiality and Privilege: A National Perspective Florida, California, Rhode Island and Connecticut…….. 6-8

Federal Rules of Evidence, Rule 408……..... 6-16

Ethical Standards - Uniform Rules on Dispute Resolution, Massachusetts.…… 6-17

ABA/ACR Model Rules of Conduct……..… 6-21

Ethical Dilemmas in Mediation ……..… 6-26

American Bar Association February 2002 Resolution on Mediation and the Unauthorized Practice of Law ……..…… 6-27

Mediator Certification and Credentialing …….. 6-35

MBA Opinion 85-3 ……..…….. 6-38

The following section reproduces and discusses laws, rules, and professional codes of conduct pertaining to the practice of mediation. It is provided for informational and educational purposes only and is not intended to serve as legal advice.

The application and impact of laws, rules, and regulations can vary widely based on the specific facts and jurisdiction involved. Given the changing nature of laws, rules and standards, we recommend that you independently verify those that pertain to the jurisdiction you will practice in and that will be relevant to your work as a mediator.

Confidentiality and Privilege in Mediation

We are all familiar with the mediator's opening statement or introduction – the overview of mediation that the mediator provides to parties that reviews the process of mediation, the principles that will inform that process, and the roles to be played by all participants.

Typically, as part of that overview, mediators will discuss the protections against disclosure that mediation communications enjoy, reassuring the parties that "mediation is confidential".

But what do we mean when we say that "Mediation is confidential"? When mediators talk about confidentiality, what they are in fact referring to is two distinct concepts that denote similar but different ideas: privilege on the one hand, and confidentiality on the other.

The concepts of "privilege" and "confidentiality" apply to communications that take place between one person and another whose relationship to each other is somehow unique. In certain circumstances, because of the nature of the relationship between people, individuals need to be able to speak candidly and reveal private information to others without fear of repercussion. Examples include spouses; therapist and patient; priest and penitent; doctor and patient; attorney and client; and, of course, mediator and party.

In the context of mediation:

Privilege means

- When a mediation communication is "privileged", it cannot be admitted into evidence in a judicial or other adjudicative proceeding, such as a trial, a deposition, or an administrative hearing.
- A privilege is typically established by statute, rule of evidence, or court rule.
- In many jurisdictions, statutes or rules of evidence give mediation participants and mediators a privilege protecting communications made during mediation from disclosure at trial.
- The privilege may be absolute or it may be limited to allow exceptions for certain kinds of evidence.
- Typically, the privilege can be waived. State law may specify whether, how and by whom the privilege can be waived, or parties may do so be written agreement.

Confidentiality means:

- "Confidentiality" means that the communication is made with the expectation of privacy and that the mediator will not disclose it to others without permission.
- Professional codes of conduct impose on mediators a duty to maintain the confidentiality of mediation communications. Unless parties agree otherwise or a statute or procedural rule applies, parties may be free to disclose mediation communications to non-participants.

- Whether mediation communications are to be kept confidential can be determined by agreement of the parties and the mediator.

- Parties can waive confidentiality and allow the mediator to discuss the case with others.

- Professionals such as therapists, physicians, social workers and others are mandated reporters, which means that they are required by law to report to state authority certain kinds of activity or conduct, such as the abuse of children. So that they can fulfill their statutory obligations, mediators who are mandated reporters in their professional roles outside of mediation practice should specify exceptions to confidentiality in their Agreements to Participate in Mediation. Contact the board that licenses or credentials you in your profession of origin for further information.

Protections against in-court or out-of-court disclosure for mediation communications derive from many possible sources, at both federal and state levels. These include but are not limited to statutes; evidentiary rules; common law doctrine; rules of courts and governmental agencies; and contractual agreement. These protections are not necessarily absolute and may be limited by constitutional law; statute; written agreement of the parties; and ethical codes of other professions, among others. Mediators should ascertain the laws and rules applicable to the jurisdiction or forum in which they practice to confirm what forms of protection are available for mediation communications and what qualifications or limits exist.

Harold had come ready to exploit the mediator's rumored high-heels fetish, a strategy his partner wished had been fully vetted ahead of time.

Uniform Mediation Act[4]

SECTION 1. TITLE. This [Act] may be cited as the Uniform Mediation Act.

SECTION 2. DEFINITIONS. In this [Act]:

(1) "Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(2) "Mediation communication" means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(3) "Mediator" means an individual who conducts a mediation.

(4) "Nonparty participant" means a person, other than a party or mediator,that participates in a mediation.

(5) "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(7) "Proceeding" means:
(A) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or
(B) a legislative hearing or similar process.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(9) "Sign" means:
(A) to execute or adopt a tangible symbol with the present intent to authenticate a record; or
(B) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

SECTION 3. SCOPE.

(a) Except as otherwise provided in subsection (b) or (c), this [Act] applies to a mediation in which:

(1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;
(2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or
(3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation.

(b) The [Act] does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;
(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the [Act] applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;
(3) conducted by a judge who might make a ruling on the case; or
(4) conducted under the auspices of:
(A) a primary or secondary school if all the parties are students or

[4] The Uniform Mediation Act as drafted by the National Conference of Commissioners on Uniform State Laws, with commentary and updates, can be viewed at < http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act>

(B) a correctional institution for youths if all the parties are residents of that institution.

(c) If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under Sections 4 through 6 do not apply to the mediation or part agreed upon. However, Sections 4 through 6 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

SECTION 4. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY.

(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.

(b) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

SECTION 5. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and
(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(b) A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section 4, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under Section 4.

SECTION 6. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege under Section 4 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;
(2) available to the public under [insert statutory reference to open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public;
(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
(4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;
(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;
(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or
(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the

[Alternative A: [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates.]
[Alternative B: public agency participates in the [State to insert, for example, child or adult protection] mediation].

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or
(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).

(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

SECTION 7. PROHIBITED MEDIATOR REPORTS.

(a) Except as required in subsection (b), a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

(b) A mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;
(2) a mediation communication as permitted under Section 6; or
(3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

(c) A communication made in violation of subsection (a) may not be considered by a court, administrative agency, or arbitrator.

SECTION 8. CONFIDENTIALITY.

Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

SECTION 9. MEDIATOR'S DISCLOSURE OF CONFLICTS OF INTEREST; BACKGROUND.

(a) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and
(2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.

(b) If a mediator learns any fact described in subsection (a)(1) after accepting a mediation, the mediator shall disclose it as soon as is practicable.

(c) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

(d) A person that violates subsection [(a) or (b)] [(a), (b), or (g)] is precluded by the violation from asserting a privilege under Section 4.

(e) Subsections (a), (b), [and] (c), [and] [(g)] do not apply to an individual acting as a judge.

(f) This [Act] does not require that a mediator have a special qualification by background or profession.

[(g) A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) to be disclosed, the parties agree otherwise.]

SECTION 10. PARTICIPATION IN MEDIATION.

An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded.

SECTION 11. INTERNATIONAL COMMERCIAL MEDIATION.

(a) In this section, "Model Law" means the Model Law on International Commercial Conciliation adopted by the United Nations Commission on International Trade Law on 28 June 2002 and recommended by the United Nations General Assembly in a resolution (A/RES/57/18) dated 19 November 2002, and "international commercial mediation" means an international commercial conciliation as defined in Article 1 of the Model Law.

(b) Except as otherwise provided in subsections (c) and (d), if a mediation is an international commercial mediation, the mediation is governed by the Model Law.

(c) Unless the parties agree in accordance with Section 3(c) of this [Act] that all or part of an international commercial mediation is not privileged, Sections 4, 5, and 6 and any applicable definitions in Section 2 of this [Act] also apply to the mediation and nothing in Article 10 of the Model Law derogates from Sections 4, 5, and 6.

(d) If the parties to an international commercial mediation agree under Article 1, subsection (7), of the Model Law that the Model Law does not apply, this [Act] applies.

SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [Act] modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but this [Act] does not modify, limit, or supersede Section 101(c) of that Act or authorize electronic delivery of any of the notices described in Section 103(b) of that Act.

SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this [Act], consideration should be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 14. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 15. EFFECTIVE DATE. This [Act] takes effect ..... .

SECTION 16. REPEALS. The following acts and parts of acts are hereby repealed:

(1)
(2)
(3)

SECTION 17. APPLICATION TO EXISTING AGREEMENTS OR REFERRALS.

(a) This [Act] governs a mediation pursuant to a referral or an agreement to mediate made on or after [the effective date of this [Act]].

(b) On or after [a delayed date], this [Act] governs an agreement to mediate whenever made.

Massachusetts Confidentiality Statute, M.G.L. ch. 233 § 23C

Chapter 233: Section 23C. Work product of mediator confidential; confidential communications; exception; mediator defined

Section 23C. 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.

Jacobs, Meyers & Brown came prepared to work the mediator.

Confidentiality and Privilege: A National Perspective

A Look at Other States: Florida, California, Rhode Island, and Connecticut

Florida Mediation Confidentiality and Privilege Act, F.S. § 44.402-44.406

44.402. Scope

(1) Except as otherwise provided, ss. 44.401-44.406 apply to any mediation:

(a) Required by statute, court rule, agency rule or order, oral or written case-specific court order, or court administrative order;

(b) Conducted under ss. 44.401-44.406 by express agreement of the mediation parties; or

(c) Facilitated by a mediator certified by the Supreme Court, unless the mediation parties expressly agree not to be bound by ss. 44.401-44.406.

(2) Notwithstanding any other provision, the mediation parties may agree in writing that any or all of s. 44.405(1), s. 44.405(2), or s. 44.406 will not apply to all or part of a mediation proceeding.

44.403. Mediation Confidentiality and Privilege Act; definitions

As used in ss. 44.401-44.406, the term:

(1) "Mediation communication" means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation. The commission of a crime during a mediation is not a mediation communication.

(2) "Mediation participant" means a mediation party or a person who attends a mediation in person or by telephone, videoconference, or other electronic means.

(3) "Mediation party" or "party" means a person participating directly, or through a designated representative, in a mediation and a person who:

(a) Is a named party;

(b) Is a real party in interest; or

(c) Would be a named party or real party in interest if an action relating to the subject matter of the mediation were brought in a court of law.

(4) "Mediator" means a neutral, impartial third person who facilitates the mediation process. The mediator's role is to reduce obstacles to communication, assist in identifying issues, explore alternatives, and otherwise facilitate voluntary agreements to resolve disputes, without prescribing what the resolution must be.

(5) "Subsequent proceeding" means an adjudicative process that follows a mediation, including related discovery.

44.404. Mediation; duration

(1) A court-ordered mediation begins when an order is issued by the court and ends when:

(a) A partial or complete settlement agreement, intended to resolve the dispute and end the

mediation, is signed by the parties and, if required by law, approved by the court;

(b) The mediator declares an impasse by reporting to the court or the parties the lack of an agreement;

(c) The mediation is terminated by court order, court rule, or applicable law; or

(d) The mediation is terminated, after party compliance with the court order to appear at mediation, by:

1. Agreement of the parties; or

2. One party giving written notice to all other parties in a multiparty mediation that the one party is terminating its participation in the mediation. Under this circumstance, the termination is effective only for the withdrawing party.

(2) In all other mediations, the mediation begins when the parties agree to mediate or as required by agency rule, agency order, or statute, whichever occurs earlier, and ends when:

(a) A partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties and, if required by law, approved by the court;

(b) The mediator declares an impasse to the parties;

(c) The mediation is terminated by court order, court rule, or applicable law; or

(d) The mediation is terminated by:

1. Agreement of the parties; or

2. One party giving notice to all other parties in a multiparty mediation that the one party is terminating its participation in the mediation. Under this circumstance, the termination is effective only for the withdrawing party.

