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NATIONAL CENTER FOR ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution

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Mediation

(Training Manual[***])

Introduction

This Manual[****] represents a compilation of material used in decades of mediation training.[1] It draws from a variety of academic disciplines, including:

- Law
- Psychology
- Communication Theory
- Game Theory
- Conflict Theory
- Sociology
- Cultural Anthropology

The principles upon which it is based transcend state and national boundaries. This is not a text about mediation theory. Rather, it is a platform for mediation skills development. It is intended to provide the background and context necessary for a rigorous experiential learning model. It is written in a simple, straight forward style that seeks to avoid excessive footnotes and jargon.

This Manual takes an interest-based, problem-solving approach to conflict resolution. It is neither wholly "facilitative" nor "evaluative" in orientation. While these training materials are relevant to mediation in any context, they often focuses on a "compulsory" mediation paradigm – whether the result of contractual agreement or litigation-based court referrals.

The heart of mediation skills training remains learning by doing. A Manual can never replace the learning cycle of seeing-doing-critiquing-re-doing, and this Manual is no exception. What a Manual can do is help inform that cycle.

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[1] We wish to thank our training colleagues for their many contributions through the years to the Frank Evans Center for Conflict Resolution at South Texas College of Law that lead to the creation of the various Training Manuals and materials on which this project is based. We are particularly grateful to the late Professor Hans Lawton, Judges Bruce Wettman and John Coselli, and the host of volunteer facilitators. We dedicate this Manual to the People of Georgia, with gratitude for the honor of sharing their efforts to incorporate mediation as one method of civil society dispute resolution.

Mediation training has become a core competency for many advocates and practitioners, even those who never intend to serve as mediators. A thorough, working knowledge of the process allows counsel to better serve their clients – whether crafting transactional documents that must consider the possibility and consequences of non-compliance, advising clients of potential recourses available in a pre-litigation environment, or participating in court-referred mediation as their client's representative.

Training faculty may supplement this Manual with exercises, role plays, work sheets, and samples. For those wishing to study further, or to research underlying theories and assumptions, the faculty can point to a wealth of resources, both print and e-based.

I. Mediation Basics

1. The Nature of Mediation

1.1. Overview

Mediation[2] gives parties a relatively inexpensive way to resolve their conflicts at an early stage. It offers them an opportunity to avoid some of the time, expense and stress involved in litigation or other formal grievance procedures. In some cases it may help the parties maintain valuable business and personal relationships. The hallmark of mediation is that it allows people to retain decision-making power and to craft solutions limited only by their own imagination.

Conflict is an inevitable part of life. It appears in many forms: within a person, between people, between a person and an institution, between a person and government, between institutions, between societies, between cultures, between nations.

Conflicts have many root causes. Mediation is not intended to "solve" the complex psychology, cultural, and social underpinnings of conflict. Similarly, it is not designed to determine the existence of historic facts that may have led to the conflict or proclaim the "truth" of the conflict narrative.

In some instances conflict proves to be a positive impetus for growth or change. It other instances, it mires the participants, sometimes impacting areas of life beyond the immediate scope of the conflict. In the vast majority of life's conflicts, the people involved are able to navigate their own end to the conflict. But that is not true in every instance. Mediation is intended to assist those experiencing conflict to reach a resolution that they craft and that allows them to move beyond the conflict.

In this training, the goal is not to eradicate conflict. It is to develop tools that allow parties in conflict to each "win" or, at a minimum, to be able to walk away from the conflict with a mutually acceptable solution which they can each live.

Mediation is essentially a form of assisted negotiation. In mediation, a neutral third person helps the parties to:

- identify issues and interests,
- vent anger and frustration,
- negotiate effectively, and
- find creative solutions to their problems.

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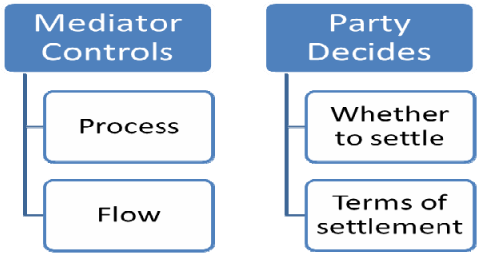
[2] In some systems, "mediation" may be known as "conciliation" although the term "conciliation" has other meanings as well. An example of mediation/conciliation in commercial disputes is found in UNCITRAL's 1980 Conciliation Rules. The conciliator's role is identical to that of the mediator, he "assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute." The UNICTRAL Rules "cover all aspects of the conciliation process, providing a model conciliation clause, defining when conciliation is deemed to have commenced and terminated and addressing procedural aspects relating to the appointment and role of conciliators and the general conduct of proceedings. The Rules also address issues such as confidentiality, admissibility of evidence in other proceedings and limits to the right of parties to undertake judicial or arbitral proceedings whilst the conciliation is in progress", <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980Conciliation_rules.html>.

Mediation differs from litigation or arbitration in that the parties themselves "own the results". That means it is the parties who have the power to decide whether and when to compromise, and under what terms. While the mediator's role is to direct the course of the process, the parties themselves maintain control over the content and any settlement.



