40-HOUR MEDIATION CERTIFICATION TRAINING PROGRAM

Presented By:

V. Michelle Obradovic, Esq.

April 20th through 24th, 2007
Boston, Massachusetts

www.icmadr.com

Institute for Conflict Management, LLC
1541 Ocean Avenue, 2nd Floor
Santa Monica, California 90401
United States of America
Telephone: 310.319.0011 | Facsimile: 310.319.1104
www.icmadr.com

INSTITUTE FOR CONFLICT MANAGEMENT

Institute for Conflict Management, LLC
1541 Ocean Avenue, 2nd Floor
Santa Monica, California 90401
Tel: 310.319.0011
Fax: 310.319.1104
www.icmadr.com

April 15, 2007

Thank you for your enrollment in the Basic Mediation Certificate Course offered by the Institute for Conflict Management. We pride ourselves on being one of the finer providers of conflict resolution training courses in the United States and Europe. We also take great pride in the quality of our graduates. Many of our graduates have gone on to become very high-profile resolutionists both in private practice and as panelists for some of the world's most respected panels.

The course you are about to begin will be an intensive yet enjoyable educational journey: a journey that will show you the simple complexities of one of the most favorable alternatives to litigation. We know that it will be even more valuable with your insightful participation.

Please feel free to comment and ask questions. Our staff is here to assist you in obtaining a superior education in mediation as well as have a pleasant experience.

Sincerely,

Andrew E. Golden
Managing Director

Acknowledgements

This manual is a compilation of the written works of David T. Armstrong, James Melamed and the Massachusetts Institute for Technology. It also includes information prepared by Lee Jay Berman and L. Therese White. Great appreciation is also due to Contributing Editor, Bill White.

Table of Contents

Chapter 1

Conflict Resolution Theory & Skills

Most people are more comfortable with old problems than with new solutions.
Anonymous

What Is Conflict?

Conflict may be viewed as a process we put ourselves through to achieve a new condition and self-definition.

Conflict arises when one or more participants view the current system as not working. At least one party is *sufficiently dissatisfied with the status quo* and is willing to *own the conflict* and speak up or act out with the hope of being able to influence the situation to arrive at an improved condition.

The Components of Conflict

The components of conflict are strikingly similar, no matter the type. They include:

- Two or more people
- Difference(s) of opinion
- Bad Behavior(s)
- Emotion
- Stress
- Unsatisfied want(s)
- Ineffective communication

The Nature of Conflict

Conflict has a bad name. Yet, there would be no advances on any level without conflict. Without conflict, the drive to innovate and achieve might never be ignited.

Earlier in this century scholars and theorists told organizations and families that they must strive to eliminate conflict. But such advice was misguided. Conflict may be dysfunctional, even damning in many situations. However, we now know that the lack of conflict can be just as bad as having too much.

There are two faces to conflict. The one that usually comes to mind first is the grim visage of discord. The other, however, is not a mask of composure and harmony, but the creative aspect of performance and achievement. Little in history or in modern organizations is attained without the constructive management of conflict.

Managing Conflict Constructively

Three crucial steps an individual or groups must take to manage their conflicts constructively:

- First is the understanding of the patterns and appearances of conflict - how it looks when it rears its ugly head - and knowing what the options and alternatives are for dealing with conflict.

- Second is assessing and understanding one's own natural or most typical approach to dealing with conflict.

- Third and most difficult is developing the skills and methods needed to apply effectively one's knowledge of how to make conflict work in constructive ways.

The Levels of Conflict

Conflict should also be recognized as existing at *four levels:*

1. The interpersonal level
2. The intra-personal level
3. Inter-group level
4. Intra-group level.

In addition to the typically obvious interpersonal dispute, there almost always exists some measure of intra-personal conflict within each disputing party as that party seeks to assert varied, sometimes contradictory, interests. This inner conflict may be evidenced by *confusion, inconsistency or lack of congruity.* In this condition, the participant has failed to effectively integrate their various "parts" or "voices" to achieve an effective and comfortable representation of personal interests.

The same insights may be applied to the inter-group disputes between groups, and the intra-group disputes that occur between the members of particular groups.

Types of Conflict

By evaluating a conflict according to the five categories below -- *relationship, data, interest, structural and value* -- we can begin to determine the causes of a conflict and design resolution strategies that will have a higher probability of success.

Relationship Conflicts

Relationship conflicts occur because of the presence of strong negative emotions, misperceptions or stereotypes, poor communication or miscommunication, or repetitive negative behaviors. Relationship problems often fuel disputes and lead to an unnecessary escalating spiral of destructive conflict. Supporting the safe and balanced expression of perspectives and emotions for acknowledgment (not agreement) is one effective approach to managing relational conflict.

Data Conflicts

Data conflicts occur when people lack information necessary to make wise decisions, are misinformed, disagree on which data is relevant, interpret information differently, or have competing assessment procedures. Some data conflicts may be unnecessary since they are caused by poor communication between the people in conflict. Other data conflicts may be genuine incompatibilities associated with data collection, interpretation or communication. Most data conflicts will have "data solutions."

Interest Conflicts

Interest conflicts are caused by competition over perceived incompatible needs. Conflicts of interest result when one or more of the parties believe that in order to satisfy his or her needs, the needs and interests of an opponent must be sacrificed. Interest-based conflict will commonly be expressed in positional terms. A variety of interests and intentions underlie and motivate positions in negotiation and must be addressed for maximized resolution. Interest-based conflicts may occur over *substantive issues* (such as money, physical resources, time, etc.); *procedural issues* (the way the dispute is to be resolved); and *psychological issues* (perceptions of trust, fairness, desire for participation, respect, etc.). For an interest-based dispute to be resolved, parties must be assisted to define and express their individual interests so that all of these interests may be jointly addressed. Interest-based conflict is best resolved through the maximizing integration of the parties' respective interests, positive intentions and desired experiential outcomes.

Structural Conflicts

Structural conflicts are caused by forces external to the people in dispute. Limited physical resources or authority, geographic constraints (distance or proximity), time (too little or too much), organizational changes, and so forth can make structural conflict seem like a crisis. It can be helpful to assist parties in conflict to appreciate the external forces and constraints bearing upon them. Structural conflicts will often have structural

solutions. Parties' appreciation that a conflict has an external source can have the effect of them coming to jointly address the imposed difficulties.

Value Conflicts

Value conflicts are caused by perceived or actual incompatible belief systems. Values are beliefs that people use to give meaning to their lives. Values explain what is *"good"* or *"bad," "right"* or *"wrong," "just"* or *"unjust."* Differing values need not cause conflict. People can live together in harmony with different value systems. Value disputes arise only when people attempt to force one set of values on others or lay claim to exclusive value systems that do not allow for divergent beliefs. It is of no use to try to change value and belief systems during relatively short and strategic mediation interventions. It can, however, be helpful to support each participant's expression of their values and beliefs for acknowledgment by the other party.

Ways of Dealing with Conflict

There are five common ways of dealing with conflict. Learning about the alternative means of handling conflict gives us a wider choice of actions to employ in any given situation and makes us better able to tailor our responses to the situation. Although listed below in an order of increasing elegance, the reality is that each of us utilizes each of these ways of dealing with conflict at least some of the time. We approach conflict in the way that we believe will be most helpful to us in our life. Our style for dealing with conflict will change with the circumstances.

Denial or Withdrawal

With this approach, a person attempts to get rid of conflict by denying that it exists. He or she simply refuses to acknowledge it. Usually, however, the conflict does not go away. It grows to the point that it becomes unmanageable. When the issue and the timing are not critical, denial may be a productive way to deal with conflict.

Suppression or Smoothing Over

"We run a happy ship here." "Nice people don't fight." A person using suppression plays down differences and does not recognize the positive aspects of handling the conflict openly. The source of the conflict rarely goes away. Suppression may, however, be employed when it is more important to preserve a relationship than to deal with a relatively insignificant issue.

Power or Dominance

Power is often used to settle differences. Power may be vested in one's authority or position. Power may take the form of a majority (as in voting) or a persuasive minority. Power strategies result in winners and losers. The losers do not support a final decision in the same way the winners do. Future meetings of a group may be marred by the conscious or unconscious renewal of the struggle previously *"settled"* by the use of power. In some instances, especially where other forms of handling conflict are not effective, power strategies may be necessary.

Compromise or Negotiation

Although regarded as a virtue, compromise ("*you give a little, I'll give a little, and we'll meet each other half-way"*) has some serious drawbacks. Such bargaining often causes both sides to assume initial inflated positions, since they are aware that they are going to have to *"give a little*" and want to buffer the loss. The compromise solution may be watered down or weakened to the point where it will not be effective. There may be little real commitment by any of the parties. Still, there are times when compromise makes sense, such as when resources are limited or a speedy decision needs to be made.

Collaboration or Integration

This approach suggests that all parties to the conflict recognize the interests and abilities of the others. Each individual's interests, positive intentions and desired outcomes are thoroughly explored in an effort to solve the problems in a maximizing way. Participants are expected to modify and develop their original views as work progresses. Participants come to appreciate that the apparent presenting problem does not need to limit their discussions. Participants are encouraged to express the full breadth and depth of their interests, with each participant seeking to identify "value" that they can bring to the discussion and the maximized satisfaction of underlying interests and intentions.

Some Final Thoughts on Conflict Management

In order to constructively and effectively manage conflict and move the parties toward resolution, the mediator must remember the following:

I. Know The Primary Causes of Conflict

As a mediator, conflict may constructively be viewed as resulting from:

1. **Varied perspectives** on the situation;

2. **Differing belief systems and values** resulting from participant's accumulated life experience and conditioning; and

3. **Differing objectives and interests**.

Effectively dealing with conflict requires the expression and management of participants' varying perspectives, interests, belief systems and values. It is important to meet the participants exactly where they are. Hear from them fully before trying to lead them anywhere. You cannot effectively move toward resolution until participants have been heard on “their perspective," "what they want," and "why."

II. You’re Facilitating a Convergence of Means

Conflict resolution represents *a convergence of means* (or arrangements for the future), not necessarily participants' interests or perspectives. Participants will commonly come to support the same arrangement or agreement for very different reasons. Conflict resolution does not necessarily resolve tensions between parties. Conflict resolution may simply sufficiently align matters to allow each participant to make enough progress toward his or her desired ends to prefer declaring there to be a *"a state of agreement"* rather than the uncertain and stressful *"state of disagreement."*

III. Search for Common Ground

Along with their sometimes too well-known differences, people in conflict share much *common ground,* including:

- **Overlapping interests** -- participants share in their own relationship, typically have common friends and colleagues, and also have interest in resolving the conflict in an expeditious and economic way;

- **Interdependence** -- no single participant has the ability to unilaterally impose a resolution on another without paying a very substantial price for doing so;

- **Points of agreement** -- even when there are many disputed issues, there may still be a number of points of agreement or possible agreement. The wise mediator

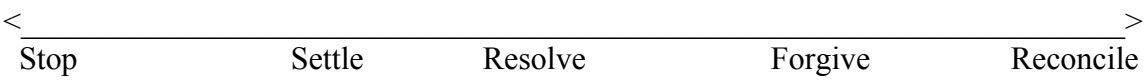
assists the parties to identify what they may be easily able to agree on as a foundation for additional discussions.

IV. Know What Level of Resolution You Want

There are different levels of conflict resolution. Deciding beforehand what level you wish to achieve or are capable of achieving will focus your resolution strategy.

- **Stop** the fighting
- **Settle** the dispute through negotiation
- **Resolve** the underlying reasons for the dispute
- **Forgive** the other party and yourself
- **Reconcile** the relationship

Think of these levels as a continuum. Merely stopping the conflict offers the least amount of lasting success and satisfaction between the parties because it is external and impersonal. At the other extreme, Reconciliation offers the most because it involves transforming people. However, it requires the most effort and time, and isn't needed for most conflicts. Therefore, most agreements fall somewhere in the middle.



Chapter 2

An Overview of Mediation

Conversation is the slowest form of human communication.
Anonymous

Mediation Defined

As an overall definition, mediation may be considered "**Facilitated Negotiation**." Negotiation itself may be defined as *communications seeking to reach an agreement.* Thus, mediation may also be considered as "**Facilitated Communications for Agreement**."

An Expanded Definition of Mediation

Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.

A mediator may not impose his own judgment on the issues for that of the parties.

Mediation, then, for our purposes, is the familiar negotiation process with the addition of an impartial third party who at a definite time and place, with all parties present, attempts to assist the parties and attorneys in arriving at an agreeable settlement.

Mediation can occur at any stage of a dispute, that is, before a lawsuit is filed but before discovery is accomplished, at any stage during discovery, and even after trail on the merits and judgment including while the case is on appeal.

In many states, mediation is now provided for by statute and the court is given authority to require the parties to engage in the mediation process.

In analyzing the differences between litigation and mediation, it is helpful to understand that, while still premised on liability, there is an additional focus on the "needs" of the parties, that is, those interests that, once recognized, can serve as an additional basis for resolution of the dispute.

Qualities of Mediation

In terms of describing the mediation process, either during an introductory session or an introductory phase of a substantive mediation session, the following concepts and language may be helpful.

Informed Consent

Central to mediation is the concept of "informed consent." So long as participants understand the nature of a contemplated mediation process and effectively consent to participate in the described process, virtually any mediation process is possible and appropriate

Voluntary

You can leave at any time for any reason, or no reason. If you are thinking of leaving, I encourage you to speak up and let me know why. The reasons that you are thinking of leaving can become conditions for your continued participation. For example, if you are thinking of leaving because you do not feel heard, presumably you would continue in mediation if you felt heard.

Collaborative

You are encouraged to work together to solve your problem(s) and to reach what you perceive to be your fairest and most constructive agreement.

Controlled

You have complete decision-making power. Each of you has a veto over each and every provision of any mediated agreement. Nothing can be imposed on you.

Confidential

Mediation is confidential, to the extent you desire, be that by statute, contract, rules of evidence or privilege. Mediation discussions and all materials developed for a mediation are not admissible in any subsequent court or contested proceedings, except for a finalized and signed mediated agreement for enforcement purposes. I, as mediator, am obligated to describe any exceptions to this general confidentiality of mediation. Confidentiality in mediation may be waived by you in writing, but I, as mediator, retain my own ability to refuse to testify in any contested case. We also need to define the extent of confidentiality for any "caucus meetings," meetings between myself as mediator and you as individual parties.

Informed

The mediation process offers a full opportunity to obtain and incorporate legal and other expert information and advice. Mutually acceptable experts can be retained. Such jointly obtained expert information can be designated as either confidential to the mediation or, if you desire, as admissible in any subsequent contested proceeding. Expert advice is never determinative in mediation. You, as parties, always retain decision-making power. Mediators are bound to encourage parties to obtain legal counsel and to have any mediated agreement involving legal issues reviewed by independent legal counsel prior to signing. Whether legal advice is sought is, ultimately, a decision of each mediation participant.

Impartial, Neutral, and Balanced

The mediator has an equal and balanced responsibility to assist each mediating party and cannot favor the interests of any one party over another, nor should the mediator favor a particular result in the mediation. As mediator, I am ethically obligated to acknowledge any substantive bias I may have on issues in discussion. The mediator's role is to ensure that parties reach agreements in a voluntarily and informed manner, and not as a result of coercion or intimidation. If you ever feel that I, as mediator, am favoring one party over another, or any particular result over another, or if you should ever feel intimidated or otherwise unsafe, speak up. The mediation should not continue unless you come to be satisfied in all these regards.

Self-Accountable and Satisfying

Based upon having actively resolved your own conflict, participant satisfaction, likelihood of compliance and self-esteem are found by research to be dramatically elevated through mediation.

Benefits of Mediation

People in disputes who are considering using mediation as a way to resolve their differences often want to know what the process offers. While mediation cannot guarantee specific results, there are trends that are characteristic of mediation. Below is a list of some of the benefits of mediation, broadly considered. Mediation generally produces or promotes:

Economical Decisions

Mediation is generally less expensive when contrasted to the expense of litigation or other forms of fighting. (Pearson and Thoennes, 1984; McIssac, 1981; Kelly, 1991)

Rapid Settlements

In an era when it may take as long as a year to get a court date, and multiple years if a case is appealed, the mediation alternative often provides a more timely way of resolving disputes. When parties want to get on with business or their lives, mediation may be desirable as a means of producing rapid results.

Mutually Satisfactory Outcomes

Parties are generally more satisfied with solutions that have been mutually agreed upon, as opposed to solutions that are imposed by a third party decision-maker. (Rochl and Cook, 1985; Pearson and Thoennes, 1985; Brett and Goldberg, 1984; Kelly, 1991)

High Rate of Compliance

Parties who have reached their own agreement in mediation are also generally more likely to follow through and comply with its terms than those whose resolution has been imposed by a third party decision-maker. (Rochl and Cook, 1985; Pearson and Thoennes, 1984; McEwen and Maiman, 1981; Bingham, 1986; Kelly, 1991)

Comprehensive and Customized Agreements

Mediated settlements are able to address both legal and extra-legal issues. Mediated agreements often cover procedural and psychological issues that are not necessarily susceptible to legal determination. The parties can tailor their settlement to their particular situation.

Greater Degree of Control and Predictability of Outcome

Parties who negotiate their own settlements have more control over the outcome of their dispute. Gains and losses are more predictable in a mediated settlement than they would be if a case is arbitrated or adjudicated.

Personal Empowerment

People who negotiate their own settlements often feel more powerful than those who use surrogate advocates, such as lawyers, to represent them. Mediation negotiations can provide a forum for learning about and exercising personal power or influence (Cook, Rochl and Shepard, 1980).

Preservation of an Ongoing Relationship or Termination of a Relationship in a More Amicable Way

Many disputes occur in the context of relationships that will continue over future years. A mediated settlement that addresses all parties' interests can often preserve a working relationship in ways that would not be possible in a win/lose decision-making procedure. Mediation can also make the termination of a relationship more amicable.