44.405. Confidentiality; privilege; exceptions

(1) Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. A violation of this section may be remedied as provided by s. 44.406. If the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees.

(2) A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.

(3) If, in a mediation involving more than two parties, a party gives written notice to the other parties that the party is terminating its participation in the mediation, the party giving notice shall have a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding only those mediation communications that occurred prior to the delivery of the written notice of termination of mediation to the other parties.

(4)(a) Notwithstanding subsections (1) and (2), there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication:

1. For which the confidentiality or privilege against disclosure has been waived by all

parties;

2. That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;

3. That requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report;

4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;

5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; or

6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

(b) A mediation communication disclosed under any provision of subparagraph (a)3., subparagraph (a)4., subparagraph (a)5., or subparagraph (a)6. remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this section.

(5) Information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in mediation.

(6) A party that discloses or makes a representation about a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation.

44.406. Confidentiality; civil remedies

(1) Any mediation participant who knowingly and willfully discloses a mediation communication in violation of s. 44.405 shall, upon application by any party to a court of competent jurisdiction, be subject to remedies, including:

(a) Equitable relief.

(b) Compensatory damages.

(c) Attorney's fees, mediator's fees, and costs incurred in the mediation proceeding.

(d) Reasonable attorney's fees and costs incurred in the application for remedies under this section.

(2) Notwithstanding any other law, an application for relief filed under this section may not be commenced later than 2 years after the date on which the party had a reasonable opportunity to discover the breach of confidentiality, but in no case more than 4 years after the date of the breach.

(3) A mediation participant shall not be subject to a civil action under this section for lawful compliance with the provisions of s. 119.07.

California Evidence Code Sections 1115-1128

1115. For purposes of this chapter:
(a) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.
(b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.
(c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

1116.
(a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.
(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

1117.
(a) Except as provided in subdivision (b), this chapter applies to a mediation as defined in Section 1115.
(b) This chapter does not apply to either of the following:
(1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.
(2) A settlement conference pursuant to Rule 222 of the California Rules of Court.

1118.
An oral agreement "in accordance with Section 1118" means an oral agreement that satisfies all of the following conditions:
(a) The oral agreement is recorded by a court reporter, tape recorder, or other reliable means of sound recording.
(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.
(c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect.
(d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

1119. Except as otherwise provided in this chapter:
(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

1120.
(a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.
(b) This chapter does not limit any of the following:
(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.
(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

1121.
Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

1122.
(a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:
(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.
(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.
(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

1123.
A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:
(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.
(b) The agreement provides that it is enforceable or binding or words to that effect.
(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.
(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

1124.
An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied:
(a) The agreement is in accordance with Section 1118.
(b) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement.
(c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

1125.
(a) For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:
(1) The parties execute a written settlement agreement that fully resolves the dispute.
(2) An oral agreement that fully resolves the dispute is reached in accordance with Section 1118.
(3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121.
(4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.

(5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.
(b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:
(1) The parties execute a written settlement agreement that partially resolves the dispute.
(2) An oral agreement that partially resolves the dispute is reached in accordance with Section 1118.
(c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.

1126.
Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

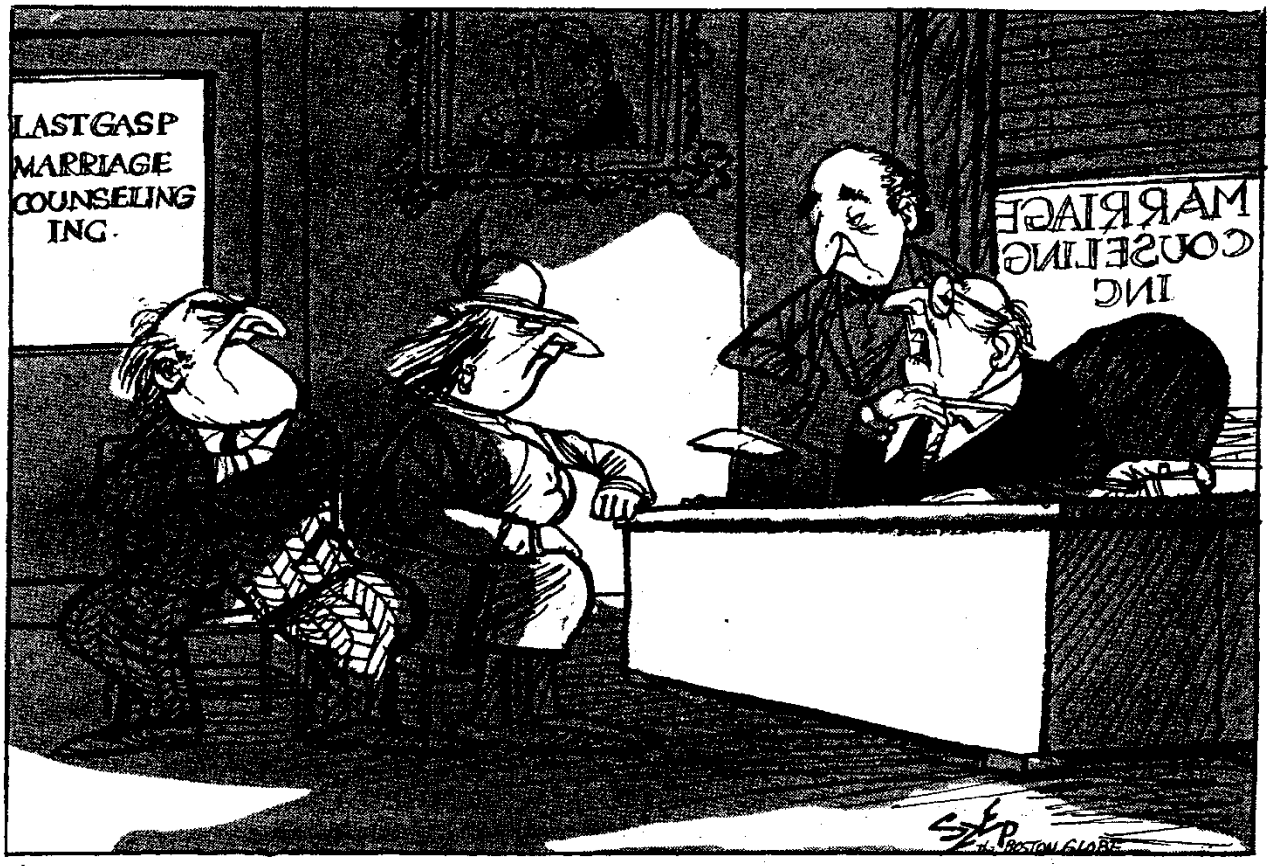
1127.
If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.

1128.
Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

Rhode Island General Law § 9-19-44 - Mediator confidentiality in mediation proceedings.

(a) All memoranda and other work product, including files, reports, interviews, case summaries, and notes, prepared by a mediator shall be confidential and not subject to disclosure in any subsequent judicial or administrative proceeding involving any of the parties to any mediation in which the materials are generated; nor shall a mediator be compelled to disclose in any subsequent judicial or administrative proceeding any communication made to him or her in the course of, or relating to the subject matter of, any mediation by a participant in the mediation process. For the purposes of this section, "mediation" shall mean a process in which an impartial third party who is a qualified mediator, who lacks authority to impose a solution, helps participants reach their own agreement for resolving a dispute, whether or not a judicial action has been filed; and a "mediator" shall mean an impartial person who enters into a written agreement with the parties to assist them in resolving their dispute and who has completed at least thirty (30) hours of training in mediation, or has two (2) years of professional experience as a mediator, or has been appointed to mediate by a judicial or governmental body.

(b) This section shall not be applicable to any and all collective bargaining mediation, including but not limited to collective bargaining mediation conducted pursuant to chapters 9.1 – 9.5 and 10 of title 28 and chapter 11 of title 36.



"Given the intensity of the fighting and the length of the conflict, we've decided to bring Jimmy Carter in to mediate this one."

Connecticut Statute Regarding Disclosure of Mediation Communications

C.G.S. § 52-235d. Mediation. Disclosure.

(a) As used in this section, "mediation" means a process, or any part of a process, which is not court-ordered, in which a person not affiliated with either party to a lawsuit facilitates communication between such parties and, without deciding the legal issues in dispute or imposing a resolution to the legal issues, which assists the parties in understanding and resolving the legal dispute of the parties.

(b) Except as provided in this section, by agreement of the parties or in furtherance of settlement discussions, a person not affiliated with either party to a lawsuit, an attorney for one of the parties or any other participant in a mediation shall not voluntarily disclose or, through discovery or compulsory process, be required to disclose any oral or written communication received or obtained during the course of a mediation, unless (1) each of the parties agrees in writing to such disclosure, (2) the disclosure is necessary to enforce a written agreement that came out of the mediation, (3) the disclosure is required by statute or regulation, or by any court, after notice to all parties to the mediation, or (4) the disclosure is required as a result of circumstances in which a court finds that the interest of justice outweighs the need for confidentiality, consistent with the principles of law.

(c) Any disclosure made in violation of any provision of this section shall not be admissible in any proceeding.

(d) Nothing in this section shall prevent (1) the discovery or admissibility of any evidence that is otherwise discoverable merely because such evidence was presented during the course of the mediation, or (2) the disclosure of information for research or educational purposes done in cooperation with dispute resolution programs provided the parties and specific issues in controversy are not identifiable.

"Remember, in this negotiation you're the 'Paula Abdul.'"

Federal Rules of Evidence, Rule 408

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses - Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses - This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias
or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

"We structured the deal so it won't make any sense to you."

Ethical Standards: Massachusetts Supreme Judicial Court Uniform Rules on Dispute Resolution, Rule 9

Introduction. These Ethical Standards are designed to promote honesty, integrity and impartiality by all neutrals and other individuals involved in providing court-connected dispute resolution services. These standards seek to assure the courts and citizens of the Commonwealth that such services are of the highest quality, and to promote confidence in these dispute resolution services. In addition, these standards are intended as a foundation on which appellate courts and Trial Court departments can build their dispute resolution policies, programs and procedures to best serve the public. These Standards apply to all neutrals as defined in these Standards when they are providing court-connected dispute resolution services for the Trial Court and the appellate courts, including those who are state or other public employees. State and other public employees are subject to the Massachusetts Conflict of Interest Law, M.G.L. c. 268A, and therefore, to the extent that these standards are in any manner inconsistent with M.G.L. c. 268A, the statute shall govern. In addition, to the extent that these standards are in any manner inconsistent with the Standards and Forms for Probation Offices of the Probate and Family Court Department promulgated by the Office of the Commissioner of Probation effective July 1, 1994, the Probation Standards shall govern. All courts providing dispute resolution services and all court-connected dispute resolution programs shall provide the neutrals with a copy of these Ethical Standards. These Standards shall be made a part of all training and educational programs for approved programs, and shall be available to the public.

Summary of Ethical Standards:

(a) Impartiality

(b) Informed Consent

(c) Fees

(d) Conflict of Interest

(e) Responsibility to Non-Participating Parties

(f) Advertising, Soliciting, or Other Communications by Neutrals

(g) Confidentiality

(h) Withdrawing from the Dispute Resolution Process

(a) Impartiality. A neutral shall provide dispute resolution services in an impartial manner. Impartiality means freedom from favoritism and bias in conduct as well as appearance.

(I) A neutral shall provide dispute resolution services only for those disputes where she or he can be impartial with respect to all of the parties and the subject matter of the dispute.

(ii) If at any time prior to or during the dispute resolution process the neutral is unable to conduct the process in an impartial manner, the neutral shall so inform the parties and shall withdraw from providing services, even if the parties express no objection to the neutral continuing to provide services.

(iii) No neutral or any member of the neutral's immediate family or his or her agent shall request, solicit, receive, or accept any in-kind gifts or any type of compensation other than the court-established fee in connection with any matter coming before the neutral.