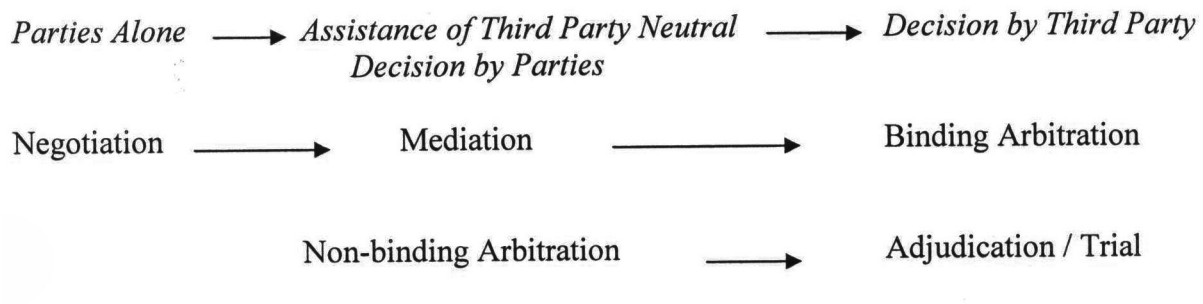
There are many different definitions of mediation, but generally, they involve an explanation of the mediator's role as a facilitator who assists people in conflict to arrive at a mutually agreeable solution. The mediator's role is not one of decision maker; instead, the mediator works with the parties to promote reconciliation, settlement, or understanding.

Generally speaking, mediation offers a private, confidential process in which an impartial third party encourages and helps disputing parties to communicate effectively with one another. It provides a somewhat structured, but still flexible, negotiation environment in which the parties may talk confidentially with one another.

Parties may come to mediation via different routes:

- pre-dispute agreement to submit to ADR process (frequently contractual)[3]
- post-dispute, ad hoc agreement to submit to ADR process
- mandatory referral (often court or agency-based).

A. Mediation's Role in the Continuum of Dispute Resolution Processes



[3] For example, the International Centre for Dispute Resolution (ICDR) [the international division of the American Arbitration Association (AAA)] provides the following mediation clause examples: If the parties want to adopt mediation as a part of their contractual dispute settlement procedure, they can insert the following mediation clause into their contract in conjunction with a standard arbitration provision: *If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation in accordance with the International Mediation Rules of the International Centre for Dispute Resolution before resorting to arbitration, litigation or some other dispute resolution procedure.* If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission: *The parties hereby submit the following dispute to mediation administered by the International Centre for Dispute Resolution in accordance with its International Mediation Rules. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings and any other item of concern to the parties.)* See <https://www.adr.org/aaa/faces/rules>.

The far left of this flow chart represents how a majority of "disputes" are resolved in daily life – the parties to the dispute reach a solution on their own, without the intervention of third parties.

The far right represents the opposite extreme, in which the dispute is decided by someone other than the parties to it. The middle block, where mediation is found, represents the insertion of a third party not connected to the dispute to help, while still leaving the ultimate decisions about whether and how a dispute is resolved to the parties themselves.

1.3. The Mediation Format

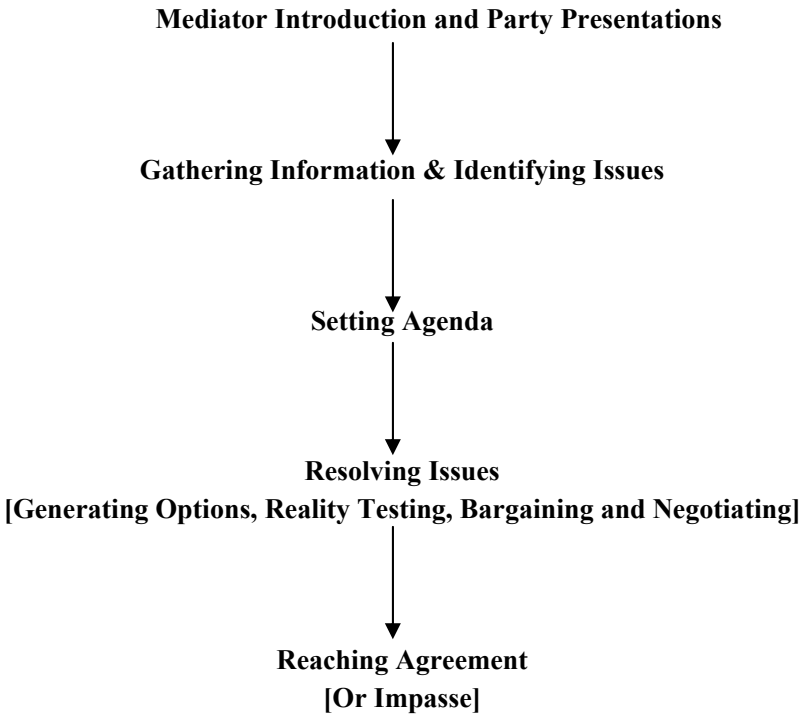
Mediation is normally conducted in a more relaxed and informal manner than formal court proceedings. Because the process involves individuals, it can be adapted to meet their particular needs. The details concerning how a particular mediation is conducted may vary according to an individual mediator's preferences and style, the relationship between the parties, and information and needs that become known during the course of the mediation. Nevertheless, there is a general template, or process, that is often followed.