Workable and Implementable Decisions

Parties who mediate their differences are able to attend to the fine details of implementation. Negotiated or mediated agreements can include specially tailored procedures for how the decisions will be carried out. This fact often enhances the likelihood that parties will actually comply with the terms of the settlement.

Agreements that are Better than Simple Compromises or Win/Lose Outcomes

Interest-based mediated negotiations can result in settlements that are more satisfactory to all parties than simple compromise decisions.

Decisions that Hold Up Over Time

Mediated settlements tend to hold up over time, and if a later dispute results, the parties are more likely to utilize a cooperative forum of problem-solving to resolve their differences than to pursue an adversarial approach (Pearson and Thoennes, 1984; Margolin, 1973; Bingham, 1986).

Chapter 3

Alternative Dispute Resolution Processes (ADR)

You must first have a lot of patience to learn to have patience.
Stanislaw J. Lec

A Spectrum of Dispute Resolution Processes

There is a spectrum of dispute resolution processes, ranging from informal discussion to formal adjudication. The concept behind the development of alternative dispute resolution, or "ADR" is that the traditional adjudicatory model of dispute resolution is not always the best approach.

With time, ADR has come to have a new meaning, "Appropriate Dispute Resolution." In light of the rapid growth of collaborative negotiation, mediation and other settlement processes, there is, in fact, nothing alternative at all about ADR today.

We are finding collaborative negotiation and mediation processes adopted with increasing frequency in legal, governmental, business and family matters.

There are no limits to the types of dispute resolution processes that can be utilized. When it comes to settlement processing, "anything goes," both in terms of the process of reaching resolution and content of any resolution. The only key is that the parties (and assisting professionals) understand and agree to the same process. This concept of "informed consent to the process" permeates the ADR movement. Also common to the ADR processes is the concept of creating a settlement event, some shared experience that increases the likelihood of resolution. All ADR processes have the following effects:

They motivate the parties and any representatives to fasten their attention on the case and prepare for resolution; the parties have "their day in court," a "hearing" in which they have the opportunity to present their perspectives on the situation and their sense of a "fair" resolution; often for the first time, the parties have the opportunity to experience a capable presentation of the other side's case; and the parties have a window of opportunity to identify common interests and points of agreement, and the opportunity to fashion mutually acceptable settlement options to disputed issues.

Mediators Should Have an Understanding of All ADR Processes

The Mediator should not only learn everything possible about mediation, but also about the other dispute resolution alternatives available to participants. In the event that the parties do not fully settle their matters, it is appropriate that the mediator act as a bit of a process advisor assisting the parties, in an impartial way, to consider their remaining alternatives.

One of the advantages of mediation is that it does not preclude any other dispute resolution alternative. It is also true that issues may be resolved by "non-mediation" processes "within" a mediation or juxtaposed to a mediation. For example, parties may agree to resolve a business valuation issue by an impartial arbitration but retain their ability to decide and mediate the remaining issues. Thus, an appreciation of the alternatives to mediation provides greater flexibility in resolving disputes.

Dispute Resolution Mythology

There are numerous myths in our culture regarding dispute resolution that the mediator must understand and, when appropriate, directly address. The mediator will need to work in the space between how the parties believe conflicts ought to be resolved in "fairness" (what is right) and how they will be resolved in fact (what will actually work). The mediator must create a certain measure of dissonance in the parties thinking regarding these myths to gain their commitment to mediation and a practical resolution.

Here are four myths that can easily be addressed with regard to the mediation of disputes:

The Myth of Justice

In the myth of justice, each party to a legally framed dispute believes that a thoughtful and compassionate judge will deliberate and make the right and fair decision. In the myth, the judge has touched the sword of Excalibur (King Arthur and the Knights of the Roundtable), assumed the mantle of fairness, the black robe, and ascended to the bench to do justice. Because few clients (or lawyers) believe they are not fair and right in the position they advocate, the expectation is that the judge will vindicate their belief. In law, the myth perpetuates the belief that there is "a remedy for every wrong." The legal system is a "big fix-it" machine. The direct impact of this mythology in legal practice, on both parties and professionals, cannot be underestimated. In virtually every interaction between judges, lawyers and clients, "fairness" and "rightness" is an implicit or explicit subject of discussion, premised on everyone's views and expectations of the justice system. Whether the mythology has been transmitted in a grade school civics lesson or by Perry Mason or LA Law on television, the depth of the belief is unmistakable. If the myth of justice remains intact, the parties will have little motivation to mediate.

The Myth of Finality

The corresponding myth of finality is a belief that a court rendered decision is equivalent to a final settlement that will be accepted, or at least followed, and if not followed, at least enforceable. However, disputes, while they may be "justiciated" (decided) by courts, are seldom resolved; court orders are frequently not the end, but only the beginning of further legal wrangling. Appeals and post divorce motions can continue years into the future, and effective enforcement of court orders is difficult at best. Yogi Berra's adage, "it ain't over 'til it's over," does not apply in complex disputes, especially family conflicts. The more accurate statement is:"it ain't never over," at least not because the parties have a final agreement or have gone to court.

The Myth of Rationality

This myth posits that decisions made by judges, arbitrators or other experts are purely logical and dispassionate. Law, medicine and other disciplines are viewed from a reductionist perspective as being essentially "cookbook," formula exercises. Facts, once established can be subjected to legal analysis (diagnosis/prognosis); a strategy decided

upon (treatment); and an outcome accurately predicted and obtained (cure). Few determinations are actually derived in this linear manner. Human variables (bias, politics) virtually always color, if not fundamentally alter, final results.

The Myth of Objectivity/Neutrality

This myth is a corollary to the myth of rationality. It is derived from the notion that decision-making is purely an objective enterprise. The professional/expert is thus placed on a pedestal by the parties and he or she believes himself to be "above the fray." In point of fact, no one is neutral; all are participants and part of the system. For this reason, the mediator should not present his or her self as a neutral, the mediator is by definition an active participant in the conflict system. Instead, the mediator should be "balanced," a term that connotes a dynamic, involved role that engages both parties. Instead of being a "neutral" who protects neither party, in being balanced, the mediator seeks to protect both parties.

ADR Processes Defined

The ADR processes differ in their formality and placement of decision-making power. If the process is mediation, the decision-making power will reside at all times with the parties. In adjudication and arbitration, the decision-making power lies with the third-party neutral.

Litigation/Adjudicatory Processes

Litigation - the competitive presentation of evidence to a judge that results in an order, judgment or decree (win/lose decision). The decision-maker is selected by the community and he/she rules according to community legal standards. There are formal rules of procedure and evidence. The judge's decision may be appealed.

Arbitration - the competitive presentation of evidence to a decision-maker selected by the parties for an award (win/lose decision). The arbitrator is typically selected based upon the arbitrator's substantive expertise. The arbitration is held according to procedural and evidentiary rules the parties agree upon. Arbitration decisions typically cannot be appealed, except in situations of undue influence, bias, duress, etc.

Court Annexed Arbitration - Court-annexed arbitration is not true arbitration as parties have right to trial de novo (a trial as if no arbitration took place). Court-annexed arbitration is really a negotiation process, intended to promote settlement for designated classes of cases, such as property claims under $25,000. There are often financial sanctions for proceeding to trial, if a party does not improve their position relative to the non-binding arbitration award.

Private Tribunals (Rent a Judge) - By statute in most states, parties can appoint any person as their judge, with full judicial powers. The private tribunal's decision is entitled to entry as a judgment and may be appealed.

Consensual Processes

Ombudsperson - An official appointed by and paid for by an institution, who investigates problems, seeks to prevent conflict and assists to resolve disputes. The ombudsperson is not a true mediator due to the institutional affiliation, which, to some extent, compromises his or her impartiality and neutrality.

Fact-finding - An agreed-upon neutral finds facts as an assist to some other processes - negotiation, mediation or adjudication. Fact-finding is often used in the labor-management context. The fact-finder may make findings public, with the parties' consent, to increase pressure for settlement. Alternatively, the fact-finders' recommendations may, by the parties' agreement, be confidential and non-admissible in any subsequent contested hearing.

Negotiation - Communications for an agreement directly between the parties or through their representatives, intended to reach agreement for the future (transactional negotiation) or to resolve a past dispute (dispute negotiation). In negotiation, the desired objective is an agreement, which is typically, but not always, enforceable under law.

Mediation - Facilitated communications for agreement, resolving a past dispute and/or creating agreement for the future, with the assistance of an impartial facilitator. Decision-making power always resides with the participants in mediation. The desired result in mediation is agreement that is sometimes, but not always, enforceable under law.

Conciliation - Conciliation typically consists of independent communications with parties in their separate contexts (their home or work environment), either to improve relations or pave the way for some other process, e.g., mediation.

Mixed Processes

Med-Rec - Mediation-Recommendation begins as mediation, but, if the parties do not come to agreement, the mediator makes a recommendation to the court or other decision-maker as to a recommended resolution.

Med-Arb - Mediation-Arbitration begins a mediation. If the parties fail to come to agreement, the process transforms into an arbitration with the former mediator assuming the role of decision-maker. The process may be modified so that parties may elect out of the process at the close of the mediation component, or the parties may select another arbitrator for their dispute.

Mini-Trial - While there are many types of abbreviated mock or mini trials, they usually include the abbreviated presentation of evidence to one or more expert neutral facilitator(s) and the presence of executives or others with decision-making authority. Following the summarized presentation of evidence and a questioning period, the decision-makers and facilitator will meet for confidential settlement discussions.

Summary Jury Trial - The Summary Jury Trial is another type of mock trial (really a settlement event) using one or more advisory juries. Summary jury trials usually include the abbreviated presentation of complex litigation to advisory juries who then render one or more advisory verdicts for executives with decision-making authority to consider in their settlement discussions, again typically facilitated by an expert advisor or facilitator.

Comparison of Dispute Resolution Processes

AVOIDANCE	NEGOTIATION	DISPUTE REVIEW BOARD	MEDIATION	ARBITRATION	LITIGATION	SELF-HELP
VOLUNTARY	VOLUNTARY	VOLUNTARY	VOLUNTARY/ INVOLUNTARY	VOLUNTARY	INVOLUNTARY	VOLUNTARY/ INVOLUNTARY
NON – BINDING	AGREEMENT ENFORCEABLE VIA OTHER PROCESSES	AGREEMENT ENFORCEABLE VIA OTHER PROCESSES	AGREEMENT ENFORCEABLE VIA ARBITRATION OR LITIGATION	BINDING/ ENFORCEABLE BY JUDGEMENT	BINDING SUBJECT TO APPEAL	NON - BINDING
NO THIRD PARTY	NO THIRD PARTY	THREE-MEMBER PANEL WITH EXPERTISE RECOMMENDS SOLUTIONS	THIRD PARTY NEUTRAL FACILITATOR	THIRD PARTY NEUTRAL DECISION MAKER WITH SUBSTANTIAL KNOWLEDGE IN THE DISPUTED MATTER	IMPOSED THIRD PARTY NEUTRAL/ JURY WITH NO PARTICULAR EXPERTISE IN DISPUTED SUBJECT	NO THIRD PARTY
INFORMAL	INFORMAL	INFORMAL	INFORMAL	SOMEWHAT FORMAL	FORMAL	INFORMAL
NO EVIDENCE NEEDED	NO EVIDENCE RESTRICTIONS	NO EVIDENCE RESTRICTIONS	NO EVIDENCE RESTRICTIONS	NO EVIDENCE RESTRICTIONS	EVIDENCE RESTRICTIONS	NO EVIDENCE NEEDED
NO ADVOCATES	PARTIES CAN REPRESENT THEMSELVES OR CAN HAVE ADVOCATES	PARTIES CAN REPRESENT THEMSELVES OR CAN HAVE ADVOCATES	PARTIES CAN REPRESENT THEMSELVES OR CAN HAVE ADVOCATES	PARTIES CAN REPRESENT THEMSELVES OR CAN HAVE ADVOCATES	PARTIES USE ATTORNEYS	NO ADVOCATES
PRIVATE	PRIVATE	PRIVATE	PRIVATE	PRIVATE	PUBLIC	PUBLIC
NO OUTCOME	MUTUAL OUTCOME	MUTUAL OUTCOME	MUTUAL OUTCOME	OUTCOME BY OTHER	OUTCOME BY OTHER	OUTCOME BY OTHER
VERY EASY	EASY	EASY	NOT DIFFICULT	NOT DIFFICULT	DIFFICULT	VERY EASY

Chapter 4

The Mediation Models

Value your words. Each one may be the last.
Stanislaw J. Lec

The Mediation Models Explained

Ken Cloke describes four basic mediation models/styles in his book, *Mediating Dangerously* (pgs. 11-12):

1. **Evaluative or Directive**

   This model considers conflict as something to end. It uses the assumption that the disputants are incapable of ending the conflict themselves. So the mediator assumes that responsibility, thereby suggesting solutions while directing the disputants through the mediation process to settlement. Also, there is little regard for the underlying issues that gave rise to the conflict in the first place.

2. **Facilitative or Conciliatory**

   This model sees conflict as something to be overcome, and the parties as capable of doing so through active listening and describing their feelings. The mediator passively supports the mediation process by empathically modeling and facilitating their interactions. The parties are responsible for reaching an agreement that may or may not address the underlying issues.

3. **Transformative**

   This model views conflict as crises in human interaction. The goal of transformative mediation is conflict transformation, that is to help parties in conflict change the quality of their conflict interaction by supporting the parties' own efforts at empowerment and recognition, as those efforts appear in the unfolding conversation during the mediation session, The Promise of Mediation, Robert A. Baruch Bush and Joseph P. Folger, 1994.

4. **Whatever-It-Takes**

   This model says the mediator should use intuitive assessments to change models as necessary. There are times when the parties can't move without honest feedback, external coaching, and strong recommendations. And there are times when the mediator should be silent, elicitive, and dangerous.

TRANSFORMATIVE MEDIATION (Transformative Model)	**PROBLEM-SOLVING MEDIATION** (Directive and Facilitative Models)
PRIMARY GOAL: Empowerment and recognition	PRIMARY GOAL: Settlement
VALUES: Individual growth, self-determination	VALUES: Satisfaction of parties' interests
MEDIATOR ROLE: Facilitator; helps parties make the most of opportunities for empowerment and recognition	MEDIATOR ROLE: Conflict resolution "process expert"; helps parties analyze interests and maximize joint gains
Mediator attends to conflict dynamics	Mediator attends to parties' interests
Less directive and structured	More directive and structured
"Parties own both process and content"	"Parties own the content; mediator owns the process"
Discuss past as a way to encourage recognition of others	Focus on future, as talking about the past focuses the blame
"There are facts in the feelings" that lead to opportunities for empowerment and recognition	Strong emotions are to be expected, but need to be managed in order to get to problem solving

Chapter 5

Being A Mediator

Men occasionally stumble over the truth, but most of them pick themselves up and hurry off as if nothing had happened.
Winston Churchill, Sir (1874-1965)

Convictions are more dangerous enemies of truth than lies.
Friedrich Nietzsche (1844-1900)

Apply the Craft of Mediation

Science and Art

There is no cookbook recipe for success as a mediator. Each mediation case is different and each mediation participant is unique. As a mediator, you will truly practice mediation, in the way that a devoted pianist practices the piano or an aikidoist practices aikido. Your office will become a place of experimentation and learning – a dojo. There is always more to learn in assisting others to reach agreement. Every mediation case is an opportunity to learn and serve.

Mediation is both science and art. The science of mediation is well represented in this manual. There is great merit in seeking to comprehensively set down helpful structures and concepts of mediation. To become the best possible mediator, you need to have supportive cognitive structures to work within. Fully understanding the rational side of mediation will not, however, make you an effective mediator. Effective mediation involves skillfully working with real people, not just knowing theoretically how to do that. With time, the structures of mediation practice become ingrained, freeing the mediator to become more out-focused and responsive.

This balance between the science and art of mediation, between the rational and the intuitive, is what attracts many of us to practice mediation – that, and the infinite challenge of assisting those in conflict to reach agreement.

Developing Your Toolbox

I ask that practitioners and students view the concepts and skills described in this manual as available tools for your mediation toolbox. Which of the available tools you use is largely a matter of professional judgment and discretion. When it comes down to it, the right way to mediate is the way that works! Fortunately or unfortunately, what works will vary on a case-by-case, participant-by-participant, and mediator-by-mediator basis. A key for the mediator is to be able to notice, in the moment, whether what he or she is saying or doing is working. If it is not working, the mediator needs to do something different! It is also said that the most flexible component of a system controls that system. As a mediator, you want to be the most flexible component of the system in selecting and implementing your facilitative tools and techniques.

Meet the Parties Where They Are

If I have learned anything as a mediator, it is that you are not going anywhere unless and until you become one with the mediation participants. It is only by effectively hearing (seeing and feeling) where each participant is at, and by honoring the participant in that place, that you are able to assist participants to shift from their typically righteous views to consider their situation from new perspectives and reach constructive and principled agreement.

Balancing Structure and Responsiveness

Effective mediation is a balancing of structure and responsiveness. If the mediator is too structured, there is the risk of being out of synch with the participants. If the mediator is too responsive, participants will feel lost, will likely plunge into their past-focused drama, and, at best, develop incomplete and fragile agreements. You may want to think of facilitative structures as a supportive context within which to exercise your facilitative intuition. The goal is to strike a maximizing balance between structure and responsiveness.

The Interdisciplinary Nature of Mediation

Becoming a mediator is more a state of mind than it is a set of specific skills. Whatever your profession of origin or background discipline, as a mediator you will no longer have the luxury of approaching clients from that perspective alone. To effectively mediate, lawyers need to understand business and relational issues; mental health professionals must understand business and legal aspects; and other professionals will also need to appreciate all parts of a dispute. Virtually all business disputes have a relational aspect to them, and virtually all relational disputes have business aspects. Business and relational issues frequently have legal ramifications. The effective mediator becomes, with time, conversant with regard to relational, business and legal issues.