(b) 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.

(c) Fees. A neutral shall disclose to the parties the fees that will be charged, if any, for the dispute resolution services being provided.

(i) A neutral shall inform each party in a court-connected dispute resolution process in writing, prior to the start of the process, of (aa) the fees, if any, that will be charged for the process, (bb) if there will be a fee, whether it will be paid to the neutral, court, and/or the program, and (cc) whether the parties may apply for a fee-waiver or other reduction of fees.

(ii) If a fee is charged for the dispute resolution process, the neutral shall enter into a written agreement with the parties, before the dispute resolution process begins, stating the fees and time and manner of payment.

(iii) Fee agreements may not be contingent upon the result of the dispute resolution process or amount of the settlement.

(iv) Neutrals shall not accept, provide, or promise a fee or other consideration for giving or receiving a referral of any matter.

(v) If the court has established fees for its dispute resolution services, no neutral shall request, solicit, receive, or accept any payment in any amount greater than the court-established fees when providing court-connected dispute resolution services.

(d) Conflict of Interest. A neutral shall disclose to all parties participating in the dispute resolution process all actual or potential conflicts of interest, including circumstances that could give rise to an appearance of conflict. A neutral shall not serve as a neutral in a dispute resolution process after he or she knows of such a conflict, unless the parties, after being informed of the actual or potential conflict, give their consent and the neutral has determined that the conflict is not so significant as to cast doubt on the integrity of the dispute resolution process and/or neutral.

(i) As early as possible and throughout the dispute resolution process, the neutral shall disclose to all parties participating in the process, all actual or potential conflicts of interest, including but not limited to the following:

(aa) any known current or past personal or professional relationship with any of the parties or their attorneys;

(bb) any financial interest, direct or indirect in the subject matter of the dispute or a financial relationship (such as a business association or other financial relationship) with the parties, their attorneys, or immediate family member of any party or their attorney, to the dispute resolution proceeding; and

(cc) any other circumstances that could create an appearance of conflict of interest.

(ii) Where the neutral determines that the conflict is so significant as to cast doubt on the integrity of the dispute resolution process and/or neutral, the neutral shall withdraw from the process, even if the parties express no objection to the neutral continuing to provide services.

(iii) Where the neutral determines that the conflict is not significant, the neutral shall ask the parties whether they wish the neutral to proceed. The neutral shall obtain consent from all parties before proceeding.

(iv) A neutral must avoid even the appearance of a conflict of interest both during and after the provision of services.

(aa) A neutral shall not use the dispute resolution process to solicit,

encourage or otherwise procure future service arrangements with any party.

(bb) A neutral may not subsequently act on behalf of any party to the dispute resolution process, nor represent one such party against the other, in any matter related to the subject of the dispute resolution process.

(cc) A neutral may not subsequently act on behalf of any party to the dispute resolution process, nor represent one such party against the other, in any matter unrelated to the subject of the dispute resolution process for a period of one year, unless the parties to the process consent to such action or representation.

(v) A neutral shall avoid conflicts of interest in recommending the services of other professionals.

(e) Responsibility to Non-Participating Parties. A neutral should consider, and where appropriate, encourage the parties to consider, the interests of persons affected by actual or potential agreements and not participating or represented in the process.

(i) If a neutral believes that the interests of parties not participating or represented in the process will be affected by actual or potential agreements, the neutral should ask the parties to consider the effects of including or not including the absent parties and/or their representatives in the process. This obligation is particularly important when the interests of children or other individuals who are not able to protect their own interests are involved.

(f) Advertising, Soliciting, or Other Communications by Neutrals. Neutrals shall be truthful in advertising, soliciting, or other communications regarding the provision of dispute resolution services.

(i) A neutral shall not make untruthful or exaggerated claims about the dispute resolution process, its costs and benefits, its outcomes, or the neutral's qualifications and abilities.

(ii) A neutral shall not make claims of specific results, benefits, outcomes, or promises which imply favor of one side over another.

(g) Confidentiality. 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 and substance of the dispute; the neutral's 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-à-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 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 from the party from whom the information was received.

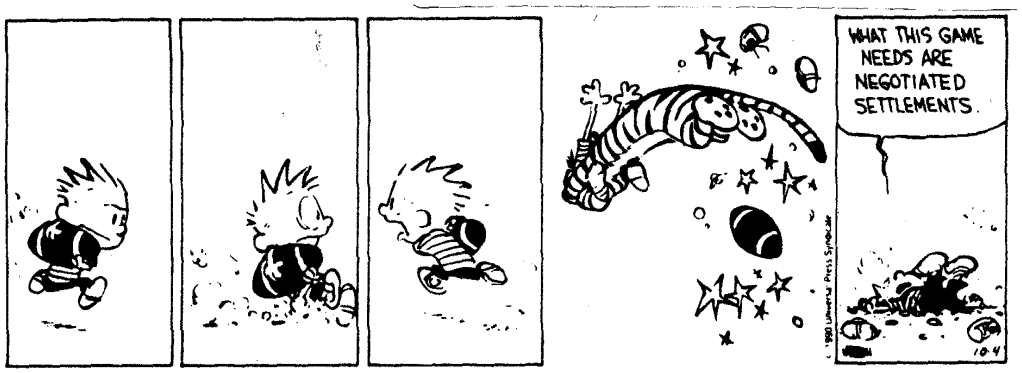
(iv) Neutrals who are part of a court-connected dispute resolution program may, for purposes of supervising the program, supervising neutrals and monitoring of agreements, discuss confidential information with other neutrals and administrative staff in the program. This permission to discuss confidential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

(h) Withdrawing from the Dispute Resolution Process. A neutral shall withdraw from the dispute resolution process if continuation of the process would violate any of the Ethical Standards, if the safety of any of the parties would be jeopardized, or if the neutral is unable to provide effective service.

(i) Withdrawal must be accomplished in a manner which, to the extent possible, does not prejudice the rights or jeopardize the safety of the parties.

(ii) A neutral may withdraw from the dispute resolution process if the neutral believes that (aa) one or more of the parties is not acting in good faith; (bb) the parties' agreement would be illegal or involve the commission of a crime; (cc) continuing the dispute resolution process would give rise to an appearance of impropriety; (dd) in a process whose outcome depends upon the agreement of the parties, continuing with the process would cause severe harm to a non-participating party, or the public; and (ee) continuing discussions would not be in the best interest of the parties, their minor children, or the dispute resolution program.



Model Standards of Conduct for Mediators

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 Resolution. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005. Both the original 1994 version and the 2005 revision have been approved by each participating organization.

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.

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.

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.

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.

Ethical Dilemmas in Mediation

The following ethical dilemmas, drawn from real-life cases, present challenges for the practitioner. For each one, identify the ethical duty or duties involved and determine how best to handle each dilemma.

1. As part of your marketing efforts and thanks to your great contacts, you have been giving informational talks about mediation and ADR at brown-bag lunches and meet-and-greets held at large law firms in the city, including one event held by Big Law LLP at its headquarters, where you snacked on a lavish array of hors d'oeuvres and then gave pointers on mediation advocacy. Shortly after that program, impressed by your know-how, one of the senior partners at Big Law approaches you to ask to retain your services to mediate a dispute involving one of Big Law's clients, whom they will be representing at the mediation. What should you do?

2. With the encouragement of the probate judge, two attorneys representing a mother and father in a high-conflict divorce agreed to refer their clients to you in an effort to address the most challenging issue: custody of twin 3-year-old girls. Knowing that this case would be difficult, you brought in a co-mediator, someone you have known professionally for many years but never co-mediated with before. S/he has a reputation as a closer. At the beginning, your co-mediator jokingly says to the parents, "We're bolting the door and not letting you out of here until we get this done." You begin to realize s/he wasn't entirely joking about the strong-arm tactics. At one point, in a private session with the father, your co-mediator says, "If you don't start being reasonable, we'll report back to the judge that you're deliberately holding this whole thing up and tell her that you don't deserve to see your daughters." What do you do?

3. You're into the fifth hour of an emotional employment discrimination case. In a private session, the attorney for the employee reveals to you their bottom line to help you understand the financial realities on the ground, asking you not to disclose it to the other side. As part of the negotiations, the attorney and the employee ask you to convey to the employer a higher dollar amount in an effort to settle the case. You meet next in private with the employer and instead of conveying the higher dollar figure, you misread your notes and accidentally convey the bottom line amount. What do you do?

4. Two business owners are embroiled in a breach of contract claim. Their lawyers contact you to schedule a mediation. You advise them about your fees, $300 an hour to be split evenly between the parties, and set a date in two weeks for the mediation. At 5 p.m. the day before the mediation, one of the business owners phones you. Pleading financial hardship caused by the current recession, he says that he must attend the mediation without counsel because he can no longer afford his

attorney and asks you to reduce your fee for him, charging him $100 an hour rather than the $150 which would have been his share of your $300 hourly rate. He begs you not to cancel the mediation since it represents his last chance to save his business from going under, and asks you not to let the other side know of his financial difficulties. What do you do?

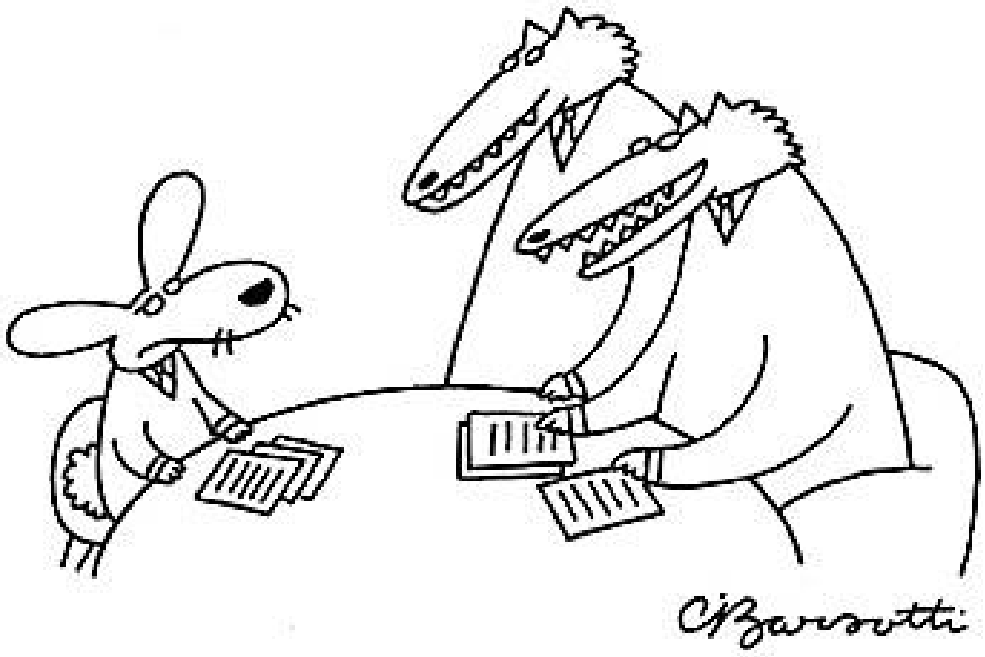
5. A volunteer mediator with a district court mediation program, you are assigned a case involving a dispute between an automobile repair shop and a customer. The repair shop has alleged non-payment and the customer claims that the work was improperly done. The customer arrives for the mediation oddly dressed; for example, you notice that although it is February, he is wearing shoes with no socks. A wool cap covers the top of his head. It's strangely lumpy, and during a private session, he removes it. You can see that it's lined with aluminum foil. He explains that he's wearing it to protect himself from electromagnetic fields. He pulls out his wallet to show you that his driver's license and credit cards are also individually wrapped in foil "to prevent the Lizard People from tracking me," he says. What do you do?