Overview

The mediation session often begins with party presentations, where the participants are encouraged to give their respective versions of the dispute. This may include the parties venting their anger and frustration. During these discussions, the mediator seeks to identify the parties' underlying interests and to determine the "why" behind the stated position. Next, the mediator assists the parties in settlement discussions by setting a discussion agenda, reframing their communications in neutral language and focusing their attention on possible solutions. The mediator will often help the parties "reality test" their proposed solutions. If the parties reach an accord, they usually execute a written agreement that may be enforced as any other contract.

Stages

The mediation process has five basic stages[4]:



[4] Some trainers separate the process into nine distinct stages, with four additional optional components.

Within this structure, the participants may repeat individual stages as often as necessary. The process is not a linear one.

2. The Mediator's Role

The mediator's primary function is to assist the parties in their communication with one another. The mediator conducts the process, controls the flow of information, helps clarify issues, and brokers the parties' negotiations.

What the mediator does NOT do:

- Adjudicate
- Make evidentiary rulings
- Advocate for a particular outcome
- State opinions
- Serve as judge or jury
- Render a verdict or binding resolution
- Coerce the parties into settlement

During the course of the mediation, the mediator will try to focus the parties' attention on the real issues in dispute and help them generate problem-solving options. Sometimes the mediator serves as a facilitator of communications by actively supervising the parties' negotiations; at other times, the mediator functions as a teacher, helping the parties understand the dynamics of their conflict and how to make effective use of the mediation process.

Often, the mediator performs the role of a devil's advocate, encouraging each party to look at the dispute from the other party's point of view and to make a realistic evaluation of the other side's position. The mediator, however, NEVER performs the function of a judge or jury. This means the mediator should refrain from making decisions or advocating a particular outcome of the case. The mediator's sole obligation is to assist the parties in reaching a *voluntary* settlement. The mediator should never coerce the parties to enter into an agreement against their wishes. Although the mediator ethically may make suggestions regarding settlement options, all settlement *decisions* must be left to the parties.

Good, effective mediators share critical characteristics including:

- Neutrality [relationship of mediator to parties – not aligned with either side]
- Impartiality [committed to aid all parties; unbiased]
- Flexibility [able to respond in real time to the dynamics present in the mediation]
- Good listening and communication skills [comfortable using a range of questioning and reframing styles]
- Creativity [able to generate options when needed or help parties do so]

3. The Mediation Environment

Parties to a dispute often come to mediation with preconceived notions about the merits of the controversy and with definite ideas about how it should be resolved. It is not unusual for the parties to feel anger toward the opposite side and they may also be apprehensive about the mediation process. Additionally, this may be the first time the parties have encountered one another since the conflict began. Because of this tension, the mediator must conduct the process in an environment that is neutral, comfortable, and calming.

In setting the stage for mediation, the mediator should consider the following items:

- *A Neutral Site*

If possible, the mediation should be conducted at a neutral site. This might be the mediator's office, a hotel conference room, commercial mediation conference space for rent, or unused space at the courthouse.

ONLY when no other location is available, should the mediation be conducted in the offices of one of the parties or their counsel.

• *Space and Seating*

Parties often come to mediation with a high degree of emotion, anxiety, and even hostility. The mediator should try to create an environment that encourages cooperative interaction. The mediator must be aware that even the seating arrangement and the distance between the parties may be important considerations.

Different cultures have established norms regarding the acceptable distance between people in various situations.[5] People become uncomfortable when the space between them does not fit their cultural expectations.

The mediation rooms need ample space for the participants to move freely. Room temperatures should be maintained at a comfortable level. The rooms should be soundproof so as to preserve confidentiality. Some studies have shown that parties reach agreement more easily in rooms that have windows.

Ideally the facility should have enough space for a joint meeting room, with smaller conference rooms ["caucus rooms"] available for the participants if it becomes necessary to move from a joint session into private meetings. When possible, a "caucus room" should also be provided for *each* party to the mediation. This is space separate and apart from the central conference room, so that each side may meet privately with the mediator. However, a mediator may find themselves conducting a mediation where space is limited. In these instances, the mediator may have to ask one party to step out of the room so they may caucus with the other party and vice versa.

• *Food and Other Considerations*

Typically, the mediator will supply beverages and food for the disputants. If the mediation lasts a full day, the mediator should make suitable arrangements for lunch. These meals should be scheduled so that they enhance, rather than disrupt, the natural rhythm of the parties' negotiations.

If possible, each caucus room should be equipped with a telephone, drawing board, and writing pads and utensils. In some instances a DVD player, computer or touch pad, and monitor will assist the process.

• *Party Advisors*

Sometimes a party will arrive at the mediation session accompanied by an accountant, financial planner, or friend who has no individual or professional interest in the dispute. The mediator should try to ascertain, before the mediation begins, if possible, the exact role such non-party intends to play in the process and whether the opposing party objects to his or her attendance. The mediator must then decide whether the third party will be permitted to attend the mediation process. Generally, it is advisable to try to keep the number of participants roughly the same on both sides.