The wise mediator also appreciates when it is desirable to recommend the infusion of the mediation process with credible expert information from resources acceptable to all parties. One mistake that many beginning mediators make is to try to do too much – to be experts in all areas. It is always safer for parties to rely on their own legal counsel, accountants, valuators, and other advisors for expertise in mediation. The mediator's role is to facilitate agreement, not to know all about all things.

Are Mediators Neutral or Balanced

Mediators are often presented as being "neutrals," which may be misleading. "Neutrality" suggests to some that the mediator is objective and "above the fray." This is generally not be accurate in interest-based mediation. The mediator to a dispute is, more accurately, a part of the system – a participant. The mediator is actively engaged with all parties and in different ways. Overall, the mediator's involvement should be balanced between the parties. Thus, rather than separation or distance, "neutrality" in mediation may best be understood as a balanced and active involvement with the parties in a way that does not favor either party nor any particular result.

The "Right Way" to Mediate

The "right way to mediate" is a contradiction in terms. There is no right way (except the way that works). There are, however, certain skills and strategies that can be developed and issues addressed to assure that decisions made by the parties in mediation are truly informed and voluntary. It is crucial to remember that the mediator is responsible for the process, not the outcome, of the mediation.

Qualities of an Effective Mediator

1. Appropriate pre-mediation set-up
2. Maturity
3. Trustworthiness
4. Honesty/Integrity/Ethical standards
5. Prepared/Familiar with issues of parties
6. Impartiality/Balanced. Ability to maintain and demonstrate neutrality toward all parties. Ability to control own biases, prejudices and emotions
7. Credibility – Knowledge of the mediation process Commitment to the mediation process (advocate for resolution).
8. Sincerity
9. Tactfulness
10. Patience
11. Ability to maintain control of disputing parties without being overly intrusive or without dictating the process
12. Flexibility
13. Understanding/Empathetic – Sensitivity to strongly held values of other. Awareness of cultural, economic, social and gender differences
14. Respect for others and opposing views
15. Open-minded
16. Inoffensive
17. Unpretentious
18. Sense of humor without being a clown
19. Good listening skills
20. Discerning as to non-mediatable issues
21. Good oral communications skills, in clear and neutral tone
22. Good questioning skills and techniques
23. Subject matter expertise, when desired
24. Nonjudgmental
25. Positive/Optimistic
26. Persistent but not overpowering
27. Ability to facilitate firm conclusions regarding settlement value
28. Familiar with litigation process

Roles of the Mediator

The mediator's ultimate role is to do anything and everything necessary to assist parties to reach agreement. In serving this ultimate end, the mediator may take on any or all of the following roles:

Convener
The mediator may assist in contacting the other party(ies) to arrange for an introductory meeting.

Educator
The mediator educates the parties about the mediation process, other conflict resolution alternatives, issues that are typically addressed, options and principles that may be considered, research, court standards, etc.

Communication Facilitator
The mediator seeks to ensure that each party is fully heard in the mediation process.

Translator
When necessary, the mediator can help by rephrasing or reframing communications so that they are better understood and received.

Questioner and Clarifier
The mediator probes issues and confirms understandings to ensure that the participants and the mediator have a full understanding.

Process Advisor
The mediator comes to be trusted to suggest procedures for making progress in mediation discussions, which may include caucus meetings, consultation with outside legal counsel and consultation with substantive experts.

Angel of Realities
The mediator may exercise his or her discretion to play devil's advocate with one or both parties as to the practicality of solutions they are considering or the extent to which certain options are consistent with participants' stated goals, interests and positive intentions.

Catalyst
By offering options for considerations, stimulating new perspectives and offering reference points for consideration, mediator serves as a stimulant for the parties reaching agreement.

Responsible Detail Person
The mediator manages and keeps track of all necessary information, writes up the parties' agreement, and may assist the parties to implement their agreement.

Chapter 6

The Mediation Process

All truth passes through three stages. First, it is ridiculed. Second, it is violently opposed. Third, it is accepted as being self-evident.
Arthur Schopenhauer (1788-1860)

Working the Mediation Process

First and foremost, mediation is a process that should be allowed to proceed incrementally.

Baby Steps to Agreement

So, given the "declaration of conflict," just how does the mediator assist parties to enter the "circle of agreement?" The short answer is "not all at once." In other words, there is no single question or other act that will suddenly leap-frog the participants into spontaneous and instantaneous agreement. Rather, the mediator learns that the progress toward agreement is made gradually and, if the mediator is skilled (and fortunate), steadily.

To the extent that this is true, that participants move toward agreement incrementally, in "baby steps," then it may be said that *the mediator is ever-interested in skills, techniques and approaches that will assist the participants to take "baby steps" forward toward agreement.* A helpful question for mediators to ask themselves is: *"Specifically, what can I do now that will assist the participants to take their next substantial step toward agreement."*

How to Measure Success

This concept of focusing upon the process of incrementally assisting mediation participants to make progress toward agreement relates to the issue of just what is "success" in mediation? Rather than defining "success" in terms of achieving a particular result at a particular time, the mediator is advised to judge his or her own success in terms of the quality of their facilitative process in seeking to successively help the parties to take "baby steps" toward agreement. We, as mediators, must ask ourselves: *"What can I say or do next to best assist these participants to reach agreement?"*

The Flow of the Mediation Process

The Beginning

Convening
Getting the Parties to the Table

Opening/Introduction
Structuring the Environment and
Setting the Tone of the Mediation

The Communication/Negotiation

Initial Joint Session
Hearing the Conflict Stories and Identifying Issues

Caucusing Session(s)
Reality Checking and Creating Options

The Conclusion

Closing Joint Session(s)
Finalizing (Dis)Agreement Terms and
Looking Toward the Future

The Structure and Execution of the Facilitative Mediation Process
-- From the Mediator's POV --

Note: The following primarily represents the Facilitative Mediation Model. The Evaluative/Directive and Transformative Models are different in their structure and execution.

The Convening Stage

- Assess if mediation is appropriate.
  - -- Describe the mediation process and its benefits.
  - -- Discuss conflict issues, fees, timing, etc.
  - -- Ask if parties are *serious* about agreeing
- Begin building trust **toward you**. and **the mediation process**.
  - -- Offer no-cost pre-mediation conference.
  - -- Present your qualifications.
- Increase chances of resolution before the mediation.
  - -- Give pre-mediation preparation homework.
  - -- Ask what needs to happen for resolution
  - -- Ask who will attend. Insist on decision-makers.
  - -- Identify and neutralize power imbalances.
  - -- Make sure the parties feel safe.

The Opening/Introduction Stage

- Model ideal behavior.
  - -- Be respectful, courteous, and kind.
- Be informative.
  - -- Explain the process. (Not a trial.)
  - -- Explain mediator's role. (Facilitation.)
- Build trust **toward you** and **the mediation process**.
  - -- Arrange room for communication.
  - -- Listen attentively. Proper body language.
  - -- Explain that the parties are in control.
  - -- Discuss confidentiality issues.
  - -- Mutually set ground rules. Invite questions.

The Joint Session Stage

- Find out what happened.
  - -- Get complete opening statements/stories.
  - -- Ask "Is there more?" questions.
  - -- Identify commonalities and agreements.
- Clarify the issues.
  - -- Ask open-ended questions.
  - -- Surface emotions and conflict.
  - -- Reframe *positions* into *interests*.

- Build trust **toward you** and **the mediation process**.
  -- Show intense listening. Pay full attention.
  -- Use careful, neutral language.

The Early Caucus Stage

- Explore *honest* feelings.
  -- Encourage venting. "How did/do you feel?"
- Build trust and rapport.
  -- Don't start with other's issues/positions.
  -- Seek understanding. Empathize.
  -- Ask what should be in the agreement.
- Explore desired outcomes.
  -- Determine *fantasy* outcome.
  -- Begin list of "priorities" and "trade-offs."
- Find *real* issues, interests, and motives.
  -- Don't suggest real issues and interests.
  -- Reframe *positions* into *interests*. "Why's."
- Look for movement/flexibility. opposition's issues.
  -- Promote *give-and-take*. Discuss
  -- Use "what if's" to test ideas/offers.
  -- Begin shifting focus from past to future.

The Later Caucus Stage

- Maintain trust. positions.
  -- Don't start with opposition's issues and
  -- Don't threaten, even subtly.
- Share information. share.
  -- Only share what you've been permitted to
  -- Watch phrasing and timing.
  -- Share opposition's issues, interests, offers
  -- Report movement by the opposition.
- Begin building trust toward **the opposition**.
  -- Highlight positive movement.
  -- Clarify (mis)understandings. Explain reasoning.
  -- Remind parties of their agreements—big/small.
- Do *reality testing*. expectations.
  -- Challenge poor reasoning and lofty
  -- Ask, "What if there's no agreement?"--BATNA
  -- Ask parties to consider a role reversal.
- Brainstorm options for mutual gain.
  -- Focus on offers, not positions.
  -- Ask, "What if their answer is no?"
  -- Ask, What might you be willing to offer if

The Closing Joint Session Stage

- Move toward conclusion.
  -- Give-and-take on offers and counteroffers.
  -- Finalize areas of (dis)agreement.
  -- Decide outcome: Agree, litigate, 2nd session, etc.

- Write agreement.
  -- Infuse with legal capacity. Look for loopholes.
  -- Use advisory attorney/other resources, if needed.
  -- Include consequences if agreement broken.
  -- Expect post-mediation work to finalize deal
  -- Each party reads, signs and dates the agreement.

- Build trust for the future.
  -- Acknowledge difficulties and progress achieved.
  -- Encourage continued cooperation.
  -- Celebrate their agreement and respective futures.

Mediator Traps

Here are some of the more common traps mediators face:

1. Failing to establish credibility
2. Portraying a perception of partiality toward a given party
3. Portraying too much agreement with any one party's position
4. Body language or emotional responses that would be perceived as a bias or prejudice or a value judgment
5. Focusing on the issue of fault
6. Taking control of fashioning a solution vs. allowing parties to work out solution
7. Making value judgment about merits or worth of case
8. Breaching confidentiality of caucus disclosures
9. Over-intervention in the negotiation process
10. Failing to use active listening skills
11. Assuming asserted goals of parties are real goals (failing to recognize hidden agendas)
12. Use of term "compromise" and "split the difference"
13. Use of term "settlement" in lieu of favored term "resolution"
14. Failing to assure at outset that parties present have "authority to settle"
15. Being insensitive to values and beliefs of parties
16. Impatience
17. Telling parties how to settle their claims
18. Making value judgment as to what is fair and equitable (exception: family law cases in some jurisdictions)
19. Overuse of "I" (e.g., "I think...")
20. Answering question by party as to "whether you think that is a fair offer"
21. Communicating final offers in caucus; rather, return to joint session first
22. After caucusing with one party, caucus with the other party (however briefly) before returning to joint session, even if only to ask party if there is anything he/she desires to share with mediator before resuming joint session
23. Accidentally assuming as a fact that which is actually in dispute
24. Commencing caucus sessions without having reason for caucusing
25. Analyzing the contents of a written document submitted by one of the parties
26. Focusing on less important sub-issues as they rise
27. Perception by the parties that no progress is being made
28. Offering a personal recommendation as to a possible settlement option
29. Failing to reduce agreement to a written memorandum

Reasons Mediations Fail

Here are the top ten reason mediators fail, presented in no particular order.

- The parties do not understand the process and have not been educated about the process.
- The parties do not realize that time and effort on their part are necessary to a mediation and fail to plan for the session accordingly.
- The parties and/or their representatives are distract my unrelated activities while in the mediation, e.g., cell phones, another engagement, etc.
- Unprepared attorneys. Mediation is no substitute for a lawyer planning and analyzing the law and the case. Mediation helps a lawyer advocate a position -- it does not replace the need for advocacy.
- Overdone mediation presentations. Too smart can be as bad as too dumb.
- Personal, non-legal needs not accommodated (e.g., a disability, no toilets, no food.)
- Lack of good faith by one or more parties.
- Unrealistic expectations.
- Lack of authority to make final decision.
- Overly contentious party or advocate and/or a failure to recognize or to consider the shortcomings of the case.

Chapter 7

Convening

Though no one can go back and make a brand new start, anyone can start from now and make a brand new ending.
Anonymous

It All Begins With Trust

Mediators traditionally enter disputes with little authority, so their ability to get the parties to accept mediation and to select them to mediate depends, in part, upon the 'willingness' of the parties to trust the mediator. *The trust-building process begins with the mediator's first interaction with the parties and continues until mediation is concluded.*

Trust is attained and maintained when the mediator is perceived by the disputants as an individual who understands and cares about the parties and their disputes, has the skill to guide them to a negotiated settlement, treats them impartially, is honest, will protect each party from being hurt during mediation by the other's aggressiveness or their own perceived inadequacies, and has no interest that conflict with helping to bring about a resolution which is in the parties' best interest. Only when trust has been established can the parties be expected to be 'candid' with the mediator, disclose their real interests and value the mediator's reactions.[1]

How the Parties Choose to Go to Mediation

Parties involved in a dispute who have elected to use the mediation process, with hopes of resolution, come to the mediator through various avenues:

1. One party contacts a mediator or a provider that in turn contacts the other party.

2. Referral of both parties by a prosecutor of court. This is typically accompanied by pressure to mediate.

3. Legal compulsion to mediate.

4. Mediator instigation.

Whether the parties are compelled to mediate or voluntarily submit, the mediator needs to be mindful of the 'willingness' of the parties to resolve their conflict. Is the tomato 'ripe' and ready to consume, or is it 'green' and needs to be left to ripen? If the mediation is compelled or mandated, 'ripeness' can be a true challenge and a barrier to the mediator. If its not ripe, leave it on the vine, or shelve it exposed to the sun for assisted ripening.

Warning I: You don't go forward unless all the parties truly want to mediate. Even if they are compelled to be there, it is better not to mediate if the parties are not willing/motivated.

Warning II: The mediator's appearance of impartiality is as important in this stage as in any other.

[1] Goldberg (1992). *Practice of Mediation.* Page 105.

If one party contacts the mediator, to assist them in their conflict resolution, and is asked to contact the other party or parties, he must be diligent in applying neutrality to that discussion. This also applies when the mediator is the instigator. It is intuitive to want to learn about the conflict, to establish fee schedules and encourage the start of the process as soon as possible. That dialogue with the initial contacting party can trap the mediator, and create rejection by the other parties when they are informed of that dialogue. 'Counter intuitive' dialogue needs to be applied:

- Obtain commitment from both parties to mediate before discussing fees, timing, and conflict issues.

- Consider a pre-mediation meeting at no cost to either party. This gives the mediator a chance to educate both parties about the process and a neutral environment to discuss fees and timing.

- Allude to your substantial knowledge in the industry of service that surrounds their issues. Market yourself and your knowledge. Do not be afraid to talk about your background. In addition, even though the parties think their conflict is unique, it most likely is not. Others have experienced similar situations that lead to this conflict.

- Be patient. Let the rapport between you and the parties develop. Allow them to educate you about their issues.

- Assume you are neither the first mediator contacted, nor the last.

What's Next?

1. Once the initial contact is made by one of the parties, write a letter to the other party explaining the contact and the limited content of the discussion to date. If acknowledgement of your letter has not taken place within a week's time, follow up with a phone call. Do not assume that the other party wants to mediate. Invite them to the pre-mediation meeting. Assure the other party that the first meeting is free of fees and the intention of the meeting is to discuss issues and fears of the process, if they have any.

2. Once the parties agree to mediate and are 'ripe' for resolution, set up the next meeting to start the process. Collect retainers, confirm time lines, and discuss empowerment balances and goals.

3. Check and recheck that all parties to the dispute have been identified and notified.

4. Make sure that the *final decision-makers* will be attending the mediation, or will be readily accessible.

5. In compelled or mandated mediations the same 'counter intuitive' dialogue should take place. The difference is that time lines are typically dictated by the referral source

and litigation is pending. Although the 'willingness' factor has outside pressures, the mediator must focus on the success of the process, its benefits of being confidential, the parties' control of the outcome, its cost effectiveness, and its quickness.

6. Before the mediator convenes the hearing, he/she must know all the parties and their position in the 'food chain'. However, he/she must be sensitive and empathetic to all the parties and emphasize compassion. Remember the goal, (if the parties are ready to mediate), is to resolve the dispute with a durable and lasting solution developed by all parties involved.

Typically, mandated mediations involve insurance carriers and other outside parties. Initially, these outside parties are perceived as third parties, when in fact they become lead parties. The Golden Rule influences most negotiations: "HE WHO HAS THE GOLD, RULES." Thus, insurance carrier's involvement tends to reposition the pecking order of the parties.

Make sure the parties resolve the following issues before the mediation:

1. Who will serve as mediator and how will he or she be paid?
2. Will the mediation be confidential?
3. What is the scope of the issues to be addressed?
4. What are the specific issues?
5. Who will attend the mediation?
6. Will there be any discovery?
7. Will there be any pre-mediation submissions?
8. How will the parties present their cases?
9. Where will the mediation be held?

Evaluating a Case for Possible Mediation

As a general rule, any civil dispute is a candidate for mediation. The following is a checklist of some of the factors that can be used to evaluate whether a given dispute might be appropriate for mediation. You should give this to the parties during pre-mediation.