6. A family has filed a wrongful death action against a nursing home, alleging that the actions of its staff and administrators caused the death of their loved one, a 97-year-old woman. The family and the nursing home, at the urging of the judge assigned to the case, come to mediation. During the course of the mediation, the family and its attorney describe unsafe practices and unsanitary conditions at the nursing home, through personal stories by family members, photographs, state agency reports, and other documentation. You privately found the photos and descriptions by family members disturbing. The family agrees to settle and dismiss their suit for $100,000, substantially less than what you believe they would have received from a jury. A week later, while talking to your next-door neighbor, you learn that she is planning to place her elderly father in the same nursing home. What do you do?

7. Two sisters, in their forties, have decided to use mediation to discuss tough decisions about their older brother, a 52-year-old man, divorced with no children, who sustained a traumatic brain injury following a diving accident one year ago. The accident left him with neuropsychological problems - including memory loss, speech issues, and depression – and unable to return to his job as chief risk officer for a large bank. He is disabled and dependent on others for daily care. One sister lives in Los Angeles, California, the other sister in Pittsfield, Massachusetts. You scheduled a mediation and are meeting for the first time with the sisters to address the decisions to be made – disposing of the brother's substantial assets to pay for his care - and to determine where he should live – in Pittsfield where he grew up and still has family and friends from high school, or in L.A., where a medical center that specializes in treatment of brain injuries is located. Each sister has accused the other of greed and selfish motives, particular with respect to the substantial assets involved. When the sisters quickly reach impasse, one of them suggests that their brother should participate in the mediation. What do you do?

8. You are mediating a case involving the dissolution of a partnership. One partner does not have counsel present, but the other partner is represented by an attorney who is an old family friend of that partner. This attorney reveals to you in a private session while her client is using the restroom that she's got only a nodding acquaintance with business law and is really there to lend moral support – she's actually a personal injury lawyer. The partners manage to negotiate a division of the partnership assets. You can see that the deal the partners are about to shake hands over will in fact result in a substantial tax burden that could be avoided with tax advice. You know this because you were an accountant who specialized in business and partnership tax matters before you became a mediator. What do you do?

9. You were brought in to mediate a dispute among a property owner, a general contractor and a subcontractor involving the construction of a "green" apartment complex project, built entirely with environmentally friendly construction materials. In a private session, the owner reveals to you that he suspects that the general contractor and the subcontractor are in cahoots to use materials that are anything but green in an effort to keep costs down and profits high. He also tells you in a whisper that he thinks that the general contractor is "mobbed up" and is worried about repercussions if he pushes too hard. What do you do?



"There. Now it's all on paper. Feel better?"

American Bar Association February 2002 Resolution on Mediation and the Unauthorized Practice of Law

ABA Section of Dispute Resolution on Mediation and the Unauthorized Practice of Law Adopted by the Section on February 2, 2002

The ABA Section of Dispute Resolution has noted the wide range of views expressed by scholars, mediators, and regulators concerning the question of whether mediation constitutes the practice of law. The Section believes that both the public interest and the practice of mediation would benefit from greater clarity with respect to this issue in the statutes and regulations governing the unauthorized practice of law (UPL). The Section believes that such statutes and regulations should be interpreted and applied in such a manner as to permit all individuals, regardless of whether they are lawyers, to serve as mediators. The enforcement of such statutes and regulations should be informed by the following principles:

Mediation is not the practice of law. Mediation is a process in which an impartial individual assists the parties in reaching a voluntary settlement. Such assistance does not constitute the practice of law. The parties to the mediation are not represented by the mediator.

Mediators' discussion of legal issues. In disputes where the parties. legal rights or obligations are at issue, the mediator's discussions with the parties may involve legal issues. Such discussions do not create an attorney-client relationship, and do not constitute legal advice, whether or not the mediator is an attorney.

Drafting settlement agreements. When an agreement is reached in a mediation, the parties often request assistance from the mediator in memorializing their agreement. The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement that goes beyond the terms specified by the parties, he or she may be engaged in the practice of law. However, in such a case, a mediator shall not be engaged in the practice of law if (a) all parties are represented by counsel and (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys.

Mediators' responsibilities. Mediators have a responsibility to inform the parties in a mediation about the nature of the mediator's role in the process and the limits of that role. Mediators should inform the parties: (a) that the mediator's role is not to provide them with legal representation, but rather to assist them in reaching a voluntary agreement; (b) that a settlement agreement may affect the parties. legal rights; and (c) that each of the parties has the right to seek the advice of independent legal counsel throughout the mediation process and should seek such counsel before signing a settlement agreement.

Comments

1. *Mediation and the practice of law.* There is a growing consensus in the ethical opinions addressing this issue that mediation is not the practice of law. *See, e.g.*, Maine Bar Rule 3.4(h)(4) (The role of mediator does not create a lawyer-client relationship with any of the parties and does not constitute representation of them); Kentucky Bar Association Ethics Opinion 377 (1995) (Mediation is not the practice of law); Indiana Ethics Opinion 5 (1992) (same); Washington State Bar Association, Committee to Define the Practice of Law, Final

Report (July 1999), adopted by Washington State Bar Association Board of Governors, September 1999 (same). *But see* New Jersey Supreme Court Advisory Committee on Professional Ethics, Opinion No. 676 (1994) (holding that when a lawyer serves as a third party neutral, he or she is acting as a lawyer). Essential to most of the common definitions of the practice of law is the existence of an attorney-client relationship. Because mediators do not establish an attorney-client relationship, they are not engaged in the practice of law when they provide mediation services. The Section recognizes that in some very extraordinary situations it might be possible for a mediator to inadvertently create an attorney-client relationship with a party in mediation. For example, if the parties were unrepresented, and the mediator did not clarify his/her role, it is possible that a party in mediation could mistakenly assume that the mediator's role was to advise and protect solely that party's interests. In mediations where the parties are represented by counsel or where the mediator properly explains (and preferably documents) his/her role, it would appear unlikely that either party in mediation could ever reasonably assume that the mediator was that person's attorney.

2. *Ethical rules governing mediators*. There is a growing body of ethical principles and standards governing the practice of mediation. Accordingly, even if a mediator's conduct is not inconsistent with state UPL statutes or regulations, there may be other sources of authority governing the mediator's conduct. *See, e.g.*, Mass. Uniform Rules on Dispute Resolution 9(c)(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).

3. *Ethical rules governing lawyers*. An important, but still partly unresolved question concerning the ethical rules applicable to lawyers is whether, and to what extent, the rules governing the conduct of lawyers apply to lawyers when they are serving as mediators and not engaged in the practice of law. If such rules were applied, in whole or in part, they would raise a host of imponderable issues for lawyer-mediators, including who is the client and how to discharge many of the traditional duties lawyers owe to clients. Recent amendments to the ABA Model Rules of Professional Conduct, when enacted in various jurisdictions, would address this issue. The new rule states:

Lawyer Serving as Third-Party Neutral

> (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of disputes that have arisen between them. Service as a third-party neutral may include service as an arbitrator, mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve their dispute.
>
> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and the lawyer's role as one who represents a client.
>
> Further, the ABA has modified the Preamble to the Model Rules as follows: "[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals." See, e.g., Rules 1.12 and 2.4.

4. *UPL and multi-jurisdictional practice of lawyer-mediators.* Lawyer-mediators should be aware that, unless they are admitted to the bar in every state, they too are potentially affected by the issue of UPL and mediation. Many lawyer-mediators provide mediation services in more than one jurisdiction. If mediation is considered the practice of law, lawyer-mediators could be accused of violating UPL statutes when they serve in a jurisdiction in which they are not admitted to the bar. Although a lawyer may petition for temporary admission, requiring such admission substantially and unnecessarily burdens the practice of mediation outside of the mediator's local area. This problem is compounded for lawyer-mediators who have ceased practicing law, serve only as a neutral, and later relocate to different states. These lawyer-mediators may face difficult bar admission issues, as a state may require a certain minimum years of active engagement in the practice of law to qualify for admission to the bar without examination. This problem arises because bar regulators. definitions of the active practice of law may not include the activities typical of mediation, whereas the regulators who enforce UPL statutes (typically the state Attorney General, local district attorneys, or a bar committee) may include such activities as the practice of law in their interpretation of UPL statutes. It would seem to be a perverse result if transplanted lawyers clearly engaged in the practice of law could do so without proving their command of their new jurisdiction's laws, while a mediator who has no intention of practicing law would be required to take the new jurisdiction's bar exam. The ABA's Commission on Multijurisdictional Practice is currently considering proposals for modification of the Model Rules of Professional Conduct that would, if adopted by the ABA and enacted by the states, eliminate, or at least reduce, concerns about lawyer-mediators engaging in a multi-jurisdictional practice.

5. *Guidelines on legal advice.* The Virginia Guidelines on Mediation and the Unauthorized Practice of Law, drafted by the Department of Dispute Resolution Services of the Supreme Court of Virginia, and the North Carolina Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law, adopted by the North Carolina Bar in 1999, articulate a UPL standard for mediators that differs from the standard articulated in this Resolution. According to those Guidelines, a mediator may provide the parties with legal information but may not give legal advice. The Guidelines define legal advice as applying the law to the facts of the case in such a way as to (a) predict the outcome of the case or an issue in the case, or (b) recommend a course of action based on the mediator's analysis. The Section believes that adoption of the Virginia and North Carolina standards in other jurisdictions would be harmful to the growth and development of mediation. It is important that mediators who are competent to engage in discussion about the strengths and weaknesses of a party's case be free to do so without running afoul of UPL statutes. Indeed, many parties, and their counsel, hire mediators precisely to obtain feedback about their case. Even though mediators who engage in these discussions do sometimes aid the parties by discussing possible outcomes of the dispute if a settlement is not reached and providing evaluative feedback about the parties' positions, this conduct is not the practice of law because the parties have no reasonable basis for believing that the mediator will provide advice solely on behalf of any individual party. This is the important distinction between the mediator's role and the role of an attorney. Parties expect their attorney to represent solely their interests and to provide advice and counsel only for them. On the other hand, a mediator is a neutral, with no duty of loyalty to the individual parties. (Thus, for example, when a judge conducts a settlement conference, acting in a manner analogous to that of a mediator and providing evaluation to the parties about their case, no one suggests that the judge is practicing law.)

6. *Discussion of legal issues.* This Resolution seeks to avoid the problem of a mediator determining, in the midst of a discussion of relevant legal issues, which particular phrasings would constitute legal advice and which would not. For example, during mediation of a medical

malpractice case, if a mediator comments that the video of the newborn (deceased shortly after birth) has considerable emotional impact and makes the newborn more real, is this legal advice or prediction or simply stating the obvious? In context, the mediator is implicitly or explicitly suggesting that it may affect a jury's damage award, and thus settlement value. S/he is raising, from the neutral's perspective, a point the parties (presumably the defendants) may have missed, which may distinguish this case from others (e.g., cases in which a baby died *in utero* or where there was no video of the newborn) in which lower settlement amounts were offered and accepted. Is the mediator absolved if s/he phrases the point as a probing question?

In their article, "A Well-Founded Fear of Prosecution: Mediation and the Unauthorized Practice of Law" (6 *Dispute Resolution Magazine* 20 (Winter 2000)), authors David A. Hoffman and Natasha A. Affolder illustrate this problem across a broader mediation context, setting out numerous alternative ways a mediator might phrase a point. They note that there would likely be very little professional consensus about which phrasings would constitute the practice of law and which would not. Even if mediators could agree as to where the line would be drawn among suggested phrasings, the intended meaning and impact of any particular statement might vary with the context and how the statement was delivered. Because mediation is almost always an informal and confidential process, it is virtually impossible without an audio or video recording of a mediation for regulators to police the nuances of the mediator's communications with the parties. Such recording would clearly be anathema to the mediation process.