4. The Mediation Atmosphere / Attitude

4.1. The Mediator's Responsibility

An important part of the mediation environment is its "atmosphere." The goal is to create an environment conducive to reaching a mutually satisfactory resolution and to avoid elements and attitudes that place the parties in opposition to one another or that heighten an adversarial posture.

The mediator directs, or choreographs, the process. To create a positive mediation atmosphere, the mediator must remain sensitive to the needs of the parties and demonstrate continuing concern about their

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[5] Christopher W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict at 149-150 (1989). For example, in the United States people comfortably engage in personal relationship communication on a 1 to 2 foot range. In contrast, working relationships and formal social interactions in the United States are normally conducted within a four to seven feet range.

comfort and well-being. This covers more than their physical comforts. Although the mediator always maintains neutrality and impartiality, the mediator is also serving as the primary proponent of successful resolution. Much of the mediator's activities will center on moving the process forward in a positive manner and recognizing when advances to settlement have been made. Even while asking the parties difficult questions and reality testing proposals, the mediator is an advocate for resolution.

4.2. Mediator Styles

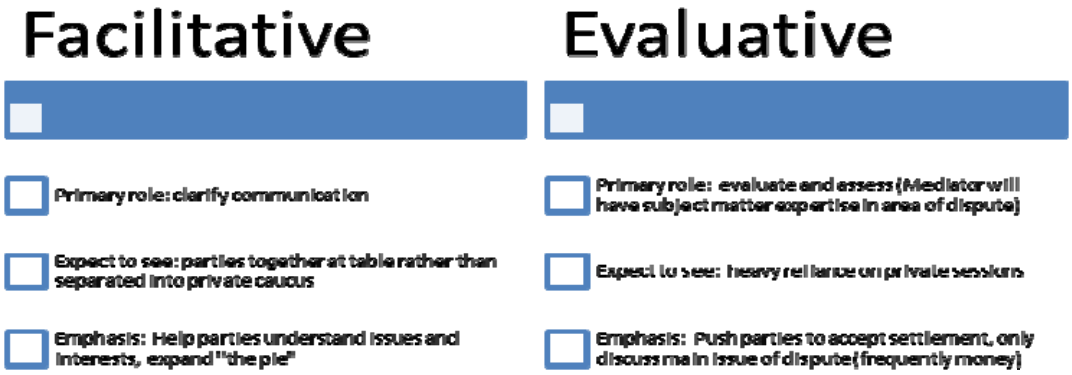
Mediators may have very different mediation styles. This may be a function of personal preference or their initial mediation training. Generally, mediators tend toward either an *evaluative* or *facilitative* approach.

One way to categorize a mediator's style is to ask:

1. How narrowly or broadly does the mediator tend to define the problem/ issue?

2. Does the mediator view her responsibility to include making assessments, offering prediction, or generating options and proposals?

At the risk of gross generalization, a mediator with an evaluative style can be thought of as one who tends to be more comfortable assessing parties' claims and options and more appear slightly more aggressive in her interactions. In contrast, the mediator with a facilitative style is one who tends to take a more passive problem-solving approach. Most mediators have a preference for one style over the other, but should be able to move smoothly between evaluative and facilitative techniques as the need arises. Many mediators have developed a style somewhere between those two extremes.



Some markets place a premium on mediators who are much more evaluative than facilitative. Mediators practicing in these environments have responded to market demands by developing the technique of "living in the question". The phrase describes a process used by evaluative mediators that has the parties constantly evaluating their case in an effort to reach settlement. Instead of the mediator stating what might be a fair and reasonable settlement, the mediator engages in sets of logical questions designed to bring the parties around to the same line of thinking. When used in caucus sessions, the questions have the party examine the strengths and weaknesses of both positions to analyze what a court might do.

Some mediators may begin a particular mediation with a more facilitative approach but in later stages move to a more evaluative stance. These shifts in approach should always be the result of a strategic choice by the mediator based on how the session is proceeding.

4.3. The Parties' Responsibility

A successful resolution often requires more than just a good mediator. The parties themselves will play the most important role in determining whether there is resolution.

The parties must be educated about why settling the dispute in mediation is in their best interest regardless of how they came to be at the mediation table. Concomitantly, both sides to the dispute must ha-

ve the necessary information, capability, and motivation in order to arrive at a realistic appraisal of their position. A party's settlement efforts may be futile if it does not have a realistic view of the dispute.

In addition, the true decision-makers must either be present at the mediation or give their representative full authority to negotiate and agree to a settlement on their behalf. When a party's representative lacks adequate settlement authority, attempts at settlement can be severely hampered. However, if the person with true settlement authority can be reached *during* the mediation (taking advantage of the many technology resources of the 21st Century), then their actual physical presence may not be necessary. Some mediators and mediation centers may insist on the presence of settlement authority as a precondition for beginning mediation.