When Mediation Is Likely to Be Successful

1. __Parties are unable to reach an agreement through normal negotiations
2. __Assistance of a neutral third party is needed to help identify and prioritize the issues and explore solutions
3. __Direct client input is important to achieve settlement
4. __Parties agree to mediate
5. __No pure question of law
6. __The law is unable to provide an adequate remedy
7. __To resolve a dispute without jeopardizing an ongoing relationship
8. __Desire for confidentiality or privacy
9. __Location of litigation is unfavorable to your client
10. __To minimize cost
11. __To expedite settlement

When Mediation is Likely to Be Unsuccessful

1. __Issue of first impression (test case)
2. __Motion in limine ruling is needed on the exclusion or admission of pivotal evidentiary issues likely to affect the outcome of the case
3. __Potential for extremely high monetary jury verdict
4. __Incompetent party (parties must be legally competent to contract)
5. __Unwilling party
6. __Nuisance issues (e.g. payback, revenge, desire for moral victory)
7. __Merely for purposes of delay of litigation
8. __Highly technical or complex issues in dispute (e.g. patent cases)
9. __Available mediators or complex issues in dispute (e.g. patent cases)
10. __Available mediators unacceptable to either party
11. __One of the parties is maintaining an extreme and uncompromising position
12. __Type of disputes which might not be appropriate for mediation include:
    a. __Constitutional rights issue (e.g. civil rights case)
    b. __Gross disparities in bargaining power between the parties
    c. __Statutory requirement of exhausting administrative process prior to litigation (e.g. social security, workers' comp)
    d. __Highly emotional issues
    e. __Underlying issue of insurance coverage
    f. __Plaintiff relying on punitive damages as a key element of his claim and proof of egregious conduct is hotly denied by defendant

Sample Pre-Mediation Letter

CLIENT INFORMATION
Natalie J. Armstrong
Golden Media
PO Box 491981
Los Angeles, CA 90049
T: 310-453-4409
F: 310-453-0866
 HYPERLINK "mailto:Natalie@Golden-Media.com" mailto:Natalie@Golden-Media.com
 HYPERLINK "http://www.Golden-Media.com" www.Golden-Media.com

This information is intended to assist you to maximize and economize your mediation experience. My goal is to assist you to most effectively, comfortably and confidently represent yourself in mediation. In mediation, you will be making all of the decisions. The mediator has no decision-making power. Thus, it is important for you to consider how you can best represent your interests in mediation, as well as the results that you would like to create in mediation.

How long will the mediation take and how much will it cost?
Unfortunately, it is hard to predict with precision how long a mediation will take or how much mediation will cost. These issues depend primarily on how agreeable the participants are. Generally, for divorce, business and organizational matters, we meet between two and six times for approximately two hours each meeting. The cost of a comprehensive mediated agreement generally ranges between $1,000 and $3,000. I will be as specific as possible in these regards once I have a better understanding of your situation.

What if we already agree on lots of issues?
Fantastic! The first thing that we want to do in mediation is to identify what you already agree on. We will use those points of agreement as a foundation for your overall Agreement. The standards that make sense to you on certain "easy" issues can often be applied to resolve other issues. We will want to be sure that your Agreement is well-informed and that you are aware of the many issues that you may want to consider. What is included in your Agreement is up to you. Our goal is to support your well-informed decision-making.

What are our chances for success?
Over the years, approximately 90% of mediating parties at The Mediation Center have reached comprehensive resolution. This high success rate is due to most participants being highly motivated to reach agreement.

What if we don't reach agreement?
In mediation, all discussions and materials, with very few listed exceptions, are confidential. If no mediated Agreement is reached, evidence of the mediation discussions,

mediation materials and any draft mediation resolution will not be admissible in court or any other adversarial proceeding.

Who pays for mediation?
Responsibility for mediation fees is an issue to be decided by mediation participants. Participants are encouraged to consider sharing fees to some extent so all will benefit from expeditious and economic resolution.

What about our own attorneys?
As a mediator and attorney myself, I am ethically bound to advise you to have any mediated Settlement Agreement reviewed by individual legal counsel prior to your signing that Agreement. In practice, I have found that it works best for mediating parties to obtain one to four hours of individual legal advice throughout the mediation process. This legal advice may be best obtained early in the mediation, by legal counsel's review of a near-final draft Agreement, and by counsel's review of the final Agreement. This level of consultation will dramatically elevate your comfort and confidence in the final agreement.

What about utilizing experts?
It may make sense, in a particular case, for mediation participants to retain mutually trusted experts. For example, participants may desire a trusted valuation of real property, personal property or a business. It is also not uncommon for mediating parties to choose to jointly consult with an accountant or tax expert. Mediation participants with parenting concerns may find it beneficial to obtain the thoughts and recommendations of a trusted child psychologist. Mediation participants may choose to jointly retain an impartial advisory attorney who, based upon an agreed-upon set of facts, may render an advisory non-binding opinion on how a court might resolve the identified issues.

What else can I do to prepare?
Perhaps the most important thing any mediating party can do to ensure a satisfying and successful mediation experience is to prepare for the mediation discussions by seeking clarity as to his or her desired outcomes and perceived standards of fairness. Stated otherwise, "What do you want?" and "How will you know that it is alright to agree?"

Thank you for your kind attention. I look forward to working with you.

Sincerely,

Sample Agreement to Mediate

AGREEMENT TO MEDIATE

This is an Agreement between _____ and _____ and Natalie J. Armstrong, hereinafter "mediator," to enter into mediation with the intent of resolving the following issues: _____

_____

_____.

The parties and the mediator understand and agree as follows:

1. Nature of Mediation
The parties hereby appoint Natalie J. Armstrong, as mediator. The parties understand that mediation is an agreement-reaching process in which the mediator assists parties to reach agreement in a collaborative and informed manner. It is understood that the mediator has no power to decide issues for the parties. The parties understand that mediation is not a substitute for independent legal advice. The parties are encouraged to secure such advice throughout the mediation process and are advised to obtain independent legal review of any formal mediated agreement before signing that agreement. The parties understand that the mediator has an obligation to work on behalf of all parties and that the mediator cannot render individual legal advice to any party and will not render therapy nor arbitrate within the mediation.

2. Scope of Mediation
The parties understand that it is for the parties, with the mediator's concurrence, to determine the scope of the mediation and this will be accomplished early in the mediation process.

3. Mediation is Voluntary
All parties here state their good faith intention to complete their mediation by an Agreement. It is, however, understood that any party may withdraw from or suspend the mediation process at any time, for any reason.
The parties also understand that the mediator may suspend or terminate the mediation if he feels that the mediation will lead to an unjust or unreasonable result; if the mediator feels that an impasse has been reached; or if the mediator determines that he can no long effectively perform his facilitative role.

4. Confidentiality
It is understood between the parties and the mediator that the mediation will be strictly confidential. Mediation discussions, any draft resolutions and any unsigned mediated agreements shall not be admissible in any court or other contested proceeding. Only a mediated agreement signed by any parties will be so admissible. The only other exceptions to this confidentiality are if all parties waive confidentiality in writing or in an action brought by any party against the mediator. The parties agree not to call the mediator to testify concerning the mediation or to provide any materials from the mediation in any court proceeding between the parties. The mediation is considered by

the parties and the mediator as settlement negotiations. All parties also understand and agree that the mediator may have private caucus meetings and discussions with any individual party, in which case all such meetings and discussions shall be confidential between the mediator and the caucusing party.

5. Full Disclosure
Each party agrees to fully and honestly disclose all relevant information and writings as requested by the mediator and all information requested by any other party, if the mediator determines that the disclosure is relevant to the mediation discussions. In family mediation cases, each party agrees to fully and accurately disclose all income, assets and debts.

6. Mediator Impartiality
The parties understand that the mediator must remain impartial throughout and after the mediation process. Thus, the mediator shall not champion the interests of any party over another in the mediation nor in any court or other proceeding.

7. Coordination with Legal Counsel
The parties agree that the mediator may discuss the parties' mediation process with any attorney any party may retain as individual counsel. Such discussions will not include any negotiations unless the parties instruct the mediator that their attorney(s) have negotiating authority. The mediator will provide copies of correspondence, draft agreements and written documentation to independent legal counsel at a party's request.

8.Mediation Fees
The parties and the mediator agree that the fee for the mediator shall be $___ per hour for time spent with the parties and for time required to study documents, research issues, correspond, telephone call, prepare draft and final Agreements, and do such other things as may be reasonably necessary to facilitate the parties reaching full Agreement. The mediator shall also be reimbursed for all expenses incurred as a part of the mediation process.

A payment of $___ toward the mediator's fees and expenses shall be paid to the mediator along with the signing of this agreement. Any unearned amount of this retainer fee will be refunded to the parties. The parties shall be jointly and severally liable for the mediator's fees and expenses. As between the parties only, responsibility for mediation fees and expenses shall be: _____.
The parties will be provided with a monthly accounting of fees and expenses by the mediator. Payment of such fees and expenses is due to the mediator no later than 15 days following the date of such billing, unless otherwise agreed in writing. There shall be a 1.0% monthly service charge on accounts not paid by the last day of the month.

Should payment not be timely made, the mediator may, in his sole discretion, stop all work on behalf of the parties, including the drafting and/or distribution of the parties' Agreement, and withdraw from the mediation. If collection or court action is taken by the mediator to collect fees and/or expenses under this Agreement, the prevailing party in any

such action and upon any appeal there from shall be entitled to attorney fees and costs therein incurred.

DATED this ____ day of _____, 200_.

Sample Mediator Fee Schedule I

The following fee schedule will apply to this mediation:

Costs: _____charges a non-refundable administrative fee of $ per party to be remitted upon execution of the Mediation and Confidentiality Agreement. This fee covers the time spent on case administration, the initial intake call, toll calls, postage, photocopying, faxes and file administration. The administrative fee does not cover extraordinary out-of-pocket expenses such as the cost of messenger services and Federal Express, or extraordinary long distance telephone, travel and other charges, for which clients will be charged separately.
Fees: The mediation fee shall be $ per hour. The mediation fee shall be split between the parties, as they shall agree in the mediation; otherwise shall be 100% responsible for these fees. The initial retainer fee of $ representing two (2) hours of mediation service, is due and payable upon the signing of this agreement. Additional fees will be billed and are due and payable upon receipt.

Mediators are entitled to compensation for all time spent on the case, including preparation time, telephone time and attendance at mediation sessions. Travel time is charged at the full hourly rate.

Cancellation Fees: If the case settles during administration or is withdrawn after the Agreement to Mediate has been signed, _____will retain the non-refundable $ administrative fee and will bill the parties for any mediation services already performed (e.g., telephone time with any of the parties after the initial intake call).

Sample Mediator's Fee Schedule II

Mediation Fee Schedule

1. Mediator's Objective

It is our objective to provide mediated dispute resolution services at a reasonable cost to the parties in, or about to become involved in, litigation. In most cases, the Schedule of Fees below accurately sets forth our fee for mediation services. If, however, the scheduled mediation Fee is determined to be inappropriate in a particular case, or unaffordable by a particular party, we will consider adjusting the fee or making alternative arrangements.

2. Services Provided

The scheduled Mediation Fee covers the cost of one mediation session day, usually in our offices, and includes scheduling and administration of the mediation, usually a working lunch at noon, and limited telephone conferences with the attorneys before and, if necessary, after the mediation sessions.

3. Daily Flat Fee Schedule of Mediation Fees Per Party

Amount in controversy Number of Parties 2 3 4 5* Less than $ - 100,000 $ 850.00 $ 700.00 $ 600.00 $500.00 $ 100,000 - 499,999 $ 950.00 $ 800.00 $ 700.00 $600.00 $ 500,000 - 999,999 $1,000.00 $ 900.00 $ 800.00 $700.00 $1,000,000 - 2,499,999 $1,250.00 $1,100.00 $ 950.00 $800.00 $2,500,000 + $1,500.00 $1,300.00 $1,100.00 $900.00

The daily fee includes:
·
Scheduling and administering the session(s) · Any pre-mediation attorney conferences, whether by telephone or in person · Preparation for the mediation · Conducting the mediation session(s) · Conducting post-sessions telephone facilitation as needed · All expenses incurred by the mediator, including long-distance telephone copying, FAX, postage, etc.
*Fees for mediations exceeding five parties will be negotiated individually.

4. Hourly Mediation Fee Schedule

Conference Time: $185.00 per hour ($250.00 for 3 or more parties) Review Time: $150.00 per hour ($180.00 for 3 or more parties) Travel Time: $ 50.00 per hour ($0.00 within _____) Administrative Fee: $150.00 per party

5. Weekend/Holiday Sessions.

If it is necessary to schedule a mediation session on a weekend day, due to scheduling conflicts or an imminent trial setting, there will be an additional charge of $_____ to cover off-hours air conditioning and staff expenses, to be divided equally among the parties.

6. Apportionment of Fee

All participating parties usually will share the total Mediation Fee equally.

7. Time & Duration of Sessions

The mediation sessions typically commence at 9;30 a.m. and continues until completed. If we determine that a case appears likely to be fully settled with only a half day of mediation , and involved only two parties, less than $50,000 in controversy, and a single issue, then the mediation session instead may commence at 1:30 p.m. (and the fee adjusted accordingly). While most sessions conclude before 6:00 p.m., we will be committed to work on the case throughout the evening, if necessary.

8. Exceptions to Fee Schedule

The usual fee for mediations scheduled for one-half day will be based on the hourly fee schedule. Except under extraordinary circumstances, regardless of the number of parties or amount in controversy, the maximum Daily Mediation Session Fee would be $_____ per day plus out-of-pocket expenses, to be apportioned equally among the parties participating in the Mediation Fee. In some complex, multi-party disputes, which are anticipated to require multiple mediation sessions, with substantial preparation and between-session work, we may also find that the Mediation Fee is more appropriately determined on an hourly basis.

9. Additional Sessions

A small number of complex, multi-party cases require more than one mediation session. If needed, subsequent sessions are usually scheduled by mutual consent at the completion of the mediation day. If more than one successive mediation day is required, then the full fee for all scheduled sessions is due and earned upon the commencement of the first day of mediation.

10. Rescheduling

There will be no fee for rescheduling of a mediation session.

11. Early Settlement

If a case settles after a mediation session has been scheduled, but before such session has occurred, then a case administration fee of $_____ shall be due from each party and either shall be retained from the parties' previously-tendered fees or delivered to our offices by the parties attorneys within ten (10) days after settlement.

12. Form of Payment

All parties' fee payments shall be in the form of cash, cashier's check, or check drawn on the bank account of (or payment guaranteed by) a law firm and made payable to _____. The Tax ID Number is _____.

13. Payment Due Date

It is requested that when a flat fee basis is utilized for the determination of the Mediation Fee, the full amount of the Mediation Fee is due in our offices not later than the commencement of such mediation session. If an hourly basis is utilized, the full amount of the Mediation Fee is due in our offices within ten (10) days after notification of the amount of the fee.

14. Responsibility of Attorneys

Each party's attorney shall be responsible for timely delivery of payment of such party's fees as specified herein.

Chapter 8

The Opening/Introduction

When one door closes another door opens; but we so often look so long and so regretfully upon the closed door, that we do not see the ones which open for us.
Alexander Graham Bell

Mediator's Opening Statement

Opening a mediation requires flexibility on the part of the mediator. Many factors enter into how the mediator should begin the process. A few are:

1. The experience of the disputants in the mediation process
2. The emotional level of the disputants
3. Two party vs. Multi-party conflicts
4. The physical layout of the facility
5. The willingness level of the parties to mediate
6. The degree of safety and hope that needs to be instilled in the parties
7. The cultural make-up of the parties
8. The educational level of the disputants

A mediator's opening statement may be divided into the following components:

1. Mediator Introduction (of self and parties)
2. Prior Contacts with parties and representatives
3. Definition of the Mediation and Description of Mediation Process
4. Statement of Impartiality and Neutrality
5. Description of Mediation Logistics (place, time, caucus rooms)
6. Explanation of any Caucus Procedures
7. Defining Confidentiality and Exceptions to Confidentiality
8. Suggested Behavioral Guidelines (ground rules)
9. Answering Parties' Questions
10. Joint Commitment to Begin

Keys to A Successful Opening/Introduction

1. The mediator wants to make the parties feel comfortable and as relaxed as possible in their situation. The mediator must concentrate on humanizing the process by acknowledging and commending the parties on their choice to resolve their conflict through the mediation process. "Break the ice' with conversation about their family, the weather, and/or anything that cannot be perceived as controversial.

2. Once the parties are assembled, the mediator's task is to start the process by first establishing his/her credibility by an introduction of his/her substantial knowledge in the field of expertise surrounding the conflict. The purpose of this is to instill 'safety' in the minds of the parties and in the process. Thus, the third party who intervenes is not only knowledgeable in the mediation process, but also in the surrounding issues of the dispute. This adds a level of comfort to the disputants, assisting them to 'open' up and tell their stories. The mediator should also ask the parties and others to introduce themselves so that he/she can have a greater knowledge of the parties backgrounds, education, ethnicity, and/or other information that might influence the process.

3. For a process to function smoothly, ground rules need to be established. The mediator's responsibility is to control the 'process' not the 'outcome'. Succinct rules to follow are necessary to add armor to the 'safety of the process'. Ground rules are important to the disputants, as a 'field leveling' device of the power of each party. If fears of the process cannot be dispelled, the willingness to proceed can be greatly diminished.

4. The 'safety of the process,' as perceived by the disputants, can be even further stimulated by reminding them and their advocates that the process is not only private but confidential and that the mediator's role is as a 'neutral' and that settlement odds are very high.

5. The mediator may find it advantageous to establish behavioral guidelines for their discussions. Any such "ground rules" should be compassionately enforced as a means of keeping the participants on track. Ground rules may be introduced by saying, for example: "Lots of people find some ground rules helpful for their discussions. These are some that I have developed over time. Would you mind taking a look at these and letting me know if these guidelines would work for you, and of any additional understandings that you would like."

Suggested Ground Rules

1. You will have a full opportunity to speak on each issue presented for discussion - there is no need to rush or interrupt.