7. *Settlement agreements*. The Virginia and North Carolina Guidelines' approach to the drafting of settlement agreements by a mediator is similar to the approach outlined in this Resolution. See Guidelines on Mediation and the Unauthorized Practice of Law, Department of Dispute Resolution Services of the Supreme Court of Virginia, at 27-28 ("Mediators who prepare written agreements for disputing parties should strive to use the parties' own words whenever possible and in all cases should write agreements in a manner that comports with the wishes of the disputants. . . .Unless required by law, a mediator should not add provisions to an agreement beyond those specified by the disputants.") Ethics opinions in some states have approved the drafting of formal settlement agreements by mediators who are lawyers, even where the mediator incorporates language that goes beyond the words specified by the parties, provided that the mediator has encouraged the parties to seek independent legal advice. *See, e.g.*, Massachusetts Bar Association Opinion 85-3 (attorney acting as mediator may draft a marital settlement agreement but must advise the parties of the advantages of having independent legal counsel review any such agreement and must obtain the informed consent of the parties to such joint representation).

8. *Resources*. A number of articles addressing the question of whether mediation is the practice of law have been published in recent years. In addition to the articles cited above, *see generally*, Symposium, "Is Mediation the Practice of Law?", *Forum*, Number 33 (NIDR, June 1997); Carrie Menkel-Meadow, "Is Mediation the Practice of Law?", *Alternatives*, May 1996, at 60; Bruce E. Meyerson, "Mediation Should Not Be Considered the Practice of Law," 18 *Alternatives* 122-123 (CPR Institute for Dispute Resolution, June 1996); Andrew S. Morrison, "Is Divorce Mediation the Practice of Law? A Matter of Perspective," 75 *California Law Review* 1093 (1987).

Mediator Credentialing and Certification FAQs

Is mediation a licensed profession?

Mediation in the U.S. is currently an unlicensed profession. Unlike other professionals in fields such as law, medicine, psychology, architecture, or social work, states do not license or regulate mediators in private practice.

Reasons for the lack of licensing or state regulatory oversight are numerous. For one thing mediation as a field is relatively new and continues to define itself. Although forms of mediation and conflict resolution have existed for millennia, mediation as a professional service rose to prominence only in the latter half of the 20th century. Its widespread institutionalization in courts, schools, businesses, and governmental agencies, and its broad acceptance by the public are a fairly recent phenomenon.

In addition, credentialing remains a controversial subject among mediators. What makes credentialing a challenge is that mediators disagree among themselves as to what constitutes the practice of mediation. Different models of practice abound, and the differences among these models can be dramatic. These models include facilitative mediation, an interest-based, problem-solving approach modeled upon the well-known classic, *Getting to Yes*; evaluative mediation, in which the neutral provides an assessment of the strengths and weaknesses of a case and makes predictions regarding each party's likely success at trial; and transformative mediation, which values the principles of empowerment and recognition–empowerment of parties to make their own decisions and the recognition by each party of the other's point of view.

In addition, there is no consensus in the field about how much training is sufficient to prepare mediators to mediate disputes effectively or what criteria best determine one's preparedness for practice. These differences are substantial. Given the lack of consensus on how to define the practice of mediation or what standards of competence to set, state oversight and licensing of mediators remains a long way off.

In the absence of formal credentialing, is mediation in fact a profession?

Do not mistake the lack of professional licensing for a lack of professionalism. During its rapid rise over the past several decades, mediation has become widely institutionalized in public and private institutions and has been used to settle thousands and thousands of disputes world-wide across a range of industries and fields.

The mediation field has produced fiercely debated theories of practice, a vast body of scholarship and publications, and numerous laws, rules, and judicial decisions regarding mediators, mediation, and the protection of confidentiality of mediation communications. Each year numerous conferences and workshops are held throughout the world where mediators gather in person or online to discuss best practices and emerging issues.

Meanwhile, practitioners, educators, scholars, researchers, and others have developed and refined standards of practice, crafted ethical rules for practitioners, and articulated guidelines for the training and education of mediators. Specializations have emerged within the field with corresponding practice standards for those specialty areas, while professional associations for mediators abound that actively work to advance the field.

Even in the absence of formal state oversight of mediators in private practice, mediation is plainly a profession.

What is "mediator certification"?

Defining "certification" depends upon context:

- **State and federal certification**

  Only a very few state courts or state bodies in the U.S. certify certain classes of mediators. These include The New Hampshire Marital Mediator Certification Board; the Supreme Court of Florida, which certifies four different categories of mediators–county court, family, circuit court, and dependency—each of which must meet specific minimum qualifications; South Carolina Board of Arbitrator and Mediator Certification, working in conjunction with the South Carolina Supreme Court's Commission on Dispute Resolution; the Judicial Council of Virginia; and North Carolina Court System's Dispute Resolution Commission which certifies family financial mediators.

  At the federal level, the U.S. Department of the Navy certifies mediators who have met the necessary requirements.

- **Certification by professional associations for mediators**

  Some professional associations for mediators have established certification for certain classes of its members who have met specific qualifications, which may include training, experience, and educational background. In this case certification is private only and is not granted under state authority nor subject to state oversight. It should not be mistaken for licensing or credentialing by a public body.

- **Certification by private training companies**

  Some private training organizations offer mediator certification training which will enable participants to meet the training requirements established by a particular state court or body for certification as a mediator. The completion of such a training is not certification itself, it is a prerequisite for subsequent certification by a state court or body.

  However, some private training companies offer what they describe as "certification training" for mediators. This means only that participants will receive a certificate of attendance upon completion of the training; it does not mean that the training will satisfy the certification requirements of a particular state court that does in fact certify mediators. Such training does not constitute formal accreditation by a public body and should not be mistaken for such.

What does the future hold for formal credentialing for mediators?

As mediation continues to gain in popular appeal, the issue of credentialing is one which the field will no doubt face and address one day. The consumer of mediation services is at risk in an unregulated market, and public confidence is at stake.

Confronting this challenge will require all the talent for consensus building and problem solving the field possesses, since many thorny issues must yet be addressed. Opponents of licensing fear the weight and inefficiency of public bureaucracy and worry that regulation would stifle the innovation that a still-evolving field requires. Others doubt that licensing would improve the quality of mediation services or provide a meaningful check against incompetence. Given the often uneasy alliance between the mediation field and the bar, others remain concerned that the legal profession would seek control of a licensing mechanism for mediators, limiting the practice of mediation to those who are attorneys. Given the deep philosophical differences among the schools of mediation practice, still others remain doubtful that the mediation profession can agree to mutually acceptable standards. The mediation field remains yet a brave, new world.

In the meantime, all we can collectively do is this: remain committed to best practices, professional self-improvement, continuing education, and the advancement of the field.

MBA Opinion No. 85-3

Summary: An attorney may, in certain circumstances outlined, act as a single mediator or as a co-mediator with a lay family counselor in divorce mediation, provided that the attorney takes certain precautionary steps, including explaining to the parties that the attorney is not representing either party, explaining the risks of proceeding without independent legal counsel and obtaining the informed consent of each party.

An attorney may also represent both parties in drafting a separation agreement, the terms of which are arrived at through mediation, but must advise the parties of the advantages of having independent legal counsel review any such agreement, and must obtain the informed consent of the parties to such joint representation.

The attorney may associate with a non-lawyer mediator provided that the services provided by each of them are properly identified and attributed, clients are separately billed for services, and clients are not mislead as to the identity, responsibility and status of the participants.

Facts: An attorney advises that he wishes to engage in providing mediation services with a family counselor associate. He asks if it is proper for the attorney either as single or co-mediator to draft a separation agreement for the mediating parties. He also asks whether he may engage in advertising that identifies him as an attorney, which is undertaken jointly with his non-lawyer associate, and whether use of a trade name would be permitted. Finally, he asks whether payments from the participants in mediation may be divided with the co-mediator.

Discussion: We are asked to address a number of issues relating to professional responsibility problems that arise for lawyers in the context of their involvement in various kinds of divorce mediation. The increasing interest in divorce mediation has been spurred by concern for more efficient, less adversarial, and less costly mechanisms for divorce. At the same time, questions have been raised about the need for lawyers participation in such proceedings by reason of the inherently adversary quality of our present system of divorce, since it it generally results from conflict between the parties and involves a distribution of assets in a setting where whatever is given to one party is taken from the other. These problems are exacerbated by the fact that there are no widely accepted screening devices to help couples decide whether mediation is advisable for them. In addition, there is no standard way to conduct divorce mediation. Indeed, lawyers who participate in divorce mediation play a variety of roles, each of which raises different problems of professional responsibility. It is useful to describe the different models of divorce mediation that involve the participation of lawyers in order to provide some background for consideration of the issues and make clear what issues we are and are not addressing.

A. The Single-Lawyer Mediator. In this model, the attorney acts as sole mediator, undertaking to direct or to facilitate the parties' efforts to discuss, negotiate and compromise the emotional, financial and child-related issues that may be involved. The attorney's task is likely to involve explaining to the parties existing statutory and decisional law relative to divorce, advising each of them concerning probable outcomes in the event they litigate rather than mediate. The parties may or may not request the attorney to draft a separation agreement embodying the terms of any agreement reached in mediation.

B. The Lawyer Co-Mediator. A second mediation model involves the participation of a team of persons (generally, two) who mediate jointly. This model includes situations in which both

mediators attempt to facilitate the resolution of all issues, as well as situations in which each mediator takes responsibility for attempting to resolve some but not all issues. It is most common for one mediator to be an attorney and the other, a mental health professional. Any blending by the attorney co-mediator of the new role of facilitator with the performance of any of the more traditional representative lawyering functions will raise the same, as well as other, issues of professional responsibility as are raised by the single-lawyer mediator model.

C. The Lawyer-Advocate. A third mediation model involves a situation where each of the parties will hire his or her own attorney, who will then function largely, if not fully, in a traditional representative manner. The participation of a more or less traditional lawyer-advocate may take place from the inception of mediation, or even prior to it. Indeed, the lawyer-advocate participant may even initiate the mediation process by suggesting to his or her client that the matter might lend itself to this alternative method of resolution. In the mediation that follows, the lawyer-advocate may stay outside the negotiating process entirely, may participate only from the sidelines (i.e., not during the actual mediation sessions), may participate with the mediator and with the lawyer-advocate for the other party (such sessions may include the parties themselves or, analogously to labor mediation, may involve only the mediator and both attorneys), or may negotiate or even litigate stipulated issues excluded from or unresolved by the mediation.

Finally, the lawyer-advocate participant may be brought in at any stage in the mediation process, in the event, for example, that the mediator wishes to shore up the process to equalize an unequal bargaining situation or, for another example, to effectuate the transition to an adversary proceeding if the mediation is headed for failure.

While the lawyer-advocate's role may be defined more narrowly than in a non-mediated divorce case, this third model does not otherwise involve any basic departure from the activities and attitudes embodied in the conventional lawyer-client relationship and does not, therefore, present special problems.

D. The Single-Lawyer Advisor. This fourth model involves the performance by an attorney of certain functions within the mediation process on behalf of both parties. The attorney may be selected by the parties or by the mediators. In fact, the most widely known booklength work in the divorce mediation field proposes that the mediation team should consist of a non-lawyer mediator who utilizes an attorney, chosen from a panel of attorneys who have undertaken some training in this method, to advise both clients on the procedural and substantive law of divorce and to draft the separation agreement that will contain the terms on which the parties have reached agreement through mediation. Coogler, Structured Mediation in Divorce Settlement.

The inquirer in this instance proposes to function as a single mediator or co-mediator, and therefore we address here only the professional responsibility issues raised by these models, separating the mediation services from those involved in drafting a separation agreement. We have not been asked and do not reach in this opinion the question of representation of the parties in subsequent stages of the proceedings.