The mediator, if possible, will have had some communication with the parties before the session formally begins. Through these communications, the mediator begins to build trust and confidence and may help alleviate some anxieties and concerns. The mediator may also start the task of gathering information about the parties and their dispute. Often this is accomplished when counsel submits a one or two page submission statement.[6]

If parties are mentally prepared for and committed to the mediation process before coming to the mediation session, they will more likely be willing to engage in good faith settlement negotiation.

5. Benefits of Mediation

How valuable mediation may in any given dispute will be a function of the nature of the dispute, the stage in the dispute at which mediation occurs, the personalities of the disputants and possibly their representatives, and the underlying interests at issue.

Generally, mediation is thought be provide the following positives:

- Saves time
- Saves money
- Is confidential
- Fosters party self-determination
- Allows for creative settlement options and tailored solutions
- Reaches agreements that are more likely to be upheld.

Although mediation provides many positive benefits, there may be situations in which this confidential process is not as appropriate as other methods of resolving disputes. Consider:

- Cases affecting important constitutional or human rights,
- Cases presenting issues that need public airing and resolution for societal reasons,
- Cases involving high animosities and power imbalances between the parties, such as domestic violence.

In some instances, a party's advocate may have little choice concerning mediation or another ADR process. There may be contractual provisions requiring ADR as a predicate to litigation, or even in lieu of court-based proceedings. In other instances, although litigation has begun, mediation may be court-ordered or court-referred.

Assuming, however, that the parties will have a choice, factors that an advocate may consider, and which echo factors that a mediator may later find relevant, include:

- What type of solution does the party need:
  - Quick fix
  - Temporary or permanent
  - Precedent, public or confidential

[6] The mediator is not reviewing pleadings, discovery transcripts, or court documents. Nor is the mediator conducting independent legal research into the strength of a party's position or the merits of their claim.

- Modifiable
- How do the parties interact:
- Long term relationship
  - Interested in maintaining
  - Want to terminate
- One-time event
- What are the client's emotional or psychological interests:
- Vindicating position
- Avoiding stress of unresolved issue
- Avoiding stress of litigation or similar proceeding
- Maintaining relationship
- What are the client's financial interests:
- Securing speedy recovery
- Containing or limiting risk
- Containing or limiting costs

II. Conducting the Mediation

Overview

Mediation, as with all dispute resolution processes, consists of a series of stages. Although these stages may overlap, they usually will include five identifiable steps. Each step has its own activities, and each step presents goals and objectives from the mediator's perspective:

Mediator's Introduction

Activity: Mediator makes a presentation to disputants

Objectives:

- Establish rapport with disputants
- Explain process, roles, and format
- Develop guidelines for the process
- Obtain commitments from parties

Party Presentations

Activity: Parties relate their view of events, desired outcomes

Objectives:

- Preliminarily identify issues underlying the dispute
- Preliminarily identify parties' positions on the issues
- Recognize problems that might occur during this mediation, including: roadblocks to communication, potential power imbalances, likelihood that parties might work together to craft creative solutions

Information Gathering/Issue Identification

Activity: Mediator follows up with questions [sometimes, also, parties respond to what they heard from one another]

Objectives:

- Clarify
- Develop list of parties issues
- Frame issues in neutral language
- Set agenda

Settlement Options/Negotiation

Activity: Can occur in joint session or private meetings (caucus)

Objectives:

- Brainstorm
- Help generate new proposals
- Explore ways for parties to share information with one another
- Reality test

Closing

Activity: Obtain written agreement (whether complete or partial)

Alternative Activity: Set date for further communications

Objective:

- Memorialize parties commitments to one another
- Provide framework for later settlement document

Mediator's Introduction

The mediator's introduction is one of the most important stages of the mediation session because it sets the tone for the parties' negotiations. Before beginning the mediation/negotiation, the mediator should make appropriate disclosures to the participants, explain the format, and confirm that the parties are willing to go forward.

Basic Mediator Introductory Checklist

Introduce mediator, parties, and representatives
Explain mediator's credentials; make disclosures; confirm neutrality and confidentiality
Obtain parties' commitments [Might include signed agreement to mediate]
Explain mediation process and mediator's role
E. Explain mediation format:
Parties' presentations
Joint or separate meetings
Discuss questions or concerns regarding any aspects of the process, neutrality or confidentiality
Express confidence and encouragement

Disclosures and Explanations

The mediator should fully disclose any known relationships with the parties or their counsel that might affect or give the appearance of affecting the mediator's neutrality. It is appropriate for a mediator to withdraw if either party expresses dissatisfaction with the mediator's neutrality or impartiality.

The mediator should fully inform the parties about: (1) his or her experience and qualifications; (2) any existing or prior relationships that might raise question about the mediator's neutrality and impartiality; and (3) the mediator's fees and other costs charged to the mediation.[7]

Commitments About Time and Settlement Authority

Before convening the mediation, the mediator should ascertain that all parties (or their designated representatives) have adequate authority to negotiate a settlement and have set aside sufficient time for the mediation.

[7] Normally issues of fees and costs will have been decided well in advance of the Mediation.

Issues Impacting the *Pro Se* Party

The mediator should refuse to proceed with the mediation if, in his opinion, a *pro se* party does not fully understand that the mediator will not provide legal advice. The mediator should also explain to a *pro se* party there might be risks in proceeding without independent counsel or professional advisors.