2. You are encouraged to ask genuine "questions of clarification." Please avoid asking "questions of attack."

3. Please use each other's first names, not the pronouns "he" or "she."

4. Speak for yourself only.

5. Appeals and attempts to convince should be made to each other and not to the mediator.

6. If something is not working for you, speak up.

Sample Mediation Opening Script – Short Form

In circumstances where parties are strongly committed to mediate and have a reasonable understanding of the process, a mediation may begin with a short "mediator's opening statement." This is typical in civil and commercial mediation where parties are represented by legal counsel, and in other situations where parties are relatively "sophisticated" and when the practicalities of the situation (e.g., multiple parties, parties from out of town, emergency) necessitate moving forward with negotiations.

Good morning. I am _____, an attorney from _____. I am your mediator today, which means that I am here to help you and to aid your efforts to resolve your conflict. To help you, I will stress three things:

One, your voluntary participation. The mediation process exists for your benefit -- which is why it can be voluntary. I will be helping you make your own choices in your own self interest by examining your essential needs and positions.

Two, I will emphasize symmetry or fairness. This means that I will treat every side equally and act only inside the limits you authorize.

Three, confidentiality. The settlement conference is off-limits, just as stated in the contract you signed. Even more, what we talk about in private remains private unless you say otherwise.

To start the process, I will ask each side to put their issues on the table and to tell us about their case. You can take the time you need, but most people take about five to ten minutes to describe things. When both sides have finished, we will then break into separate groups or caucuses and go from there, as the matter requires.

_____, I would like you to start by sharing some information about your case. What would you like to tell us?

Sample Mediation Opening Script – Long Form

Good morning. My name is _____. I will be your mediator today. Let me tell you briefly what my qualifications are. I am a lawyer, passed my first bar exam in 1982 and have been in litigation practice since then. I am also a mediator certified by _____. and I have been participating in alternative dispute resolutions since about 1987.

You are to be commended for agreeing to participate in mediation, which is a proven, successful process. Since you are here by agree ment I know that you are committed to making the system work for you and in attempting to reach the best resolution for your dispute.

At the outset I should clarify that I have no connection with this case and that I know what I know about this case from the confidential position statements and other materials you have sent me. My knowledge of the parties and their positions is limited to what you have presented me.

While this has allowed me some familiarity with your contentions, it is not enough for me to have formed an opinion or any preconceived ideas about the nature of your dispute or how it should be resolved.

Also, in case there is any question, I want to explain the mediation process. I am not a judge or a decision maker. My job is to facilitate communication and to help each of you think and communicate more clearly with the hopes that you will be able to reach a settlement.

My job is to probe and ask questions. My job is to help each of you explain your case to me in a manner that will help you reevaluate both your position and that will help you reevaluate the position of the other party with an eye towards reaching a resolution of this dispute.

By Texas State statute the mediation process is confidential. I will do everything in my power to assure that the process remains confidential. The pre-submission materials and any materials you give me here today are either returned to you or destroyed at the end of the mediation. My notes are destroyed at the end as well.

However, let me warn you that any information that can be independently discovered is not confidential as to the parties. Regardless of that, I as a mediator cannot be compelled to come into court and testify as to any part of the mediation except that the case did or did not settle. That the case did or did not settle is the only disclosure that I will make as to the case. The reasons, so-called "fault" and other matters are all the subject of absolute privilege as far as I am concerned.

Now let me briefly describe the procedure that we will be following today. When I finish my remarks, each party will make an opening statement. An opening statement is simply a statement of your party's position. It should take from five to twenty minutes.

Usually an opening statement includes the history of the dispute, the relief or resolution that you think is appropriate, and anything that you wish to add to shed light on the position of your client.
After each of you makes an opening statement, we will remain together for what is called the joint session. In the joint session I will ask questions from each of you to make certain that I understand your position and that I have all the information that I need.

At some point in our discussion we will probably break into separate groups called caucuses. During this time, each group will be in a different physical location. I will meet privately with one party and then with the next. This portion of the mediation usually lasts for several hours.

It is important for you to understand that during the private caucuses I may spend more time with one party than with another. The time I spend with each party has nothing to do with anything other than the number of questions I might have and is often influenced by special needs, such as directions to smoking areas, that have nothing to do with the dispute.

During the caucuses you will have an opportunity, if you wish, to disclose things to me that you want me to know, but that you do not necessarily wish for me to disclose to the other side.
I want to assure you that what you tell me remains confidential. I also want to remind you that if you want something disclosed you will need to give me permission to disclose it.

For this process to work I need your commitment on the issues of time and of authority. Mediation is a process and it takes time to develop. While I will not keep you here against your will, I would like your commitment to stay and work on resolving the dispute as long as I see progress being made. The reason I ask this commitment is that I am the only person who will have an overall picture of the progress of this dispute. Each of you will only have a partial picture. Are you willing to make this commitment to me now?

Good. Thank you. The next commitment I ask is that of authority. Do each of you have full authority to negotiate a settlement of this case? By authority I mean the ability to establish or change a position during the course of these negotiations, up to the amount of the last demand. I am not asking you to use such authority, I am only asking if each of you has full authority? Do you?

Good. Our goal here is to reach an agreement. I again commend you for your commitment to this process and your agreement to participate. If you have no questions at this time we will begin with your opening statements.

Chapter 9

Communication

Good communication is as stimulating as black coffee, and just as hard to sleep after.
Anne Morrow Lindbergh

Communicating During the Mediation Process

Once the mediator has the process opened, it is the disputants' opportunity to tell their stories and express their interests. Depending on the emotional level of the dispute, the mediator may need to let the parties vent their anger and feelings early in the process and before they begin their factual stories. The ability of the disputants to vent, humanizes the conflict and allows underlying issues to be addressed. This then allows the process to move towards resolution and facilitates rational discussions.

The mediator typically uses the opening presentations (party communication) to learn as much as possible about the parties' interests and priorities to determine whether underlying conflicts must be addressed to resolve the immediate dispute.

Close the gap between the facts and the parties' differing perceptions of them. (Then you are saying, "John, you are not upset with the quality of the product your contractor is providing, but object to the time delays and the attitude your contractor has.")

Reinforce the positive aspects of the relationship

Establish enforcement of the agreed upon ground rules. (Interruptions, control of emotion, and other behaviors)

With active listening and the demonstration of patience on the part of the mediator, he/she builds the trust and rapport necessary for the parties to truly open up, telling their stories and divulging their interests. Once the stories are told and interests are acknowledged, the parties then can begin to develop their rational negotiating thought process.

Advocates for the parties trained in negotiation tend to intervene at this phase and wish to 'cut the chase' and proceed directly to settlement, blaming the other party for the conflict. If the disputants actually control the outcome, instead of an insurance carrier or organizational body, the mediator needs to restate the ground rules and re-establish the road map developed in the convening and opening phases. The durability of the final settlement is 'at stake'. Disputants negotiating without the ability to tell their stories and explain their underlying interests jeopardize the longevity of their settlement agreement.

At this point in the mediation, the mediator also has the opportunity to ask the disputants about their evaluation of the weaknesses and strengths of their cases and whether they have left any pertinent information out. It is also an opportunity to emphasize the benefits of settling once the disputant reveals their evaluation of their weaknesses. This tends to trigger the parties' conversion from storyteller to negotiator.

Caucusing Strategies and Guidelines

The ideal mediation enables the mediator to have the parties in joint session (the same room) as much as possible. However, this is not always possible. To keep the mediation productive, a private session with each party may be useful. These caucuses have the ultimate goal of arriving at a proposal that can be transmitted to the other side.

The following guidelines may apply:

Choose which party to meet with first
Initial Caucus guidelines
Give the non-caucusing party an assignment to work on, such as identifying a strategy to address the issues concerning that party.
Review the confidentiality agreement at the beginning.
Keep the caucus as short as possible.
Recognize how the caucus affects party power balance.
Focus on the interests of the parties.
Refrain from making evaluative statements of the case until later in the mediation process.
Goals of the Initial Caucus
Learn additional information.
Discover interest underlying the issues.
Give the parties an additional opportunity to vent.
Find the real source of conflict.
Move unrealistic parties into reasonable positions.

When a Party is not forthcoming, try using a hypothetical to suggest a direction the negotiation may take without obligating a party to the suggestion.

RESPONDING TO EMOTIONS

When responding to emotions:

Use emotion as information.
Define emotions of conflict.
Use emotions to inform and educate the parties.
Encourage emotional expressions.
Draw out emotion if it represents interests that should be considered.
Draw out unexpressed emotion when it is impeding progress.

Identifying the Issues

When identifying the issues in a mediation, these guidelines may be useful:

- What is an issue?
- Any element of the dispute that expresses a party's interest(s) or need(s) and that is capable of being addressed effectively in the mediation process.
- Understand the dispute at hand
- The dispute may encompass many issues.
- Understand that only the disputes that can be addressed effectively in the mediation process itself should be considered as issues.
- Shift the focus of attention to the future of the dispute.
- Identify the issues and label or characterize each one in a way that frames the issues for the parties. This will further discussion and encourage a possible range of solutions.
- Establish priorities
- Identify the issues that matter most to the parties.
- Identify the issues that the parties continually return to, (this is a good indicator that it is high priority).

Structuring the Discussion of the Issues

The mediator must facilitate agreements by leading the parties into negotiation. Understand that agreements beget agreements. The following strategies may be useful:

- Discuss the easy issues first.
- Discuss the hard issues first.
- Categorize the issues and begin with discussion of the issue of highest priority.
- Identify principles of conduct that the parties can apply to particular elements of the dispute.
- Deal with issues chronologically.
- Determine causal relations of various issues, and start with the first cause.

Whatever approach the mediator takes, he/she must understand that he/she is solely responsible for shaping the structure and agenda of the discussion.

Active Listening

The following text is excerpted and modified from ICM's manual for this training prepared by Lee Jay Berman of the Institute for Mediation Studies.

Hearing and Listening are not the same. Hearing is *physiological*. Listening is *psychological.*There's a difference between listening for what you want/expect to hear versus what is actually said/meant.

Active listening refers to a whole orientation toward life and people. It exhibits that the listener is trying to understand how it would be to speak or feel as the other person. It implies that the person speaking is important and worth giving your attention, energy and time. You cannot fake listening actively because it demands more that nodding your head and saying "uh-huh" occasionally.

Active listening is difficult because it demands that you attempt to understand another person's communication and temporarily suspend judgment on what is being said. By withholding judgment and showing another that we are attempting to understand his or her feelings, we communicate that we respect the person and that he or she does not run the risk of an immediate "put-down" by being judged stupid or silly. This helps to build a climate in which people feel safe to discuss beliefs and values. Expressing empathy builds trust and closeness.

Guidelines for Active Listening

The following text is excerpted and modified from ICM's manual for this training prepared by Lee Jay Berman of the Institute for Mediation Studies.

1. Do not express your agreement or disagreement with what the other person is saying. Simply show that you have understood what he or she said. Some typical ways to do this are:

- "Then the problem as you see it is…"
- "Do you mean, for example, that…!"
- "If I understand you correctly, you feel we should…"
- "You would like me to…"

2. After you have summarized what you understand the other person to say, give them a chance to agree or disagree with your perceptions. Stay on this level until all misunderstanding seem to be resolved, and you believe that you understand what the other person feels and would like to see happen.

3. Value the silences to encourage the other person to say all that may be on their mind. Don't rush to fill the void.

4. Use open-ended questions to encourage the other person to continue talking or to elaborate on what they are thinking or feeling. For example, some typical questions might be:

- "How would you like thing to change?"
- "How did you feel about that?"
- "Is there anything else?"
- "How important do you think this is?"
- "Where do you think the two of you disagree?"
- "Can you tell us more about this?"

5. Don't take the focus of the conversation away from the other person by disagreeing, or by talking about you or your thoughts or perceptions.

Active Listening Techniques

Encouraging-- Use this when you are seeking candor/honesty and to keep them talking.
Clarifying-- Use this when you are seeking understanding or to get more information.

Restating-- Use this to show you understand and/or to check the accuracy of your understanding.

Reflecting-- Use this to show understanding/empathy of the other person's feelings/emotions.
Validating-- Use this to show you care about the person and/or the issue.

An Example

P1: "Any opinions on the Xmas party?" -- Encouraging
P2: "Why are we changing the location?"

P1: "So you prefer the old location?" -- Clarifying

P2: "Yes, it was really convenient for everybody."

P1: "So location is most important?" -- Restating

P2: "Yeah, it only works for the planning committee!"

P1: "You seem really angry about this." -- Reflecting

P2: "You bet I am!"

P1: "That's good. Let's talk about it."-- Validating and Encouraging

Reframing Issues

The following text is excerpted and modified from ICM's manual for this training prepared by Lee Jay Berman of the Institute for Mediation Studies.

Reframing is when you are using the Language of Diplomacy. It means choosing your words carefully in order to de-escalate hostility and calm emotions. It allows users to move from positions to interests, describe issues as solvable problems, and develop *shared* goals or trade-offs.

Reframing Techniques

1. Frame issues in terms of the situation or relationship of the participants rather than in terms of a person's attitude or behavior.

   Wrong: Let's talk about your negative attitude to anything we propose.
   Better: Let's talk about how we can evaluate proposals.

2. Frame issues so they cannot be answered in a "yes" or "no" manner.

   Wrong: Let's talk about whether the staff will have three additional days off.
   Better: Let's talk about the issue of days off.

3. Frame issues as questions or problem statements.

   For example, "How can we ...?" or "What can be done to ...?"

4. Frame issues so that multiple solutions are possible.

   Wrong: Who will have use of the school car?
   Better: Let's talk about the issue of transportation needs.

5. Separate issues or problems from people. Depersonalize conflict.

   Wrong: Let's talk about John's exploiting the grievance procedure.
   Better: Let's talk about making the grievance procedure more effective.

6. Frame issues so that they are a joint problem.

   Wrong: How can the administration better inform teachers about policy changes?
   Better: How can we improve communication when there are policy changes?

7. Frame issues in terms of future relationships rather than past guilt or innocence.

   Wrong: Who was at fault for the impasse in our last negotiations?
   Better: Let's discuss how to develop a negotiating procedure that avoids impasse.

Reframing Exercise

1. You are in the initial Joint Session in mediation with roommates Tom and Sue.

2. Take Tom's "complaints" and rephrase them into more neutral language that captures the underlying interest or need she seems to be expressing. (Remember that Sue will also hear what you say.)

"So, one of your concerns is..."

3. Do the same with Sue's complaints.

4. Look at Tom and Sue's list of "interests" for any interests they have in common, and express them to Tom and Sue.

"You both have expressed, in different ways, a concern about..."

Tom's Responses to Your Question:

1. She's always trying to tell me what to do.
2. What a busy body! She wants to know every detail of my life.
3. She says one thing and does another.
4. You can't depend on her. She's always late.
5. She thinks our home needs to be the center of every activity in the neighborhood.
6. Whatever I tell her ends up all over the neighborhood.
7. She's neurotic! Every time I put something down she thinks that I'm making a mess.

Sue's Responses to Your Question:

1. He wants everything done right now.
2. I can't believe anything he tells me.
3. He never says what's really going on.
4. I never know when he will return what he borrows.
5. He wanders around the house at all hours of the night.
6. His dirty clothes are everywhere. Our upstairs smells like a locker room.
7. It's his damn music - all day, all night. -- Nothing but rap music.

"I" Messages

"I" Messages are another tool to take the sting out of potentially negative or hurtful communication between the parties. The mediator models how and then encourages the parties to speak in reference to their personal "I" instead of an attacking "you."

"I" Message Execution

"When you (Blank #1)" (behavior of the listener)

"I (Blank #2)" (behavior of the speaker)

"because I (Blank #3)"(the source of the conflict inside of the speaker)

"so, what I'd like you to do is (Blank #4)" (speaker's suggested solution).

Example

"When you don't tell me the task is a priority, I may not finish it when you need it because I am focused on my normal workload. So, what I'd like you to do is tell me your deadline when you give me the task."

Questions to Elicit "I" Messages

Asking "Why" or "What" questions will trigger "I" messages.

"You seem _____." (insert a feeling like angry, adamant, etc.)

"What makes you _____?"

"Why does that make you _____?"

"Specifically, what about that makes you feel so _____?

Reality Checks

The following text is excerpted and modified from ICM's manual for this training prepared by Lee Jay Berman of the Institute for Mediation Studies.

Mediators can use reality checks to rein in run-away emotions. When people are overly angry, hurt, or greedy, they lose their perspective. And a wake-up call is needed. Reality checks may be used in joint session and in caucus.

1. The Relationship

   "How long have you known Janie?"
   "Could you be doing business with each other in the future?"

2. Basic Concerns

   "What would you consider to be your basic concerns or needs?"
   "What would you like to see happen here today?"

3. The Other People's Shoes

   "What do you think the other people's concerns are?"
   "What do you think they will want?"

4. Principles

   "What standards should be taken into account in arriving at a fair settlement?"

5. Benefit of Agreement

   "How would it feel to walk away today with the whole matter settled?"

6. Options

   "What are some fair ways of settling this problem, fair to you and fair to them?"

7. Costs of No Agreement

   "What will you do if you don't reach agreement?"
   "What are they likely to do if you don't reach agreement?"
   "How much will not agreeing cost you?"

8. The Parade of "Horribles"

   "Do you know what your attorney fees would be, and you could still lose."

Chapter 10

Negotiation

It is the nature, and the advantage, of strong people that they can bring out the crucial questions and form a clear opinion about them. The weak always have to decide between alternatives that are not their own.

-- Dietrich Bonhoeffer (1906-45), German Protestant theologian

Negotiation Theory

Negotiation power can be defined as "the ability of the negotiator to influence the behavior of another."