Mediation Services: Earlier ethical opinions that have considered these issues analyzed the attorney's role as mediator as involving the attorney in representation of multiple clients, literally applied DR 5-105, which deals with representation of multiple clients, to the attorney as mediator, and tended to conclude that the conflicts inherent in matrimonial proceedings made such representation impossible in most cases. See opinions cited in Silberman, Professional Responsibility Problems of Divorce Mediation, 16 Fam. L.Q. 107, 113-15 (1982). Other analyses have attempted to reconcile DR 5-105 with the code's recognition in EC 5-20 that attorneys may

serve "as impartial arbitrators or mediators" and with the legitimate desire to accommodate the right of parties interested in this form of resolution of issues to have the benefit of an attorney's impartial services. E.g. Boston Bar Opinion No. 78-1 (1978); New York City Bar Association Committee on Professional and Judicial Ethics No. 80-23 (1981); District of Columbia Bar Opinion No. 143 (1984).1

We do not view the attorney who acts solely as a mediator as representing either party in the sense that traditional adversarial concepts of "adequate representation" should govern. The role of the mediator is not a representational one vis-a-vis the parties but one of an intermediary, representing neither party and remaining impartial in an effort to help the parties resolve outstanding issues for themselves.
Certainly, to the extent that the attorney provides the mediating parties with information as to the legal consequences of various courses of action and draws upon his legal knowledge in identifying the issues to be resolved, he is using his legal skills. Presumably parties who seek an attorney as mediator as opposed to a lay counselor with expertise in other areas such as mental health do so in order to benefit from the attorney's training and skills. However, his assistance is not being rendered in a traditional attorney-client, representational relationship.

We agree with the views well expressed by the Committee on Professional and Judicial Ethics of the Bar Association of the City of New York, in its Opinion No. 80-23, that although the code should not read so as to bar divorce mediation by attorneys, caution must be taken to assure that the parties involved understand the attorney's limited role and the risks involved. As the committee has pointed out, there may be some circumstances in which a truly informed consent to the attorney's limited, non-representation role is not possible:

[I]n some circumstances, the complex and conflicting interests involved in a particular matrimonial dispute, the difficult legal issues involved, the subtle legal ramifications of particular resolutions, and the inequality in bargaining power resulting from differences in the personalities or sophistication of the parties make it virtually impossible to achieve a just result free from later recriminations of bias or malpractice, unless both parties are represented by separate counsel. In the latter circumstances, informing the parties that the lawyer "represents" neither party and obtaining their consent, even after a full explanation of the risks, may not be meaningful; the distinction between representing both parties and not representing either, in such circumstances may be illusionary. Whether characterized as a mediator or impartial advisor, the lawyer asked to exercise his or her professional judgment will be relied upon by parties who may lack sophistication to recognize the significance of the legal issues involved and the impact they have on their individual interests. Further, the "impartial" lawyer may in fact be making difficult choices between the interest of the parties in giving legal advice or in drafting provisions of a written agreement which purports merely to embody the parties' prior agreement. Although the parties may consent to the procedure, one or both may not be capable of giving truly informed consent due to the difficulty of the issue involved. In such circumstance, a party who is later advised that its interests were prejudicied in mediation or that the impartial advice offered or written agreement drawn, by the lawyer-mediator, favored the other spouse is likely to believe that it was misled into reliance on the impartiality of the lawyer-mediator. In short, we believe there are some activities and some circumstances in which a lawyer cannot undertake to compose the differences of parties to a divorce proceeding without running afoul of the strictures and policies of DR 5-105--even if the lawyer disclaims representing the interests of any party, purports to be acting impartially and obtains the consent of the parties to the arrangement.
We do not believe that the requirement in DR 5-105(C) that an attorney may represent multiple clients only where it is "obvious" that he can "adequately represent" the interests of each party

should be applied to prevent an attorney, with the informed consent of the parties involved, from performing in a non-representational role as a mediator. On the other hand, the policies behind DR 5-105 -- (1) assuring that the parties are fully informed and consent to limitations on the attorney's role, and (2) preventing the attorney, despite consent, from undertaking a limited role where to do so would be inappropriate to the matter or unfair to the parties -- should continue to govern the attorney who provides non-traditional mediation services.

Drafting a Separation Agreement: The drafting of a separation agreement which is the product of mediation involves the attorney in more of a traditional dual representational role. In drafting a contract, the attorney is generally faced with choices in language, choices concerning the allocation of the risk of non-performance, etc., which will generally advantage one party's interests as against the other. While it may be the case that the mediation process was so thorough and the agreement reached so uncomplicated that the drafter's efforts are truly those of a mere "scrivener or secretary," see Maryland Bar Association Opinion 80-55A (1980), this will not usually be the case. The committee views such activity as invoking the dual representation provisions of DR 5-105, so that in each instance the attorney must, at the time he or she undertakes the drafting process, obtain the informed consent of both parties, and the attorney must satisfy himself that the "obviousness" test of DR 5-105(C) has been met -- namely, that the parties' interests, analyzed in light of the extent of their prior agreement on the terms of the separation agreement and against the perspective on informed consent discussed above, can be adequately represented. If there is participation by independent counsel, the degree of such participation will be a factor in determining whether the DR 5-105(C) conditions are met.

General Guidelines: We believe that lawyers should consider the following guidelines in entering into any of the roles presented by the inquiry:

(1) Because many lawyer-activities within the mediation context differ to varying extents from the traditional advocacy-based role that is familiar to the public, the lawyer-participant should discuss with the parties the difference between the contemplated role and traditional advocacy-based lawyering, including that the parties are not being represented by the attorney. The lawyer should also discuss the potential risks to the protection of each party's interests of proceeding without independent legal counsel, as well as the advantages that may inhere in the proposed mediation process and his or her role therein. In short, the lawyer should attempt to provide the parties to the mediation with the fullest feasible understanding of the process and then obtain their informed consents to the chosen mediation model and to the lawyer's role within it.

(2) Lawyers should also advise the parties to mediation that, because the attorney as mediator is not representing them, their communications will not be protected by privilege unless and until a mediator's privilege is enacted. If the attorney undertakes representation of the parties through the drafting of a separation agreement, he should advise the parties that the attorney-client privilege will apply, although there will be no confidentiality for communciations between each of them and the attorney vis-a-vis the other party.

(3) Where the issues are too complex, or other factors make it unlikely that the parties' consent could be effectively given to the mediation activity, the attorney should decline to undertake the mediation services.

(4) In the event the lawyer chooses to undertake functions traditionally rooted in the adversary process, such as the drafting of separation agreements for both parties, he or she should at that

time provide full disclosure of the costs and risks that may emanate from single-lawyer representation in the performance of such tasks, as well as the costs and risks of traditional alternative procedures, and should obtain the clients' informed consents to the chosen procedure. This explanation should include the advantages of having the participation of independent legal counsel, assuming that there has been none up to this point. The lawyer should undertake such a function only in situations where the "obviousness" test of DR 5-105(C) has been met.

(5) Finally, noting the possibility that in many cases the lawyer may start as mediator representing no one and end up representing both parties in drafting a separation agreement, the lawyer should at the outset explain the various alternatives and changes in his role, including the possibility that he or some other lawyer might draft the separation agreement. Moreover, since this whole process is a relatively new one, the lawyer should explain the various possible judicial reactions to the procedure, including the possibility that a court would consider the lack of separate representation in deciding whether to enforce the agreement.

(6) The attorney should advise the parties that he will not represent either party against the other in any future contested proceedings.

Participation with Non-Attorneys: The second part of the attorney's inquiry concerns the ways in which the attorney can ethically collaborate with a non-attorney in the advertising and operation of a mediation service. The attorney wishes to know if he may advertise as an attorney, advertise jointly with a family counselor co-mediator, use a trade name, and finally, divide mediation fees with the co-mediator. The inquiry states that the proposed business arrangements would not involve a partnership between the attorney and the counselor.

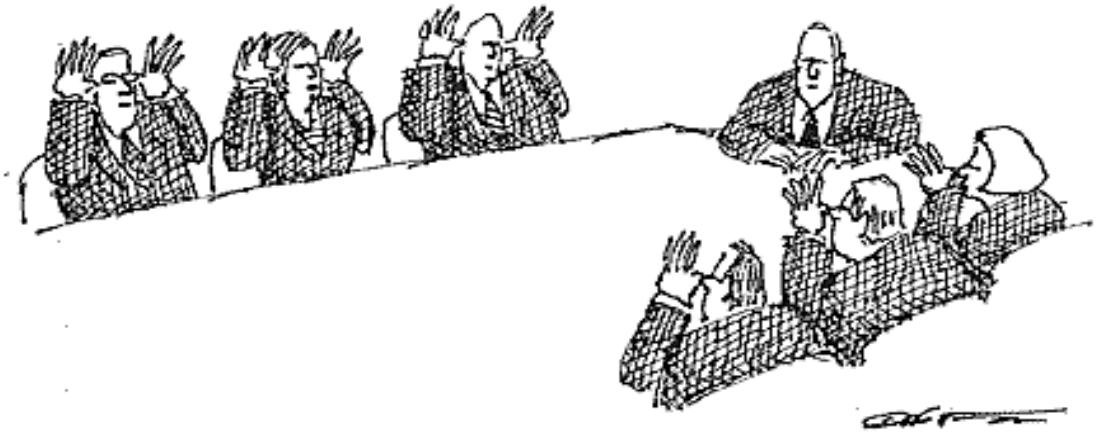
An attorney may certainly identify himself as such through the use of such a term as "Esq." where the designation is relevant to the attorney's activities. Since the committee views the mediator role, when undertaken by an attorney, as involving use of the attorney's legal training and skills, such advertising is permissible.

Attorneys may not enter into a partnership with non-lawyers if any of the partnership activities consist of the practice of law. DR 3-103(A). See also DR 5-107(C) on professional corporations and associations. Our jurisdiction as a committee does not extend to questions of unauthorized practice of law. Since the inquiry here does not contemplate the establishment of a partnership, we assume that there will be no formal partnership and that the parties will take steps to avoid structuring their relationship in any way which would result in their being held to have operated as a partnership. In light of this, we address the remaining questions.

All advertising and other public communications engaged in by an attorney must be free of deceptive statements or claims. DR 2-101(A). Letterheads are similarly constrained. DR 2-102(A). The danger in shared letterhead or team advertising is that it may be deceptive if it suggests the existence of a partnership or associational relationship where there is, in fact, none. Advertising and public communications of the type the attorney proposes must, therefore, take care to clarify the lack of any partnership relationship between the participants in such joint communications. The use of a trade name such as "City Mediation Services" would raise similar concerns in terms of the potential for deception.
Under DR 3-102, a lawyer may not share "legal fees" with a non-lawyer. Without relying on the technical question of whether a fee for mediation services conducted by an attorney is a "legal fee," this rule serves an important function in preventing deception of the consumer. The inquiry does not make it clear whether the fee division is to be made as a business profit-sharing, which

would probably run afoul of DR 3-102, or whether what is contemplated is the division of a total fee between the co-mediators based on the services rendered by each. We believe the better practice would be to separately charge the participants for the respective services of the lawyer and non-lawyer mediator.

In the committee's view, avoiding the potential for deception depends upon accurately providing information concerning the mediation team members and their relationships. The choice of any term, such as "consultant" or "associate" to describe the relationship between the attorney and non-attorney, should therefore be accurate and avoid possible confusion of the parties as to the nature and source of the services rendered.



The mediator sensed that the negotiations were in trouble.