Commitment to Negotiate in Good Faith

Next, the mediator should obtain the parties' commitments they will abide by the rules and procedures established by the mediator and will engage in good-faith negotiations to try to reach a compromise of their dispute. At the end of the mediator's introductory statement, the parties should fully understand the mediation process and be mentally committed to try to settle the dispute. The mediator should then give the parties another opportunity to ask questions and make comments.

Mediator Opening: Sample One

Good Morning!

I appreciate your coming here today. I hope you are comfortable and relaxed. We have water, coffee, and cookies on the table; if you need anything else, please let me (us) know. The restrooms are right down the hall.

We have some important tasks to accomplish today, but I think you will find this to be a rewarding process. If we all work together, I am confident we can reach a good result and that you will appreciate having taken part in this cooperative effort.

First, I would like for each of us to introduce ourselves, and I will begin. My name, again, is _____, and my role is to assist you and your counsel in resolving this dispute. (Continue around the table with introductions).

Now, before we hear the parties' presentations, let me take a minute to further explain my background and experience and to be sure you are satisfied with my qualifications and neutrality as the mediator. (Mediator offers further explanation about credentials, if necessary; makes any required disclosures; and confirms the parties' desire that he/she continue to serve as the mediator). It is very important that you are comfortable with my serving as your mediator today. If anything occurs during the mediation that seems unusual or inappropriate to you, please do not hesitate to bring it to my attention so we can discuss it. Unless you have confidence in my ability, in my neutrality and in the mediation process, we will not be able to make the most effective use of the mediation process and everyone's time today. However, if you have confidence in me and the mediation process, and if we work together as we have committed to do, I think we have an excellent chance of resolving this matter today. Now, here is the mediation agreement that represents what we have agreed. I have previously sent a copy of it to your counsel, but I would like you to briefly review it and let me know if you do not understand something in it. If it is agreeable to you, please sign in the appropriate place and return it to me. Everyone will receive a signed copy.

All right, now let's review the mediation process and decide what our roles are here today. First, as I am sure you understand, this is not a court function (even though the court may have referred this dispute to mediation), so there are no court rules to be concerned with. I will not function as a judge or jury. I will not enter a judgment, make a ruling, or render a verdict. My sole function is to serve you, as a neutral person, and to assist you in your settlement negotiations. So, please keep in mind that no one is going to try to make you settle your case, and it will be entirely up to you and your counsel whether or not you decide to settle. If you do decide to settle your case today, you will likely save yourselves considerable time, cost and stress, and you certainly will be able to get on with your lives without worrying about this case. I will discuss these and other considerations with you in greater detail.

Next, I would like to briefly cover what we will be doing today and see if the format is agreeable to you. I have had some discussions with your counsel (if represented by counsel), so I think I have their

general guidance on the format of today's session. First, we will hear brief presentations from each side (what will constitute "brief" will depend upon the facts of each case). This means that each party's counsel (or the party if not represented by counsel) will address some brief remarks to the opposite party, giving their client's understanding of the dispute and stating what they would like to see happen as a result of today's efforts. I have an understanding with counsel that: (1) their remarks will be as brief as possible; (2) they will explain their client's claims in a non-accusatory manner; and (3) that we will not interrupt one another and will address each other civilly and with respect. At the conclusion of each counsel's opening remarks, I will invite each party and their representatives to add their statements to those given by your counsel, and particularly, to tell us what you hope to see accomplished here today. It is not imperative that you or your representatives say anything at that time, and each of you will have ample opportunity to talk throughout the day. However, if you feel inclined to say something, and your counsel does not object to your doing so, please feel free to say whatever you would like. In this respect, I would like to emphasize the importance of a free and open exchange of information and ideas in developing options for the resolution of this dispute.

At the conclusion of the parties' presentations, we will take short break. (Here describe logistics, including location of rooms, etc). Then, I think it may be best to move one side of our table to the far conference room, so that I will have an opportunity to personally visit with each of you and so we can more easily exchange information that may be confidential to you (this portion to be used when the plan is to caucus right after initial party presentations). During these visits, I will discuss the issues with you and your counsel in an effort to bring a more objective focus on the matters in dispute. In these discussions, my duty is to raise questions about the relative strength and weakness of particular arguments, and on occasion, it may seem that I am more inclined toward the position taken by the opposing side. But, in reality, that is not the case, and you may be assured that I am performing an identical "devil's advocate" task when I am in the other conference room visiting with the opposing side. If, in our discussions, I seem to be "way off course" in my questions or comments, please don't hesitate to tell me about it. We are here to reach a consensus of thought, and that will not happen if we are afraid to talk openly with one another during our confidential discussions.

On the issue of confidentiality, I want to assure you that any confidential information given to me during our private discussions will stay with me and will not be released to the opposite party unless and until you tell me to do so. Therefore, I hope you will tell me anything that bears on the dispute and which could help us reach a settlement, knowing that I will respect the confidential nature of the information. To be sure that I understand what information should not be disclosed without your permission, please try to tell me what information you consider to be confidential so that I can "flag" that information in my notes.