There are two primary negotiation theories and strategic approaches to negotiation:

1. Competitive/positional negotiation

2. Problem-solving/collaborative negotiation.

The Best Negotiators Will Have Both Skills Sets

It is important to appreciate that the most effective negotiators will have a wide array of negotiation skills, both competitive and problem-solving, and will effectively mix and match these approaches depending upon what the negotiator believes will work best with a particular "negotiating partner."

The Competitive Approach To Negotiation

Competitive negotiation strategy is essentially a manipulative approach designed to intimidate the other party to lose confidence in their own case and to accept the competitor's demands. This approach is characterized by the following:

1. High opening demands;
2. Threats, Tension and Pressure;
3. Stretching the facts;
4. Sticking to positions;
5. Being tight lipped;
6. Want to outdo, outmaneuver the other side; and
7. Want clear victory.

When a competitive negotiator is asked how they will know that they have reached a good agreement, they may reply that the agreement is "better than fair."

Assumptions of the Competitive Approach

There are certain assumptions, a worldview really, that lie behind the competitive approach to negotiation. This "distributive" worldview includes the following assumptions:

1. Negotiation is the division of limited resources;
2. One side's gain is the other's side's loss; and
3. A deal today will not materially affect choices available tomorrow.

Risks of the Competitive Approach

While competitive negotiation tactics are often effective in "claiming" already defined value, there are also certain risks to competitive negotiation. Foremost among these risks are damage to the negotiating relationship and a lessened overall likelihood of reaching agreement. Here is a list of the disadvantages of the competitive style:

1. Confrontation leads to rigidity;
2. There is limited analysis of the merits of dispute and relevant criteria for resolving issues;
3. There is limited development of solution alternatives;
4. It is hard to predict the outcome of the competitive approach or control the process;
5. Competitors are generally blind to joint gains;
6. Competitors threaten their future relations; and
7. Competitors are more likely to have impasse and increased costs.

The Problem-Solving Approach

The problem-solving approach to negotiation has been described as "enlightened self-interest," rather than the "egocentric variety." This approach is collaboration-based, where *value is created* by the parties rather than claimed. Therefore, gains are not necessarily viewed as at the expense of the other party.

Assumptions of the Problem-Solving Approach

As one might expect, there is a different worldview behind the problem-solving approach to negotiation. The primary assumptions of the this approach are the following:

1. Some common interests exist between parties;
2. Negotiation is benefited by a full discussion of each participant's perspective and interests; and
3. We live in an integrated and complex world and our problems can be best resolved through application of our best intelligence and creativity.

Risks of the Integrative Approach

Risks of the integrative approach are based upon the common sense observation that "it takes two to collaborate." If one party is unwilling to participate in integrative, problem solving negotiation, the more collaborative negotiator may put himself at risk in the following ways:

1. The negotiator will be forced to either "give in" or adopt a competitive stance;
2. The negotiator may see himself as a failure if they do not reach agreement; and
3. The negotiator lays himself open by honestly disclosing information that is not reciprocated.

Overall Problem-Solving Model

As an overall chronological model for mediation facilitation that is suggested by considering "what works" in conflict resolution and negotiation theory, please consider the following:

- **Informed Consent as to Process**
  (the process is always negotiable and must be agreed to)

- **Sharing Perspectives**
  (separating relational issues from substantive issues; discuss both, just separately)

- **Remember the Common Ground**
  (common interests, interdependence and initial points of agreement)

- **Establish a Problem-Solving Agenda**
  (questions seeking solutions)

- **Identify Desired Information and Documentation**

- **Clarify Desired Outcomes, Interests and Positive Intentions**

- **Develop Options**
  (based upon outcomes, interests and positive intentions; separate from evaluation process)

- **Select from Options**
  (Evaluate based upon participant desires, criteria, standards, principle, rationale or rationalization -- and considering personal, procedural and substantive BATNAs)

- **Integration and Finalization**
  (Any possible improvement; drafting, review, revision, implementation)

Two Final, Quick Thoughts:

Distinguish Strategic Approach from Personality

While there may be some correlation between negotiation approaches and personality style, the two do not necessarily go together. For example, a competitive negotiator may be very "pleasant" to work with in terms of demeanor, but utilize extremely competitive tactics. In fact, a negotiator's pleasantries may themselves be part of an overall manipulative approach! A problem-solving negotiator may, on the other hand, be rather ornery in terms of their personality, yet effectively utilize interest-based, problem-solving strategies in negotiation.

There's a Difference between Dispute Negotiation and Transactional Negotiation

Dispute negotiation focuses on resolving past facts. While transaction negotiation focuses on reaching agreement for the future. While it is often helpful to appreciate this difference between dispute negotiation and transaction negotiation, it is also beneficial to appreciate that many negotiation situations involve the resolution of past issues as well as planning future outcomes and relations.

Negotiation Styles in Mediation

The following text is excerpted from a web page developed by Stephen Marsh, Attorney at Law, Witchita Falls, TX. Related links are provided at the bottom of this page.

In mediating conflicts, it helps to understand the five styles of dispute resolution most often used by negotiators. Often, the various styles need a mediator to buffer the interactions and turn a toxic negotiating atmosphere into a successful mediation.

Five Methods of Negotiation

1. Attack or fight. This type of negotiator is often called an aggressive negotiator.

2. Appease or attempt to convert. This type of negotiator is often called a cooperative negotiator.

3. Flee or attempt to evade the problem. This kind of negotiator is often called a distractor.

4. Displace or analyze the problem. When a man is told not to come in to the office today because it has burned down and responds by analyzing the changes in traffic patterns the fire trucks will have made, he is engaging in displacement. This kind of negotiator is often called an analyst.

5. Truth seeking. This kind of negotiator is often called an idealist.

Understanding And Dealing With Each Style

Fighting Negotiators:

- **Goals**: They seek to win. The goal is victory, defined as maximizing the client's outcome and outmaneuvering or beating opposing counsel.
- **Traits**: They make threats, insult, withhold information, "stretch" the facts, and demand one-sided gains.

Appeasing Negotiators:

- **Goals**: They seek to act fairly. The goal is agreement, defined as reaching a "fair" result for their client, with a high value placed on the relationship between the attorneys and the clients.
- **Traits**: They are courteous, realistic in positions, and openly share information. They also often make one-sided concessions with the expectation that the opponent is morally obligated to reciprocate.

Fleeing Negotiators:

- **Goals**: They seek to win but are uncertain what that means. The goal is survival, defined as not losing or being beaten.
- **Traits**: They dither between three patterns: attack, appeasement and hiding/delaying/stalling. Many, many attorneys who are thought of as "attack" or "appeasement" negotiators are actually dithering attorneys whose strategy of dithering emphasizes either attacking or appeasement (but includes the other two patterns). They are often noncommittal, with the desire of avoiding loss or harm. In an attack orientation the bottom line is "what can I conquer or take?" In appeasement, it is "what can we work out or create?" In dithering: "what can I avoid losing?"

Analyzing Negotiators:

- **Goals**: They seek to understand. The goal is solving the problem (often independent of the parties benefit) and increased understanding.
- **Traits**: They are thoughtful and act independent of trust. Where an appeaser can not work with you if he or she does not trust you, and a ditherer will not trust you (even as he or she works with you), an analytical attorney does not see trust as an important issue. They tend to rely on objective criteria and to seek multiple options -- even where there is only one solution.

Truth-seeking Negotiators:

- **Goals**: They seek abstract truth or justice often without regard to human factors or reality. They often have a single "truth" (e.g. global warming or global cooling) that dominates them in spite of rational considerations (pro or con. They may well be right in their "truth" but reason isn't why they hold to it).
- **Traits**: Honest, sincere, dedicated. Often intense, inflexible and idealistic.

Applying Mediation to the Process

One reason that mediation works very well in improving the negotiation process is because it helps defuse the natural conflicts created by differences in negotiation styles. As a mediator, by being aware of the various styles, you can seek to use the process to improve the interactions and the results. When negotiations hit a bottleneck or a seemingly impossible conflict of personality, by being aware of these issues you can aid mediation work to resolve the matter by removing the issue of style conflicts.

Mediation is generally set up in a structure that isolates parties from style conflicts. The parties take fixed positions prior to the mediation meeting. The parties present their sides of the conflict with minimal interruption. The parties then retire to caucuses (separate areas) and the mediator shuttles back and forth with offers, positions, questions and information reworded in more neutral terms by the mediator.

The most common contemporary mediation process tends to take the style out of the process and reduces the matter to positional shifts and objective statements. It should be remembered that mediation made substantial improvements in its success rates when this basic format became the standard or common format for mediating disputes.

Negotiation Power

Commentators have observed a variety of aspects and qualities of negotiation power. It is important for the mediator to take note of these various aspects and qualities of negotiating power as a means of assisting each negotiating party to be at his or her best in representing his or her interests in mediation. Here are a number of aspects and qualities of negotiating power that have been identified:

1. Negotiating power is relative between the parties;
2. Negotiating power changes over time;
3. Negotiating power is always limited;
4. Negotiating power can be either real or apparent;
5. The exercise of negotiation power has both benefits and costs;
6. Negotiating power relates to the ability to punish or benefit;
7. Negotiating power is enhanced by legal support, personal knowledge, skill, resources and hard work;
8. Negotiating power is increased by the ability to endure uncertainty and by commitment;
9. Negotiating power is enhanced by a good negotiating relationship;
10. Negotiating power depends on the perceived BATNA; and
11. Negotiating power exists to the extent that it is accepted

Should Negotiation Power Be Balanced?

Some theorists suggest that the mediator has an obligation to "balance negotiating power," to, essentially, "level the playing field." The author suggests that this is not the best approach. Rather, the mediator's obligation with regard to negotiation power is to ensure that each party in mediation has sufficient capacity to effectively represent their interests in mediation. In other words, each party must have a certain threshold of negotiation effectiveness to be able to effectively and appropriately take part in mediation.

Again, the mediator should do everything in his or her power to capacitate each mediating party and, having done so, must ask himself or herself the question of whether each mediating party individually (with any desired legal or other support) has sufficient capacity to effectively represent his or her interests in the specific mediation. If the answer to this question is "yes," then the mediation may proceed. If the answer is "no," then the mediation should not proceed. "Balancing bargaining power" has no place in mediation. Determining whether each participant can effectively represent his or her interests is, however, at the heart of the mediation process.

Impediments to Settlement

Once the mediator has allowed expression and storytelling by the disputants and their positions have been delineated, the mediator needs to move the positions and interests into a resolution through negotiation.

There are many barriers in the process of negotiation that the mediator will have to address. He/she must empower the parties with knowledge of possible outcomes, alternatives, facts and the process of negotiation itself. The mediator can help the disputants identify their underlying interests and concerns and provide options and suggestions. Some of the barriers most common to settlement are:

1. Communication failure
2. Poor negotiating skills
3. Lack of or different information
4. Misinformation
5. Differing perceptions
6. Transference of anger
7. Dishonesty
8. Emotionality
9. Differing legal perspectives
10. Inappropriate/ineffective representatives
11. Personality conflict
12. No decision-making authority
13. The need to set a precedent or prove a point

The mediator's primary goal during the negotiation stage is to keep the negotiation going!!! Flexibility and innovation are the mediator's best tools. He/she can encourage the parties to focus on the future. Won't it be great to not have this conflict! Educating the parties on bargaining or negotiation techniques is a tremendous key to unlock the parties' fixed positions that brought them into this conflict.

Principled Negotiation

In their book, Getting to Yes, Fisher and Ury set forth their concept of "Principled Negotiation." Here is a brief summary of the main points of principled negotiation:

Separate the People from the Problem
Fisher and Ury suggest that we are all people first -- that there are always substantive and relational issues in negotiation and mediation. The authors describe means of dealing with relational issues, including considering each party's perception (for example by reversing roles); seeking to make negotiation proposals consistent with the other party's interests; making emotions explicit and legitimate; and through active listening.

Focus on Interests, Not Positions
Positions may be thought of as one-dimensional points in a space of infinite possible solutions. Positions are symbolic representations of a participant's underlying interests. To find out interests, you may ask questions like: "What is motivating you here?" "What are you trying to satisfy" or "What would you like to accomplish?" You may also ask: "If you had what you are asking for (your position), what would that experientially get you - what interests would that satisfy?"

In negotiation, there are multiple, shared, compatible, and conflicting interests. Identifying shared and compatible interests as "common ground" or "points of agreement" is helpful in establishing a foundation for additional negotiation discussions. Principles can often be extrapolated from "points of agreement" to resolve other issues. Also note that focusing on interests tends to direct the discussion to the present and future, and away from the difficulties of the past. If we have learned anything about the past, it is that "we can not change it." The past may help us to identify problems needing solution, but, other than that, it does not tend to yield the best solutions for the future.

Invent Options for Mutual Gain
Before seeking to reach agreement on solutions for the future, Fisher and Ury suggest that multiple solution options be developed prior to evaluation of those options. The typical way of doing this is called brainstorming. In brainstorming, the parties, with or without the mediator's participation, generate many possible solution before deciding which of those best fulfill the parties' joint interests. In developing options, parties look for mutual gains.

Select from Among Options by Using Objective Criteria
Using objective criteria (standards independent of the will of any party) is where the label "principled negotiation" comes from. Fisher and Ury suggest that solution selection be done according to concepts, standards or principles that the parties believe in and are not under the control of any single party. Fisher and Ury recommend that selections be based upon such objective criteria as precedent, tradition, a course of dealing, outside recommendations, or the flip of a coin.

What if They are More Powerful? - Developing a BATNA

In the event that the other party has some negotiating advantage, Fisher and Ury suggest that the answer is to improve the quality of your "best alternative to a negotiated agreement" (your BATNA). For example, if you are negotiating for a job and want to make a case for a higher wage, you improve your negotiating power by having another job offer available, or at least as a possibility.

What if They Won't Play or Use Dirty Tricks?
Fisher and Ury's answer to the resistant competitive negotiator is to "insist" on principled negotiation in a way that is most acceptable to the competitor. The principled negotiator might ask about the competitor's concerns, show he or she understands these concerns, and, in return, ask the competitor to recognize all concerns. Following the exploration of all interests, Fisher and Ury suggest inducing the competitive negotiator to brainstorm options and to think in terms of objective criteria for decision-making.

Another way of thinking about encouraging principled or integrative bargaining is to think in terms of matching, pacing, leading and modeling. To get a negotiator to shift orientations, it is critical that they first experience themselves as fully heard in terms of content, intensity and emotion. By so matching and pacing with a negotiator (asking a few clarifying questions), the negotiator will become more open to your lead and modeling of productive means of negotiating.

Converting Positions to Interests to Positive Intentions
Negotiating parties tend to come to negotiation with well-rehearsed positional statements about the truth of the situation. As wise negotiators, we know that we want to assist all parties to get below their positions to achieve a full understanding of their respective interests. If you view negotiating parties as, essentially, survivors, wanting to improve their situations, you may be able to assist negotiating parties to recognize that even the most difficult interests, like revenge and anger, can be understood in terms of positive intentions, such as a desire for acknowledgment and respect. So reframed, the mediation effort can become a joint search for mutually acceptable solutions to the parties identified positive intentions. This reframing of the entire mediation effort can dramatically shift the entire atmosphere of your negotiation.

Finding Solutions

The following text is excerpted and modified from ICM's manual for this training prepared by Lee Jay Berman of the Institute for Mediation Studies.

Problem solving with the participants can be difficult for mediators. Often a neutral person with an outside perspective or experience in dispute resolution sees possible solutions more clearly than the disputants do. Ideally, the participants are better served if they find their own solutions. Suggested or imposed solutions may seem sensible, but the participants tend to feel more committed to making the agreement work when the suggestion is their own. Seemingly logical solutions may not always fit the particular situation or needs of individual disputants and will only serve to alienate them.

1. Ask *if* someone can make a trial suggestion.

2. Urge disputants to talk through the consequences of proposed solutions / their demands.

3. Move to another issue where agreement is more likely. Once discussion begins flowing, the earlier roadblock may shrink.

4. Ask each party to explain why the want the situation changed.

5. Ask each party what changes they would like to see.

6. Restate the problem clearly so that everyone is discussing the same issue.

7. Point out that all participants have obviously reached the end of their patience with things as they are, or they would not have come to mediation. Given that desire to change, where can they go?

8. Have everyone brainstorm -- even far-out ideas -- if the participants feel comfortable with the method.

9. Meet separately with each participant to generate possible solutions

10. Split the difference.

11. Create a silence so the parties can think about it.

12. When all else fails, the mediator may choose to offer advice and suggestions impersonally (from "other voices"): "Some people find that _____ works well." Examples from the Mediator's own experience can carry enough authority that participants hesitate to reject the idea. Offering two or three suggestions at once can make accepting or discarding a proposal easier: "You could speak directly, or you might want to leave a note."

Chapter 11

Drafting the Agreement

Men keep agreements when it is to the advantage of neither to break them.
Solon (638 BC - 559 BC)

Drafting the Agreement

As the negotiations progress, the mediator summarizes areas of agreement to motivate the parties toward a final settlement. If the parties move to common positions, the mediator typically helps draft the agreement.

The mediated agreement may be executed on the spot or held pending review by counsel. It may be a private agreement or incorporated into a consent judgment in pending litigation. There may be an enforcement clause that provides for monitoring by the mediator or another party and specifies what the parties will do if they believe the agreement has been violated.

Contract disputes are perhaps best concluded with an agreement that is based on money, product, or other tangible asset, not based on further relationships between the parties unless relationship interests were a primary goal of the mediation. Complete releases from one party to the other on any future claim may be more important to the parties than the actual dollar or asset settlement.

If the parties fail to agree on all issues, the mediator may try to salvage the positive result of the mediation. The parties may be able to stipulate certain facts, cooperate in discovery, or agree to another way to resolve the dispute. They may have learned to negotiate better and may, in fact, settle unresolved issues by themselves later.