Section Seven: ADR Resources

National and International ADR Organizations…….. 7-1

Recommended Reading in Print…….. 7-2

Online Resources……... 7-4

University Courses of Study on ADR…….. 7-6

ADR Email Lists and Listservs……. 7-7

National and International ADR Organizations

American Bar Association Section of Dispute Resolution
www.americanbar.org/groups/dispute_resolution

American College of Civil Trial Mediators
www.acctm.org

Association for Conflict Resolution
https://acrnet.org/default.aspx

Association of Family and Conciliation Courts
www.afccnet.org

International Academy of Collaborative Professionals
www.collaborativepractice.com

International Academy of Mediators
www.iamed.org

International Ombuds Association
www.ombudsassociation.org

LEADR – Association of Dispute Resolvers (Australasia)
www.leadr.com.au

National Academy of Arbitrators
www.naarb.org

National Association for Community Mediation
www.nafcm.org

Southern California Mediation Association
www.scmediation.org

US Ombudsman Office (USOA)
www.usombudsman.org

Recommended Reading in Print

Mediation, Conflict Resolution, and Consensus-Building

- Bowling, Daniel, and Hoffman, David, eds., *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* (Jossey-Bass, 2003)
- Bush, Robert A. Baruch, and Folger, Joseph P, *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass, 2005).
- Cloke, Kenneth, *Mediating Dangerously: The Frontiers of Conflict Resolution* (Jossey-Bass, 2001)
- Cloke, Kenneth, *The Crossroads of Conflict: A Journey into the Heart of Dispute Resolution* (Janis Publications, 2006)
- Friedman, Gary, and Himmelstein, Jack, *Challenging Conflict: Mediation Through Understanding* (American Bar Association, 2008)
- LeBaron, Michelle, and Pillay, Venashri, *Conflict Across Cultures: A Unique Experience of Bridging Differences* (Intercultural Press, 2006)
- Little, J. Anderson, *Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes* (American Bar Association, 2007)
- Mayer, Bernard, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (Jossey-Bass 2000)

Negotiation

- Babcock, Linda, and Laschever, Sara, *Ask for It: How Women Can Use the Power of Negotiation to Get What They Really Want* (Random House, 2008)
- Fisher, Roger, and Shapiro, Daniel, *Beyond Reason: Using Emotions as You Negotiate* (Viking, 2005)
- Fisher, Roger; Ury, William; and Patton, Bruce, *Getting to Yes: Negotiating Agreement Without Giving In* (Houghton Mifflin Harcourt, 1992)
- Susskind, Lawrence E., and Cruikshank, Jeffrey L., Breaking Robert's Rules: The New Way to Run Your Meeting, Build Consensus, and Get Results (Oxford University Press, 2006)
- Stone, Douglas; Patton, Bruce; and Heen, Sheila, Difficult Conversations: How to Discuss What Matters Most (Viking, 1999)
- Malhotra, Deepak, and Bazerman, Max, *Negotiation Genius: How to Overcome Obstacles and Achieve Brilliant Results at the Bargaining Table and Beyond* (Bantam, 2007)

- Schneider, Andrea Kupfer, and Honeyman, Christopher, eds., *The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator* (American Bar Association 2007)

- Shell, G. Richard, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* (Penguin, 2006)

Decision Making and Judgment

- Ariely, Dan, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (HarperCollins, 2008)

- Cialdini, Robert, *Influence: The Psychology of Persuasion* (Collins Business, 2006)

- Lehrer, Jonah, *How We Decide* (Houghton Mifflin, 2009)

- Plous, Scott, *The Psychology of Judgment and Decision Making* (McGraw Hill, 1993)

The Business of Mediation

- Lenski, Tammy, *Making Mediation Your Day Job: How to Market Your ADR Business Using Mediation Principles You Already Know* (iUniverse, Inc., 2008)

- Mosten, Forrest S., *Mediation Career Guide: A Strategic Approach to Building a Successful Practice* (Jossey-Bass, 2001)

Online Resources

ADR and Conflict Resolution

Title and URL	*Description*
ADR Professionals www.linkedin.com/groups/163292 (or search for the Alternative Dispute Resolutions (ADR) Professionals group)	Provides practitioners with a forum for exchanging ideas and opinions about the ADR profession
Mediate.com www.mediate.com	Provides news, information, and an online library of articles on mediation, ADR, negotiation, and conflict resolution.
CRInfo http://crinfo.org	CRInfo, a conflict resolution information source, is a free service funded by the William and Flora Hewlett Foundation maintaining a keyword-coded catalog of over 20,000 web, print, and organizational resources.
Peacemakers Trust www.peacemakers.ca	Peacemakers Trust is a Canadian charitable organization dedicated to research and education on conflict transformation and peacebuilding. Site includes a bibliography, case studies, and reporting.
Campus Conflict Resolution Resources www.campus-adr.org	Provides tools and resources for working with or teaching conflict resolution in higher education.
National Center for Technology and Dispute Resolution www.odr.info	NCTDR supports and sustains the development of information technology applications, institutional resources, and theoretical and applied knowledge for better understanding and managing conflict.
Hamline University Mediation Case Law Videos http://digitalcommons.hamline.edu/dri_mclvideo	Hamline University has made available for free downloading videos covering issues in mediation litigation.
ABA Section on Dispute Resolution National Clearinghouse for Mediation Ethics Opinions www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions	An online database of opinions regarding ethics in mediation practice.

Negotiation

Title and URL	*Description*
Program on Negotiation at Harvard Law School www.pon.harvard.edu	The web site for a university consortium dedicated to developing the theory and practice of negotiation and dispute resolution
Program on Negotiation at Harvard Law School Clearinghouse www.pon.org	A resource for materials and downloads for teaching negotiation and dispute resolution

Blogs and Podcasts

Title and URL	*Description*
Brains on Purpose westallen.typepad.com/brains_on_purpose	This site explores the nexus between neuroscience and conflict resolution, published by dispute resolution professional Stephanie West Allen and Jeffrey Schwartz, M.D.
Cross Collaborate www.crosscollaborate.com	A blog about public policy collaboration, discussing methods for shaping and influencing government decisions and policies
International Dispute Negotiation Podcast http://www.cpradr.org/EventsEducation/IDNPodcasts.aspx	Hosted by Michael McIlwrath, this podcast addresses issues in cross-border commercial conflict resolution through interviews with influential thinkers around the globe.
Making Mediation Your Day Job http://makingmediationyourdayjob.com	Published by Dr. Tammy Lenski, this blog provides business-building strategies combined with digital tools to help ADR professionals build their practices.
Settle It Now Negotiation Law Blog http://negotiationlawblog.com	Published by ADR professional Victoria Pynchon, this blog discusses negotiation and settlement strategies for the mediation table.

University Courses of Study on ADR

- *American University International Peace and Conflict Resolution School of International Service / MA in International Peace and Conflict Resolution-* www.american.edu/sis/ipcr
- *Fresno Pacific University Center for Peacemaking and Conflict Studies -* www.fresno.edu/programs-majors/graduate/peacemaking-and-conflict-studies-pacs
- *George Mason University Institute for Conflict Analysis and Resolution-* https://scar.gmu.edu/
- *Hamline University School of Law Certificate and various ADR programs -* https://mitchellhamline.edu/dispute-resolution-institute
- *Ohio State University College of Law Dispute Resolution Program –* https://moritzlaw.osu.edu/program-on-dispute-resolution/
- *Pepperdine University - Straus Institute for Dispute Resolution –* https://law.pepperdine.edu/straus
- *University of California - Irvine - School of Social Sciences Global Peace and Conflict Studies* www.cgpacs.uci.edu
- *University of Massachusetts, Boston - Graduate Programs in Dispute Resolution* https://mccormack.umb.edu/
- *University of Missouri-Columbia, School of Law - LLM in Dispute Resolution* http://law.missouri.edu/csdr/llm/
- *University of North Carolina - Institute of Government - Public Dispute Resolution Program* www.sog.unc.edu/resources/microsites/public-dispute-resolution
- *Wayne State University - Center for Peace and Conflict Studies Program on Mediating Theory and Democratic Systems* http://madr.comm.wayne.edu

ADR LinkedIn Groups

1) Alternative Dispute Resolution (ADR) Professionals - https://www.linkedin.com/groups/163292

2) ADR, Conflict Resolution and Mediation Exchange - https://www.linkedin.com/groups/935617

3) Mediator Network - https://www.linkedin.com/groups/2071512

4) Mediation Discussion Group - https://www.linkedin.com/groups/1889646

5) Alternative Dispute Resolution Worldwide - https://www.linkedin.com/groups/1507247

6) Alternative Dispute Resolution (ADR) Professionals - Family Mediation - https://www.linkedin.com/groups/2839628

7) International Mediation Institute - https://www.linkedin.com/groups/5147585

8) CEDR News Network for Mediation & ADR Professionals - https://www.linkedin.com/groups/3219753

9) Mediators for the Advancement of the Profession (MAP) - https://www.linkedin.com/groups/841687

10) MWI - https://www.linkedin.com/groups/1133487

Section Eight:
ADR Career and Marketing Information

Overview of Careers in ADR…… 8-1

Mediation Career and Marketing Resources Online and in Print……... 8-4

Best Business Practices for the Professional Mediator…… 8-5

The State of the Field: Overview of Careers in ADR

Alternative dispute resolution, including mediation, is increasingly utilized to resolve conflicts ranging from neighborhood arguments over barking dogs and fallen tree limbs to lawsuits involving complex issues and multijurisdictional litigants. The skills taught in mediation trainings are applicable to a broad range of disputes and negotiations, whether in board rooms, courthouses, or the middle school down the street. Mediation can involve private individuals or public actors. It can transform conflict at many levels – person-to-person, locally, nationally, internationally, and on the web.

Despite its many applications and the increasingly diverse range of settings in which it is practiced, mediation as a career can be difficult to pursue. Two primary routes lead to a career in mediation: launching a private practice or finding a salaried position with an employer. Many mediators elect the first option and start their own business. Why? Unlike other professions – such as medicine, mental health, law enforcement, or engineering – mediation has no clearly defined career paths that those pursuing jobs in conflict resolution can easily follow. This is largely due to the still-evolving nature of the profession and the lack of formal, public credentialing, including established educational requirements, for mediators in private practice. Therefore, those who seek to make a career out of conflict resolution will need to creatively search out opportunities where they can apply their training, experience, and skills.

Examples of workplaces where such opportunities may be found include the following:

- Private practice, solo or with partners
- National dispute resolution service providers
- Community mediation programs
- Community-based nonprofits providing social services
- Federal, state, and municipal government
- Federal and state courts
- Law enforcement and correctional facilities
- Military
- International non-governmental organizations
- Secondary schools, colleges, and universities
- Religious institutions
- Hospitals and large health care providers
- Large employers (for profit and non-profit)
- Financial institutions
- E-commerce

In such settings, mediation skills – the ability to defuse and help others address interpersonal conflict and to assist others in negotiation – can be used either directly or indirectly in a number of jobs including:

- Staff mediator
- ADR program coordinator
- ADR quality assurance director
- Case coordinator
- Ombuds
- Juvenile restorative justice facilitator
- Mediation/arbitration analyst
- Executive director
- Director of training
- Victim-offender dialogue coordinator
- Housing mediation case manager
- Construction ADR specialist
- Custody and visitation mediator
- Conciliation specialist
- Equal employment opportunity specialist
- Employee relations manager
- Police crisis and hostage negotiator
- Resident director
- Peer mediation coordinator

Those with an entrepreneurial spirit may opt for starting their own mediation practice. The following are suggestions for preparing for that initial step:

- **Practice, practice, practice.** Taking a basic mediation training is only a first step, not a final one. You need experience in order to build a successful career. The best place to gain experience is by starting with the program that trained you. Find out from your trainers whether and what opportunities are available to mediate. Typically, many mediators begin by volunteering their time in small claims or community mediation programs - all great learning laboratories for putting your training into practice. Seek mentoring from more experienced practitioners as well.