Now, sometimes I will have to stay longer talking with one room than another, and I can seldom predict when that will occur. So, while I will try to keep you apprised of my whereabouts, please know that, when I am not with you, I am working hard with the other side. In this respect, when I am not in the room with you, I would appreciate your continuing to work with your counsel, so that you may continue to analyze your position and perhaps keep a step or so ahead of me (if not represented by counsel it is still a good idea to leave the party with something to work on).

We have a lot of ground to cover today. However, I know we have a good chance for settlement if we all work hard and keep at it. Please let me know if at any point you feel you need to take a break. Otherwise, I hope you will try to stay close by so we can find you if we need your guidance or decision on a particular matter. (For those of you that smoke, you will need to go outside the building, please let your colleagues know where you are heading so they may find you).

All right, if there are no questions about anything I have said, let's get to work.

Mediator Introduction:Sample Two [Caucus Format][8]

My name is _____. Thank you very much for agreeing to participate in today's mediation. I presume everyone knows each other; however, before we get started today, let us all take the opportunity to introduce ourselves and to let everyone know how we would like to be addressed. You may all call me _____.

As you probably know, mediation is a forum in which an impartial person, the mediator/neutral – me in this instance – facilitates communication between the parties to a dispute – today that is all of you – to promote reconciliation, settlement, or understanding among the parties – you all.

If handled properly this can be a rewarding and/or useful process. It is my job to encourage and to assist you all in reaching a settlement of your dispute; however, I am not here to compel you to settle. This is not a Court of law and I am not here to judge the merits of your case (dispute if no suit pending) or to make a determination of the outcome. It is up to you all and you all alone to decide whether it is in each of your best interests to resolve your dispute today.

The beauty of mediation is that all mediation sessions are private, confidential and privileged from discovery (if a lawsuit or potential lawsuit is involved). I am not required to disclose any information revealed to me unless you all authorize me to do so, and I will not disclose any confidential information unless you ask me to do so. Likewise, each of you has agreed not to make any effort to compel any testimony whatsoever of the mediator regarding any communication, written or oral, made in connection with the mediation.

That said, it is important that you feel comfortable with my qualifications to mediate this matter and with my impartiality in this matter. (Discuss your qualifications and disclose any relationships that may cause concern with respect to your impartiality/neutrality). If everyone is comfortable with me conducting this mediation for you, I would like to go over the mediation agreement that will bind us through the mediation process. (If the parties are represented by counsel)… I have previously sent a copy to your counsel, but always like to go over our agreement again in case you all have any questions or concerns.

On that note, if at any time you think something unusual or inappropriate to you has occurred, please bring it to my attention so that we can correct the situation and have you comfortable with completing the mediation process. Likewise, if at any time during the day, you believe I have lost my impartiality or neutrality, please bring that to my attention as well. Although at times I may be tough on you in our private sessions in order to facilitate meaningful discussions, I am probably being equally as tough on the other side and that does not mean that I have lost my impartiality or neutrality or that I believe in one outcome over another. Please keep this in mind as we go through the process.

Now that you know what mediation is, what my role is and who I am, let me explain the "process" in further detail.

As I mentioned earlier, the mediation process is not a court function and your dispute will not be judged by any third party (either by a judge or a jury). Accordingly there are no court rules to deal with; however, to maximize the process and the potential for settling your dispute today, I have a couple of rules that I need you all to agree to follow: 1) I ask that everyone is polite and respectful of all parties and their counsel; 2) I ask that you allow me to determine when the parties, you, have reached an impasse and that no other work will be constructive in resolving your dispute. On that note, I ask that you not leave until I have called an impasse or otherwise determined that further discussions will not be productive at this time. If you follow these rules, I believe there is a very good chance that our hard work and constructive effort will result in your dispute being resolved today. Which, of course, is a good thing as it will eliminate the need for you all to spend any additional time or money in the future and it will prevent you from having to rely on a judge and/or unknown stranger on a jury to decide this dispute for you.

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[8] This is a less common model.

I like to conduct caucus format mediations. This means that I like to separate the parties into their own room and conduct "shuttle diplomacy" between the rooms in order to facilitate candid and open discussion on the various issues and possible solutions to you all's dispute.

First, we will here brief opening remarks from each of your counsel, and if your counsel and/or you desire from each of you as well. This means that each side will address, in a courteous and non-argumentative fashion, the other side and explain their respective understanding of the dispute and how they would like to see this matter resolved. Although I would prefer that each side make opening remarks, it is not imperative that either you or your counsel to say anything at this point. You will have more than ample time to state your position throughout the caucus sessions. However, I do think it is helpful to set a framework for the discussion and would encourage you to at least make some introductory comments.