Whatever the agreement stipulates, it is only a good agreement if it endures. For an agreement to be durable, it should be satisfying to both parties, procedurally, substantially, and psychologically. This can only be accomplished when the parties make an informed decision.

Infusing the Mediation Process with Legal Capacity

It may well be that the safest and most beneficial process, both for the non-lawyer mediator and for mediation participants, is for the non-lawyer mediator to "infuse" their mediation process with true legal capacity. This can be done by the mediator or mediation center employing a co-mediation or advisory attorney to provide information with regard to the legal structuring of an agreement, to assist by impartially offering established "black letter" law and to give other mutually beneficial legal advice. Once mediation participants have decided upon the solutions for their situation, this co-mediation or advisory attorney can, as the participants desire, draft their settlement agreement in legal form.

Rely on Outside Attorneys?

Another alternative is for the non-lawyer mediator to rely on the drafting skill of one mediation participant's representational attorney. While this approach can certainly work, it also may create some problems in the sense that the representational attorney's drafting may be viewed as slanted in their client's favor, and additional peripheral issues may

arise. Other mediation participants may, with one representational attorney doing the drafting, feel compelled to have their own attorney provide additional review, and there is a risk that the entire matter may come to be removed from mediation to the level of attorney-to-attorney communications and negotiation.
To maintain "control" over the completion of the mediation work product, and also over the mediation process, it may, thus, be advisable for the mediator, whether an attorney or not, to work with the parties to develop a final statement of their settlement.

The Memo of Understanding

For the non-lawyer mediator, acting as "scrivener" and without attorney assistance, the typical work product form is that of a "memorandum of understanding." While this memorandum can be as detailed and sophisticated as a settlement agreement, it should have certain indications that it is not itself intended as the final drafting of the parties' legal settlement agreement.

Begin by placing "MEMORANDUM OF UNDERSTANDING" at the top of the document. Mediators may want to consider putting the date of the drafting in parentheses below this document title.

The non-lawyer mediator should likely include a provision such as the following as a protection against accusations of unlawful practice of law:

"This memorandum of understanding is the result of a deliberative mediation process between the parties with _____ as mediator. It is understood and acknowledged by the parties that this memorandum is not itself a legally binding document. It is further understood and acknowledged by the parties that their signing of this memorandum indicates only that the document accurately reflects the points of agreement created by the parties in mediation. It is the parties' intention to have this memorandum become part of their legally binding settlement."

Resolving Pressing Issues

Sometimes it is necessary for the mediator to assist parties to resolve "pressing issues" simply so they can have breathing time and sufficient comfort to do a good job reaching agreement on the full range of their substantive issues. What is also true is that, for some parties, "all of the issues are pressing issues."

Using discretion, the mediator may want to suggest that certain interim agreements be reached simply to allow the parties to comfortably and competently mediate. Parties will often be hesitant to reach such agreements fearing that they will set dangerous precedent for themselves. They may also fear reaching interim agreements that, with fuller consideration of the issue, turn out to be clearly inadequate or inappropriate resolutions.

To address these types of concerns and to allow "pressing issues" to be resolved as easily and quickly as possible, it is recommended that pressing issues be resolved according to the following guidelines:

1. The resolutions shall be interim only, either for the duration of the mediation or until the parties agree otherwise or a court orders otherwise;

2. The resolutions shall not set precedent in any way nor be admissible in any court or other contested proceeding, except for enforcement, if necessary; and

3. The eventual resolution to the issue, be that by the parties' agreement or court order, shall be retroactively applied to the beginning date of the interim agreement, to the extent that this can be accomplished. (Thus, for example, if the parties agree to interim wages of $4,000 monthly and their eventual agreement or the court's order or judgment is $5,000 monthly, then there would be a payment of $1,000 additional for each month of the interim agreement.)

More on Drafting the Agreement

- Write in language and sentence structure the parties can easily read and understand. Be sensitive to the needs of parties who don't read very well or don't have a good command of English.

- Do not refer to the parties as "complainant" or "respondent" in the agreement. Use the names they have used throughout the mediation session. If the agreement is going to be forwarded to a referring court you may want to use full legal names throughout.

- Have only one agreement in each numbered statement, and never make the agreement conditional on the act of another party.

- Have each party to the dispute agree to each individual clause. Do not write "we agree to," but rather "John agrees to," and in a separate item, "Mary agrees to."

- If payments are a part of the agreement, be specific about where and how they are to be made. In general, it is not a good idea to have payment made by personal check. Ask the parties to use certified checks, money orders, or cash with appropriate receipts whenever possible.

- Be specific as possible in wording agreements about future behaviors. Avoid phrases such as "will not harass" since each party may understand them differently and lead to further disagreement.

- Attempt to balance the agreement as much as possible. If the situation is one-sided, you can balance clauses by asking one party to agree to accept what the other is agreeing to do. (e.g. "Jones agrees to accept this method of payment.")

- Remember that the agreement belongs to the parties. Use their word choice when it is clear and mutually understood. Check the wording of each item with each of the parties to make sure you are writing what they agree to.

- Consider what the impact of the words of the agreement will be if the parties read it month after the mediation session. Have you written a clause that implies guilt or blame? Will all the clauses be clear to the parties and to anyone else to whom the agreement is shown?

- Never allow a party to agree to admitting guilt or blame. Never allow a party to give up his/her right to legal advice. Never allow a party to withdraw a criminal complaint, unless the court has specifically empowered your mediation practice to do this.

- Be sure the agreement reflects issues in the original dispute that were submitted, or change the submitted form.

The Enforceability Clause

Agreement by Disputants

I. Oral or written agreements.

- Agreements reached between disputants as a result of the dispute resolution services may be oral or written.

II. Presumption of Non-Enforceability.

- Under Evidence Code Sections 1152.5 and 1152.6, such agreements are presumed inadmissible as evidence in judicial or administrative proceedings.

III. Option to Make Agreements Enforceable.

- Disputants may elect to make their agreements enforceable at law or admissible as evidence at judicial or administrative proceedings. This election may be made at any time. To be enforceable or admissible, an agreement must:
    - Be in writing and signed by all disputants, and
    - Contain an Enforcement of Agreement Statement that clearly expresses that each disputant intends that the agreement will be enforceable at law and/or admissible as evidence in any judicial or administrative proceeding.

Sample Enforceability Clause

> "All parties agree that they intend that this agreement will be enforceable as a judgment in a court of law and/or admissible as evidence in any judicial or administrative proceeding."

Sample Settlement Agreement

SETTLEMENT AGREEMENT

_____ and _____
met with _____, mediator, to resolve their dispute. The parties have agreed to the following.

The parties acknowledge that the terms stated above accurately reflect their statement agreement. The parties further agree to abide by the finding, terms, and conditions set forth above.

The parties (do ___) (do not ___) choose to make this agreement admissible and enforceable in a court of law.

Date signed: _____, 20___.

_____
_____
_____
_____
_____
_____

_____
Mediator

SETTLEMENT AGREEMENT, PAGE _____

Parties

_____ _____

Sample Settlement Memorandum

SETTLEMENT MEMORANDUM

On the _____ day of _____, _____ A.D., the parties and their attorneys met for a mediation session.
After and outside of the close of the mediation session, and without regard to the processes thereof, the parties and their attorneys reached a full and final settlement of their dispute. This writing memorializes that settlement and is intended as a binding writing.
The dispute settled is:

_____
_____
_____
_____
_____

The terms and conditions of the settlement are:

1._____
2._____
3._____
4._____
5._____
6._____
7._____
8._____
9._____

The parties and their attorneys have read this agreement and understand that it is a binding contract that completely and finally resolves this dispute. The parties and their attorneys agree to be bound to this agreement and to seek to fulfill the intent of this agreement.
Approved as to form
and substance by both
the parties and
their counsel:

_____ _____
Signature date

_____ _____
Signature date

_____ _____
Signature date

_____ _____
Signature date

_____ _____
Signature date

_____ _____
Signature date

_____ _____
Signature date

_____ _____
Signature date

MEDIATION NOTESHEET
PARTIES ATTORNEYS
| Special Factors
_____ _____ | _____
_____ _____ | _____
_____ _____ | _____
_____ _____ | _____
_____ _____ | _____
PRE-SESSION NEGOTIATION HISTORY
DEMAND/DATE RESPONSE/DATE | Mediation Notes
_____ _____ |
_____ _____ |
_____ _____ |
_____ _____ |
_____ _____ |
PLEADING STATUS
PETITION FILED?____ |_____
|
ANSWER FILED?____ |_____
DISCOVERY?____ |
HOW MUCH? _____ |
_____|
OTHER MATTERS? _____ |
_____ |
LITIGATION COST TO DATE? $_____ |_____
FUTURE LITIGATION COST? $_____ |_____
ISSUES
FACTS /LAW
_____ _____ |
_____ _____ |
_____ _____ |_____
_____ _____ |
_____ _____ |_____
PERCENTAGE CHANCE OF A FAVORABLE VERDICT _____% |
AMOUNT OF FAVORABLE VERDICT $_____ |_____
PERCENTAGE CHANCE OF A NEGATIVE VERDICT _____% |
AMOUNT OF NEGATIVE VERDICT $_____ | |_____
NEW MATTERS/WEAKNESSES TO EVALUATE:

Chapter 12

Group/Multi-Party Mediations

Never doubt that a small group of thoughtful committed people can change the world: indeed it's the only thing that ever has!
Margaret Meade

Getting Large Group Mediations Off the Ground

The larger the group the mediator is working with, the more complex the mediation becomes. Therefore, it is critically important for the mediator to assist the group to reach clear process agreements. The following structure may be of value in seeking to get large group mediations up and running smoothly.

Opening/Introductions

Participants like to "take part," so it is a good idea to give each participant the opportunity to briefly introduce themselves and to briefly comment why they are there, i.e., what they are hoping overall to accomplish. In large groups, the mediator may encourage "laser beam" contributions to help ensure that all participants are able to participate.

Who Participating and Who Is Not?

The mediator may appropriately ask whether all those who have a stake in the outcome of the group's discussions are taking part or represented in the discussions and, if not, why not? It is generally better to involve even recalcitrant participants or groups, rather than allow them to later sabotage the group's best efforts. Certainly, all participants necessary to create a legally binding and implementable agreement should be included.

Scheduling

Remember, the larger the group, the greater the challenge when it comes to scheduling. Note that it may not be necessary for all participants to be at every meeting, if the mediator does a quality job documenting progress that can subsequently be reviewed and refined. The mediator may also want to consider encouraging interest groups to form and designate one or more representatives to attend mediation sessions. The mediator can facilitate caucus meetings within respective interest groups and also personally help to ensure that the true variety of perspectives and interests are represented.

Using Process Sub-Groups

It may also be advisable for the mediator to work with the participants to designate a process sub-group that can act as liaison to the mediator with regard to suggestions for improving the parties' process and assist the mediator to resolve challenging process issues. This sub-group designation can help to make full group meetings more efficiently focused on the resolution of substantive issues.

Confidentiality Issues for Group Mediations

It is important for groups to define the degree of confidentiality they expect and desire in the mediation. The larger the group, the harder it generally is to maintain confidentiality of discussion in the sense of no participant discussing matters outside of the mediation discussions. In fact, one may question whether this is generally desirable.

Allowing participants to discuss the issues being mediated with outside advisors and constituents can be an important matters in terms of capacitating and legitimizing their participation in the mediation. In some situations, particularly those involving governmental entities deliberating substantive issues, it may well be that some sort of public meetings law may require that the mediation discussions themselves be open to the public. On the other hand, groups will sometimes desire to impose a "gag order" on themselves, agreeing to not speak to members of the press or the like, at least during the pendency of discussions.

One aspect of confidentiality that most groups tend to favor, even if they view their discussions to otherwise be open or capable of being shared with outsiders, is that nothing said in the mediation should ever be used against any party in any subsequent court, administrative or other contested proceeding. Most groups will agree to this extent and commonly put such a limited confidentiality agreement in writing. The mediator may also want to be a party to such agreement further providing that the mediator may not be subpoenaed to testify or provide materials in any possible contested proceeding between the parties or any of them.

Suggested Ground Rules for Group Mediations

The following ground rules may be utilized in the group context:

- You will have a full and equal opportunity to speak up on every issue presented for discussion - there is no need to rush or interrupt.
- You are encouraged to ask genuine "questions of clarification." Please avoid asking "questions of attack."
- Use each other's first names, not the pronouns "he" or "she."
- Speak for yourself only.
- You agree to work for your perceived most constructive and fairest agreement.
- Appeals and attempts to convince should be made to each other and not to the mediator.
- If something is not working for you, speak up.
- Try to avoid establishing hard positions, expressing yourself instead in terms of your personal interests, positive intentions, and the outcomes you would like to create.

It is critical that the mediator not *impose* ground rules. Rather, the mediator can offer the suggested ground rules as "process agreements that seem to have worked for other somewhat similar groups." The mediator is also advised to encourage participants to question, modify, eliminate and add process agreements of their own. It is helpful to begin mediation discussions with parties being able to practice their agreement-reaching skills on process issues, rather than the substantive issues they almost certainly have strong beliefs about and emotions behind.

Relationship Issues

One of the most challenging issues for the mediator in the group context is that of effectively dealing with emotional and relational issues in a way that supports personal safety and does not threaten the group's ability to also effectively deal with the many substantive issues before them. While the mediator may be tempted to want to exclusively focus on the substantive issues in need of resolution and ignore past-focused emotional/relational issues, the problem with doing this is that these emotional/relational issues will tend to contaminate the group's attempt at reaching substantive agreement if they are ignored.

In fact, there will be a tendency for the group's substantive agreement to become, consciously or unconsciously, a symbolic representation of the unresolved emotional/relational issues from the past if these issues are not directly expressed. Still, how can the mediator support such expression in a way that does not threaten the groups substantive progress?

One option is to have a private feedback process in which participants are supported to be able to send personal messages to other participants, either anonymously or with the sender identified. The mediator may want to suggest that such messages be given first to him or her and that the mediator's office will then type and deliver all such messages to ensure confidentiality and anonymity, to the extent that is desired. This type of process can allow for desirable direct communication of past-based feelings and perspectives in a safe way that can provide an effective catharsis without threatening the group's substantive efforts.

Some groups will, however, resist this type of confidential/anonymous messaging system, believing that participants should own their communications. Thus, some groups may prefer to require personal identification.

Whatever the process, it is critical that the mediator be able to separate any and all past-focused emotional/relational communications from future-focused substantive problem-solving. The mediator can help participants to identify the nature of their contribution and insist that emotional/relational communications be delivered as such and separately from the group's best efforts to reach substantive agreement.

Group Decision-Making

Large groups also need to decide what their decision-making standard will be. Will it be "majority rules," "super-majority rules," some type of "consensus," or "unanimity?"

Sometimes there will be a combination of decision-making standards. For example, the group may adopt some consensus standard, such as 80% support, on individual issues, but require unanimity on the overall agreement when considered as a package. It is generally better to have some voting response system that is more sensitive than a simple and polarized "yea" or "nay" system. The following "Levels of Agreement" model can be used in multi-party mediation and facilitation situations.

Participants can be encouraged to use their number of raised fingers to indicate their level of support for a proposal. In this model, where the group members will respond with anywhere from a "1" to a "5" or "6" depending on their degree of support for a proposal, it is common for the group to want to hear from anyone voting a "4," "5," or "6" to see if that participant's concerns can be addressed by a somewhat modified or refined proposal. After hearing from such initial "non-supporters," the group may, depending on its decision-making standard process agreements, permit itself to still take action if a near unanimity (80-90%) exists.

Here is an example of a “Levels of Agreement” Consensus Voting Model:

1. I give an unqualified "yes" to the proposal.

2. I find the proposal acceptable.

3. I can live with the proposal although I'm not especially enthusiastic about it.

4. I do not fully agree with the proposal and need to register my view about it.

5. However, I do not choose to block the proposal. I am willing to support the decision, if adopted, because I trust the wisdom of the group.

6. I do not agree with the proposal and feel the need to stand in the way of this decision being accepted.

7. I feel that we have no clear sense of unity in the group. We need to do more work before consensus can be reached.

The above model can be simplified as:
1. Strongly support. 2. Support. 3. Willing to go along with. 4. Want to be heard. 5. Unwilling to support.

Developing a Group Agenda

When facilitating groups, I almost always put the quote: "A problem well-stated is a problem half-solved" on the flip chart. It is critical that the mediator assist the group to effectively define the issues it will be discussing.

Participants will tend to offer issues for discussion as accusations, such as "how to get so-and-so to stop doing this or that." It is critical that the mediator reflect such "blame frame" statements back to the participants as effective problem-solving challenges.

It is recommended that problem-solving statements begin in one of two ways:

1. "How can we best . . . ?" or

2. "What is the best way for us to . . . ?"

The key is to state issues for discussion in future-focused, mutualized, problem-solving terms.

Having identified a number of problems to be solved, the mediator may want to assist participants to group and order items for discussion. Commonly, it is best to assist the group to resolve process (communication) issues first, suggesting that the group then immediately begin to practice their agreements; then deal with issues that seem central to the group's overall sense of progress; then assist in the resolution of miscellaneous or derivative issues.

The reality is that the group will commonly evolve to making simultaneous progress on a number of issues, either through homework assignments or sub-group work. In trying to decide which issues are central and should be first addressed, each participant can be given two or three votes, with the greatest vote getting items receiving the first attention.

Addressing Issues

On each substantive agenda item, it is recommended that the following sequence of information be developed:

The Identification of Desired Results, Interests and Intentions

It is recommended that participants be assisted to cumulatively list all of their desired results, interests and intentions on each issue.