- **Be realistic.** Although there are a seemingly infinite number of disputes, there are more and more mediators that you will be competing against. It takes time to build a successful mediation practice, and it will not happen overnight. There are steps you can take to increase your chances of success, but there are no guarantees.

- **Think like an entrepreneur.** If you are starting a practice, you are starting a business. Starting a business needs more than luck and self-confidence; it warrants careful planning. You need to identify your target market and your market niche, and then take time to develop a sound business and marketing strategy.

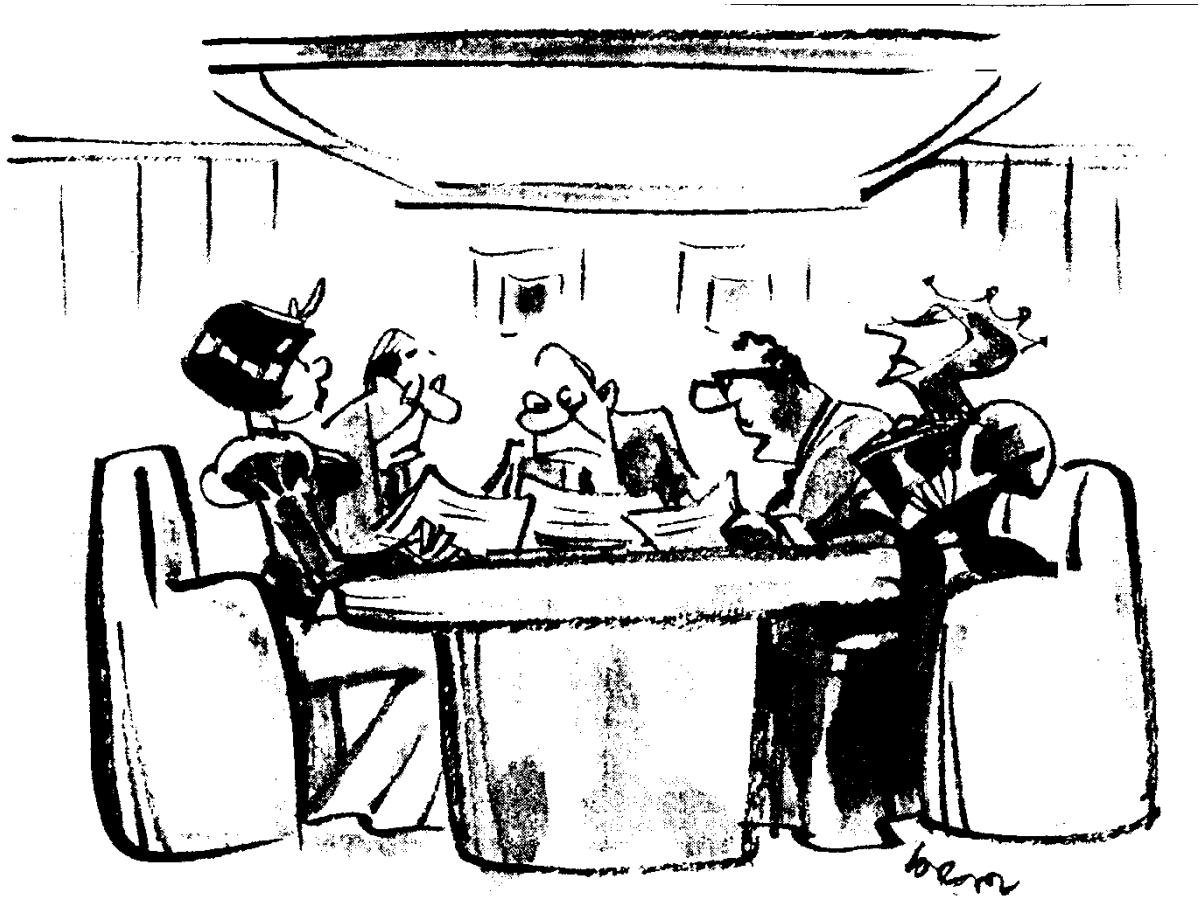
- **Keep your day job.** Your current position counts in several ways. First of all, it serves as a source of financial support, stability, and ready-made contacts. Begin by offering mediation to your clients or customers in addition to your existing services. This is a way of testing the waters safely with relatively little risk. Second, the profession you're in right now is a good source for referrals and an ideal place to begin networking. Remaining in your current field means for now you will remain close to your best source of referrals.

- **Play to your strengths.** You are more likely to succeed if you provide dispute resolution services in a field you know well, since prospective clients will view you as someone who understands their needs. Disputes abound in every field, whether health care, business, digital technology, environmental, education, labor, public sector, the law. Leverage your expertise to build a successful career.

- **Get connected.** Join professional associations for mediators to network with other dispute resolution professionals. Other mediators are not only potential referral sources but your peers are invaluable resources to turn to as you wrestle with ethical dilemmas or other challenges in your practice. Not only should you join professional associations

for mediators, but join associations for your profession of origin, your local chamber of commerce, or other civic, religious, political, or professional organizations to cultivate and build your referral network. View every meeting, every introduction to someone new, as an opportunity to educate people about mediation and what mediation can do to help them solve their problems.

- **Keep learning.** It's called the practice of mediation for a reason–you never stop learning. Invest in continuing education, and attend conferences to stay abreast of emerging trends in the field or to refine your skills and expand your understanding of conflict resolution and negotiation. You owe it to yourself, to the field, and to your clients.



Snow White and the Wicked Queen submit the fairness question to binding arbitration.

Mediation Career and Marketing Resources Online and in Print

The following are resources, both online and in print, for those interested in pursuing a career in mediation or starting, managing, and marketing their own practice.

Online Resources

Title	URL
Monster Mediation Jobs	http://www.monster.com/jobs/q-mediator-jobs.aspx
Indeed Mediation Jobs	http://www.indeed.com/q-Mediation-jobs.html
Making Mediation Your Day Job	http://makingmediationyourdayjob.com
Mediation Jobs	http://www.mediationjobs.net/

Print Resources

- Lenski, Tammy, Ed.D., *Making Mediation Your Day Job* (iUniverse, Inc., 2008).
- Lovenheim, Peter, *Becoming a Mediator: An Insider's Guide to Exploring Careers in Mediation* (Jossey-Bass, 2002)
- Lovenheim, Peter, and Doskow, Emily, *Becoming A Mediator: Your Guide To Career Opportunities* (NOLO, 2004).
- Mosten, Forrest S., *Mediation Career Guide: A Strategic Approach to Building a Successful Practice* (Jossey-Bass, 2001)

Best Business Practices for the Professional Mediator

As discussed in Section Six, the private practice of mediation in the United States at the present time remains unregulated by government. This absence of formal regulation, licensing, and credentialing does not diminish mediation's standing as a profession. It does, however, place weighty responsibility on the shoulders of U.S. mediators, collectively and individually, to protect the reputation of the profession and to build public confidence in mediation services.

Professional standards of conduct remind mediators to strive for consistency between values and practice. But a professional ethos embraces more than the practice of mediation: our professional values apply not just to the delivery of services, but also to the business of mediation.

In May 2002, as part of a joint initiative, two highly respected institutions - the CPR Institute for Dispute Resolution and Georgetown University Law Center - drafted and approved Principles for ADR Provider Organizations[5]. These principles were created to provide guidance to "any entity or individual which holds itself out as managing or administering dispute resolution or conflict management services" and to encourage the responsible practice of ADR. These principles are set forth below.

I. Quality and Competence of Services

a. The ADR Provider Organization should take all reasonable steps to maximize the quality and competence of its services, absent a clear and prominent disclaimer to the contrary.

b. Absent a clear and prominent disclaimer to the contrary, the ADR Provider Organization should take all reasonable steps to maximize the likelihood that (i) the neutrals who provide services under its auspices are qualified and competent to conduct the processes and handle the kind of cases which the Organization will generally refer to them; and (ii) the neutral to whom a case is referred is competent to handle the specific matter referred.

c. The ADR Provider Organization's responsibilities under Principles I and I.a decrease as the ADR parties' knowing involvement in screening and selecting the particular neutral increases.

d. The ADR Provider Organization's responsibilities under this Principle are continuing ones, which requires the ADR Provider Organization to take all reasonable steps to monitor and evaluate the performance of its affiliated neutrals.

II. Information Regarding Services and Operations

ADR Provider Organizations should take all reasonable steps to provide clear, accurate and understandable information about the following aspects of their services and operations:

a. The nature of the ADR Provider Organization's services, operations, and fees;

[5] The complete principles, including the drafters' commentary and appendices, can be found on the web at <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Tools/Principles%20for%20ADR%20Provider%20Organizations.pdf >.

b. The relevant economic, legal, professional or other relationships between the ADR Provider Organization and its affiliated neutrals;

c. The ADR Provider Organization's policies relating to confidentiality, organizational and individual conflicts of interests, and ethical standards for neutrals and the Organization;

d. Training and qualifications requirements for neutrals affiliated with the Organization, as well as other selection criteria for affiliation; and

e. The method by which neutrals are selected for service.

III. Fairness and Impartiality

The ADR Provider Organization has an obligation to ensure that ADR processes provided under its auspices are fundamentally fair and conducted in an impartial manner.

IV. Accessibility of Services

ADR Provider Organizations should take all reasonable steps, appropriate to their size, nature and resources, to provide access to their services at reasonable cost to low-income parties.

V. Disclosure of Organizational Conflicts of Interest

a. The ADR Provider Organization should disclose the existence of any interests or relationships which are reasonably likely to affect the impartiality or independence of the Organization or which might reasonably create the appearance that the Organization is biased against a party or favorable to another, including (i) any financial or other interest by the Organization in the outcome; (ii) any significant financial, business, organizational, professional or other relationship that the Organization has with any of the parties or their counsel, including a contractual stream of referrals, a de facto stream of referrals, or a funding relationship between a party and the organization; or (iii) any other significant source of bias or prejudice concerning the Organization which is reasonably likely to affect impartiality or might reasonably create an appearance of partiality or bias.

b. The ADR Provider Organization shall decline to provide its services unless all parties choose to retain the Organization, following the required disclosures, except in circumstances where contract or applicable law requires otherwise.

VI. Complaint and Grievance Mechanisms

ADR Provider Organizations should provide mechanisms for addressing grievances about the Organization, and its administration or the neutral services offered, and should disclose the nature and availability of the mechanisms to the parties in a clear, accurate and understandable manner. Complaint and grievance mechanisms should also provide a fair and impartial process for the affected neutral or other individual against whom a grievance has been made.

VII. Ethical Guidelines

a. ADR Provider Organizations should require affiliated neutrals to subscribe to a reputable internal or external ADR code of ethics, absent or in addition to a controlling statutory or professional code of ethics.

b. ADR Provider Organizations should conduct themselves with integrity and evenhandedness in the management of their own disputes, finances, and other administrative matters.

VIII. False or Misleading Communications

An ADR Provider Organization should not knowingly make false or misleading communications about its services. If settlement rates or other measures of reporting are communicated, information should be disclosed in a clear, accurate and understandable manner about how the rate is measured or calculated.

IX. Confidentiality

An ADR Provider Organization should take all reasonable steps to protect the level of confidentiality agreed to by the parties, established by the organization or neutral, or set by applicable law or contract.

a. ADR Provider Organizations should establish and disclose their policies relating to the confidentiality of their services and the processes offered consistent with the laws of the jurisdiction.

b. ADR Provider Organizations should ensure that their policies regarding confidentiality are communicated to the neutrals associated with the Organization. ADR Provider Organizations should ensure that their policies regarding confidentiality are communicated to the ADR participants.