Brainstorming Options

Having identified the results, interests and intentions that the group would like to ideally satisfy, the group may then be beneficially assisted to brainstorm all possible ways of satisfying those desires. No possibility should be initially discounted. Once all

possibilities are listed, the group can then be asked to respond, with "straw voting," to the various possibilities. Based upon the group discussion, it may be that "a bit" of one option, combined with "a component" of another, and "a dash" of a third will form the best overall synthesized solution. Such integrating work can only take place if all possible solutions are simultaneously presented to the group.

Evaluating Options

It may be helpful for the group to try to identify "evaluation criteria" to be applied to the various possible solutions. It is not necessary that the group agree on a single set of criteria; all they really need to agree on are the solutions. Still, it is often the case that participants can be assisted to understand why they might support certain options. Participants will commonly not be willing to move from a "state of disagreement" to a "state of agreement" unless they are able to explain to themselves (and often to significant others or their constituency) why they believe certain solutions to be among the best. Note that it is common that different participants will be attracted to different criteria for selection. It is not necessary that participants agree to the same criteria or "reasons why," only that they all agree to common solutions. It is typical that participants will agree to the same thing for different reasons, and this is perfectly fine. The mediator will need to use his or her discretion as to whether such divergent reasons should be highlighted or finessed.

Memorializing Progress

It is recommended that the mediator summarize all progress made to date following every group meeting. This helps to avoid confusion or backsliding between meetings. The group should be reminded that nothing is "set in stone" until there is a final agreement and encouraged to regularly review the progress made to date for refinement and improvement.

Framework for Multi-Party Policy Mediation

The following checklist may assist the mediator and participants in attempting to develop a process for the negotiation and mediation of multi-part public policy issues.

1. What is the problem (plan, issue, etc.) we are trying to reach some agreement about? What is the purpose of the mediation?

2. Who are the parties or interests who need to be involved in addressing this problem or range of issues? How many from each should sit at the table? If new parties become known during the mediation, should the process provide for their inclusion?

3. Will this effort involve organizations, interest groups, etc.? If so, is each group sufficiently organized so that representatives can speak for their constituents? Do representatives understand the importance of keeping constituents informed throughout the process?

4. What is our timetable for the process? What deadlines should we establish for completing, discontinuing, and/or evaluating the progress?

5. How does the undertaking relate to existing governmental structures, processes and decisions?

6. Are officials of government agencies with jurisdiction supportive of this undertaking? Are there reasonable assurances that they will cooperate in implementing an agreement if one is reached?

7. How do we define consensus? Are we seeking a consensus of individuals or of groups? What do we do if we are not able to achieve it? Understanding that voting and majority/minority reports as fallback decision procedures can inhibit the chances for agreement, might it be acceptable to reach agreement on just some of the issues? In that case, would it be useful to produce a statement defining areas of disagreement within the agreement? Should we have explicit provisions for disbanding the effort? For example, should we agree beforehand to restrictions on subsequent use of information and positions developed and divulged during the negotiations?

8. What type or form of agreement are we seeking? Will it be a written contract? A set of consensus recommendations to an agency or agencies with jurisdiction? A memorandum of understanding? An agreement to testify for (or at least not oppose) a plan or project or new zoning ordinance, etc.?

9. If organizations, interest groups, etc. are represented in the negotiations, will constituents need to ratify an agreement? Have we allowed time for our different decision processes?

10. If it is likely that new information will be needed, how shall we gather it so that the collection process is credible and the product advances the negotiations?

11. Will the meetings be open or closed? If closed, will there be observers?

12. Who will deal with the media and how?

13. How will results of meetings be recorded?

14. Are there clear understandings about our responsibilities in dealing with interests not at the table? What role would a mediator have in this regard, if we use one?

15. What will the mediator's role be?

16. Are there any ground rules regarding behavior during the meetings or outside them that we should establish?

17. Have we reached explicit agreement on the questions in this list that are pertinent to our situation? Are there any others not on the list that we should consider, such as a provision for setting agendas and forming working groups? Shall we put them in writing as a set of ground rules or protocols that describes our purpose and the process we intend to follow to achieve it? Can we each commit to follow the process we have here defined in our protocols and make a good faith effort to reach an agreement?

Chapter 13

Ethics of Mediation Practice

A man without ethics is a wild beast loosed upon this world.
Manly Hall (1901 - 1990) Canadian philosopher

Mediation Practice Standards

Here are the generally accepted Standards of Mediation Practice of the American Bar Association, American Arbitration Association and Association for Conflict Resolution. You should also identify relevant state standards of practice.

These are the standards of mediation practice jointly defined by the American Bar Association (ABA), Association for Conflict Resolution (ACR) and the American Arbitration Association (AAA) and are generally applicable to the mediation of legal disputes.

The purpose of this initiative was to develop a set of standards to serve as a general framework for the practice of mediation. The effort is a step in the development of the field and a tool to assist practitioners in it--a beginning, not an end. The model standards are intended to apply to all types of mediation. It is recognized, however, that in some cases laws or contractual agreements may affect the application of these standards.

Preface

The model standards of conduct for mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. The standards draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice. They are offered in the hope that they will serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation.

I. Self-Determination: A Mediator Shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.

COMMENTS:

The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.

A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

II. Impartiality: A Mediator Shall Conduct the Mediation in an Impartial Manner.

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

COMMENTS:

A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.

When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially.

A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

III. Conflicts of Interest: A Mediator Shall Disclose all Actual and Potential Conflicts of Interest Reasonably Known to the Mediator. After Disclosure, the Mediator shall Decline to Mediate unless all Parties Choose to Retain the Mediator. The Need to Protect Against Conflicts of Interest also Governs Conduct that Occurs During and After the Mediation.

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

COMMENTS:

A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.

Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressure from outside of the mediation process should never influence the mediator to coerce parties to settle.

IV. Competence: A Mediator Shall Mediate Only When the Mediator has the Necessary Qualifications to Satisfy the Reasonable Expectations of the Parties.

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively. In court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.

COMMENTS:

Mediators should have information available for the parties regarding their relevant training, education and experience.

The requirements for appearing on the list of mediators must be made public and available to interested persons.

When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.

V. Confidentiality: A Mediator Shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality.

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.

COMMENTS:

The parties may make their own rules with respect to confidentiality, or other accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.

If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.

In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.

Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator. Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to the statistical data and, with the permission of the parties, to individual case files, observations of live mediations, and interviews with participants.

VI. Quality of the Process: A Mediator Shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties.

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

COMMENTS:

A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.

Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process. A mediator should not allow a mediation to be unduly delayed by the parties or their representatives.

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 the entire mediation process.

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should, therefore, refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who

undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other processes.

A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial.

A mediator shall withdraw from a mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.

Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.

VII. Advertising and Solicitation: A Mediator Shall be Truthful in Advertising and Solicitation for Mediation

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

COMMENTS:

It is imperative that communication with the public educates and instills confidence in the process. In an advertisement or other communication to the public, a mediator may make reference to meeting state, national, or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

VIII. Fees: A Mediator Shall Fully Disclose and Explain the Basis of Compensation, Fees, and Charges to the Parties.

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees shall be reasonable, considering among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.

COMMENTS:
A mediator who withdraws from a mediation should return any unearned fee to the parties.
A mediator should not enter into a fee agreement that is contingent upon the result of the mediation or amount of the settlement.

Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.

A mediator should not accept a fee for referral of a matter to another mediator or to any other person.

IX. Obligations to the Mediation Process: Mediators have a Duty to Improve the Practice of Mediation.

COMMENT:

Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.

Appendix

Client Self-Assessment Worksheet for Personality- and Emotion-Driven Conflicts

Answers to commonly asked questions. Make this available to all individuals who are filling out checklist sheets.

How are you perceived?
What if the perception is wrong? *I assume that most of the perceptions are wrong. If the perceptions are correct, things are much easier.*

What actions of yours have allowed this perception?
Are you stating that an incorrect perception is my fault? *No. However, even crazy people have reasons. To be honest, the type of actions that allow perceptions often tell one a great deal about the person with the perception.*

Why have those actions allowed the perception?
What if the other side is crazy? *This is a good time to examine that possibility as well as others.*

Who shares this perception?
Why not ask who perceives me the way I want to be perceived? *Those few who have an accurate perception tell you a great deal more about what you need to know to deal with the problems.*

Who does not share this perception?
You mean those who are causing the problem? *Not necessarily. Those who do not see you accurately include those who see you as you want to be seen. This group of those who do not share your perception is not necessarily those who oppose you.*

What changes ***that are within your control*** can be made in the current situation [that will help to bring about a change in perception]?
What about reality? *People act based on perception, not reality. Mediation of conflicts usually is limited to altering the patterns of action between people. The changes within your control are your unilateral alternatives to negotiation and settlement and are the things you can do.*

At this time you may also wish to define and consider your single best alternative to changing perception by unilateral acts. Do not list all the alternatives [i.e. stay in place and be unhappy, change jobs, go back to school, back pack across Alaska, etc.], just the single best alternative.

Why are you willing, or not willing, to effect those changes?
Why answer this question? *This tells you how much you really care about the changes.*

What are the changes that you feel the institution should make?
Why this question? *This defines what you think you want from the "outside" party. Most people want an imposed solution. This asks you to define what solution you want imposed and how, by which changes, you want the solution imposed.*

What are the institution's limits [i.e. what can reasonably be expected of an imperfect institution in an imperfect world]?

Why should this matter? *Many conflicts happen because people expect institutions to act outside of their nature or ability -- much like expecting a state governmental agency to change a federal policy. It can't and won't be done without first having the federal policy delegated to the state. [Texas is outside of the EPA for most matters because it had those matters delegated to state agencies. Attempts to get state action were futile before that happened].*

If you made changes in your actions and/or processes, what reciprocity do you think is fair on behalf of the institution and on behalf of those in conflict with you?
Why do I need to change? *You don't. However, in most situations, a quid pro quo is expected. The natural trade-off demanded in most human affairs is why "new wine in old bottles" is often such a failure -- in the short run.*

At this time you also need to ask yourself if what you want is valuable enough to take a long term approach and to seek triumph through gradualism much like the Fabian Socialists.

****

2. What do you see as your real goal?

Don't you mean, "what positions am I supporting?" *No. The above steps help to define the tools and the problem in ways necessary to mediation. This question comes back to an issue you should have thought a great deal about and should have some firm ideas concerning.*

A party should prepare a one page outline of the goal they want to achieve. You need to know and define your interests and goals rather than to rehash the positions you have taken. Positions rarely have any firm connection with reality or goals.

3. What do you see as the available realistic solutions that will achieve your goal and solve the problem

Is this where my positions go? *No. If you were dealing in positions, this would be where you outline, in a page or two, how you intend to reach your positions. Rather than look at positions, this is where you take time to write a one or two page outline of how to realistically achieve your goals in a step by step fashion. Your goal in mediation or negotiation should be to realistically move towards a problem solving step rather than to make a futile attempt to impose a direct end result.*

California Evidence Code
Section 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.

California Code of Civil Procedure
Section 1775-1775.15(Court Ordered Mediations)

1775. The Legislature finds and declares that:
(a) The peaceful resolution of disputes in a fair, timely, appropriate, and cost-effective manner is an essential function of the judicial branch of state government under Article VI of the California Constitution.
(b) In the case of many disputes, litigation culminating in a trial is costly, time consuming, and stressful for the parties involved. Many disputes can be resolved in a fair and equitable manner through less formal processes.
(c) Alternative processes for reducing the cost, time, and stress of dispute resolution, such as mediation, have been effectively used in California and elsewhere. In appropriate cases mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the public interest for mediation to be encouraged and used where appropriate by the courts.
(d) Mediation and similar alternative processes can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred. Where appropriate, participants in disputes should be encouraged to utilize mediation and other alternatives to trial for resolving their differences in the early stages of a civil action.
(e) As a pilot project in Los Angeles County and in other counties which elect to apply this title, courts should be able to refer cases to appropriate dispute resolution processes such as judicial arbitration and mediation as an alternative to trial, consistent with the parties' right to obtain a trial if a dispute is not resolved through an alternative process.
(f) The purpose of this title is to encourage the use of court-annexed alternative dispute resolution methods in general, and mediation in particular. It is estimated that the average cost to the court for processing a civil case of the kind described in Section 1775.3 through judgment is three thousand nine hundred forty-three dollars ($3,943) for each judge day, and that a substantial portion of this cost can be saved if these cases are resolved before trial.
The Judicial Council, through the Administrative Office of the Courts, shall conduct a survey to determine the number of cases resolved by alternative dispute resolution authorized by this title, and shall estimate the resulting savings realized by the courts and the parties. The results of the survey shall be included in the report submitted pursuant to Section 1775.14. The programs authorized by this title shall be deemed successful if they result in estimated savings of at least two hundred fifty thousand dollars ($250,000) to the courts and corresponding savings to the parties.

1775.1. (a) As used in this title:
(1) "Court" means a superior court or municipal court.
(2) "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) Unless otherwise specified in this title or ordered by the court, any act to be performed by a party may also be performed by his or her counsel of record.

1775.2.(a) This title shall apply to the courts of the County of Los Angeles.
(b) A court of any county, at the option of the presiding judge, may elect whether or not to apply this title to eligible actions filed in that court, and this title shall not apply in any court which has not so elected. An election under this subdivision may be revoked by the court at any time.
(c) Courts are authorized to apply this title to all civil actions pending or commenced on or after January 1, 1994.

1775.3. (a) In the courts of the County of Los Angeles and in other courts that elect to apply this title, all at-issue civil actions in which arbitration is otherwise required pursuant to Section 1141.11, whether or not the action includes a prayer for equitable relief, may be submitted to mediation by the presiding judge or the judge designated under this title as an alternative to judicial arbitration pursuant to Chapter 2.5 (commencing with Section 1141.10) of Title 3.
(b) Any civil action otherwise within the scope of this title in which a party to the action is a public agency or public entity may be submitted to mediation pursuant to subdivision (a).

1775.4. An action that has been ordered into arbitration pursuant to Section 1141.11 or 1141.12 may not be ordered into mediation under this title, and an action that has been ordered into mediation pursuant to Section 1775.3 may not be ordered into arbitration pursuant to Section 1141.11.

1775.5. The court shall not order a case into mediation where the amount in controversy exceeds fifty thousand dollars ($50,000). The determination of the amount in controversy shall be made in the same manner as provided in Section 1141.16 and, in making this determination, the court shall not consider the merits of questions of liability, defenses, or comparative negligence.

1775.6. In actions submitted to mediation pursuant to Section 1775.3, a mediator shall be selected for the action within 30 days of its submission to mediation. The method of selection and qualification of the mediator shall be as the parties determine. If the parties are unable to agree on a mediator within 15 days of the date of submission of

the action to mediation, the court may select a mediator pursuant to standards adopted by the Judicial Council.

1775.7. (a) Submission of an action to mediation pursuant to this title shall not suspend the running of the time periods specified in Chapter 1.5 (commencing with Section 583.110) of Title 8 of Part 2, except as provided in this section.
(b) If an action is or remains submitted to mediation pursuant to this title more than four years and six months after the plaintiff has filed the action, then the time beginning on the date four years and six months after the plaintiff has filed the action and ending on the date on which a statement of non-agreement is filed pursuant to Section 1775.9 shall not be included in computing the five-year period specified in Section 583.310.

1775.8. (a) The compensation of court-appointed mediators shall be the same as the compensation of arbitrators pursuant to Section 1141.18, except that no compensation shall be paid prior to the filing of a statement of non-agreement by the mediator pursuant to Section 1775.9 or prior to settlement of the action by the parties.
(b) All administrative costs of mediation, including compensation of mediators, shall be paid in the same manner as for arbitration pursuant to Section 1141.28. Funds allocated for the payment of arbitrators under the judicial arbitration program shall be equally available for the payment of mediators under this title.

1775.9. (a) In the event that the parties to mediation are unable to reach a mutually acceptable agreement and any party to the mediation wishes to terminate the mediation, then the mediator shall file a statement of nonagreement. This statement shall be in a form to be developed by the Judicial Council.
(b) Upon the filing of a statement of nonagreement, the matter shall be calendared for trial, by court or jury, both as to law and fact, insofar as possible, so that the trial shall be given the same place on the active list as it had prior to mediation, or shall receive civil priority on the next setting calendar.

1775.10. All statements made by the parties during the mediation shall be subject to Sections 703.5 and 1152, and Chapter 2 (commencing with Section 1115) of Division 9, of the Evidence Code.

Any party who participates in mediation pursuant to Section 1775.3 shall retain the right to obtain discovery to the extent available under the Civil Discovery Act of 1986, Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4.

1775.12. Any reference to the mediation or the statement of non-agreement filed pursuant to Section 1775.9 during any subsequent trial shall constitute an irregularity in the proceedings of the trial for the purposes of Section 657.

1775.13. It is the intent of the Legislature that nothing in this title be construed to preempt other current or future alternative dispute resolution programs operating in the trial courts.

1775.14. On or before January 1, 1998, the Judicial Council shall submit a report to the Legislature concerning court alternative dispute resolution programs. This report shall include, but not be limited to, a review of programs operated in Los Angeles County and other courts that have elected to apply this title, and shall examine, among other things, the effect of this title on the judicial arbitration programs of courts that have participated in that program.
(b) The Judicial Council shall, by rule, require that each court applying this title file with the Judicial Council such data as will enable the Judicial Council to submit the report required by subdivision (a).

1775.15. Notwithstanding any other provision of law except the provisions of this title, the Judicial Council shall provide by rule for all of the following:
(a) The procedures to be followed in submitting actions to mediation under this act.
(b) Coordination of the procedures and processes under this act with those under the trial Court Delay Reduction Act, Article 5 (commencing with Section 68600) of Chapter 2 of Title 8 of the Government Code.
(c) Exceptions for cause from provisions of this title. In providing for exceptions, the Judicial Council shall take into consideration whether the civil action might not be amenable to mediation.