After the opening remarks, we may take a brief break and then, as I mentioned before, I will split the parties up in different rooms and meet with each side individually. During these "visits" I will discuss the interests and issues with you and your counsel in an effort to bring a more objective focus on the issues in dispute. My duty is to raise questions about the relative strengths and weaknesses of particular arguments raised by each side. Sometimes, it may appear as if I am more inclined toward the position taken by the opposing side. This is not the case. It is important for the mediator – me – to play the "devil's advocate" when helping you to become more focused on possible resolutions and/or solutions to your dispute. It may also seem as if I am spending more time with one side or the other; however, you should not take this as me taking "sides" in the dispute or playing favorites. It often and routinely happens that some caucuses take longer than others in facilitating a resolution to a dispute. It is important for you all to remember that what we discuss in the private caucus is confidential. If anything is said in those discussions that you do not want me to relay to the other side you simply need to let me know so that I can make a note of what you do not want me to discuss.

Finally, we will continue with the caucus with the caucus sessions until you all have reached an agreement or until I have determined that the mediation has reached an impasse. If you reach a resolution today, and I am confident with hard constructive work you can reach a resolution through the mediation process, I will work with you in drafting a Mediated Settlement Agreement that will memorialize your agreements and become the "contract" by which you all have resolved your dispute.

Before we get started I just want to let you know that we have snacks and drinks in the kitchen and the restrooms are down the hall. For you smokers, we have a smoking area outside, but please do not wander to far afield without letting me know where you are.

So, if there are no questions about anything I have said, I would like to begin with the opening remarks.

Written Agreement to Mediate

At some point during the opening, often after receiving a commitment to negotiate in good faith, some mediators may then ask the parties to sign a written Agreement to Mediate that confirms these disclosures and explanations.

Such an agreement might provide the following language:

The undersigned parties and their counsel have agreed to submit this matter for mediation before _____. For the purpose of this mediation, the undersigned agree:

1. That the parties are satisfied with the qualifications and neutrality of the mediator, and no conflict of interest prevents his serving that capacity.

2. That the parties will cooperate with each other and with the mediator in making a good faith effort to negotiate a prompt and reasonable settlement of this dispute.

3. That the parties and their representatives will remain in attendance at the mediation session until an agreement is reached or the mediator and parties decide that the session should be postponed or terminated.

4. That the parties will continue settlement negotiations following the mediation session if so requested by the mediator.

5. That the mediation will be considered a compromise negotiation as that term is used in rules of evidence. No stenographic, visual, or audio record will be made of the proceeding. All conduct, statements, promises, offers, views and options, whether verbal or written, made in the course of the mediation by any party, their agents, employees, representatives, or other invitees, or by the mediator, will constitute privileged communications, and will be deemed confidential and protected Subject to the rule that evidence otherwise discoverable cannot be insulated from discovery by disclosure in a mediation, all such conduct, statements, promises, offers, views and opinions, whether oral or written, will not be discoverable or admissible for any purposes, including impeachment, in any litigation or other proceedings involving the parties, and the same shall not be disclosed to anyone, including a referring court.

6. No service of any subpoena, process, summons, complaint, citation or writ will be made or attempted on any person at or near the site of the mediation, or who may be entering, attending or leaving the session. The mediator will never be subpoenaed or called as a witness by any party to such a proceeding.

Executed this _____ day of _____, 20__ in _____.

_____ _____

Practical Suggestions for Mediator's Opening Statement

Since this is the mediator's opportunity to set the tone and build rapport, there are some forensic techniques that can help achieve those goals:

- Be formal, but not too formal.
- Personalize your opening and make it "your own", not something prepared by someone else and delivered by rote.
- "Tell" your opening, do not read it.
- Maintain eye contact (equally) with the parties.
- Keep the introduction the appropriate length. It should be long enough to signal a break from the act of getting situated in the room to actually beginning the process but not so long that that parties lose focus. Many mediators find that an opening of five to seven minutes achieves that transition.

Party Presentations

At the conclusion of the introduction phase, the mediator invites the parties to make brief oral presentations regarding their positions and asks them to state what they hope to accomplish in the mediation.

In many cases the party's attorney will make the introductory presentation on behalf of the client. In other mediations, both the attorney/advocate and the party will make preliminary remarks. Regardless of the format, during this party presentation the speaker [attorney, client or both] should be educating the mediator and other parties about:

- the party's version of the facts,
- underlying issues,
- an initial idea of what they are asking for and/or willing to do to compensate the other side (if anything).

An experienced mediator usually will encourage the parties to listen attentively to this exchange of information, because it often represents the first meaningful communication since the inception of the conflict. Although the format of this exchange is informal and relaxed, the mediator maintains careful control over the process so that each side has an uninterrupted opportunity to speak and be heard.

It is not unusual for legal and factual issues can become muddled and distorted during the parties' presentations. The parties' presentations tend to set the tone for the negotiations, and they may have considerable impact in motivating the other side to accept a reasonable settlement.

Mediator's Analysis

After both sides have made their presentations, the mediator should have a reasonably good idea of the issues underlying the dispute and the parties' positions on those issues. The mediator should also have some preliminary notions about problems that may occur during the mediation, including the potential of a power imbalance and whether the parties may work together in developing creative solutions to the problem.

At the end of the party presentations, the mediator may have remaining questions about the dispute, the parties positions, their relationship with one another, or the state of negotiations leading up to the mediation. It is appropriate for the mediator to ask questions and seek clarification. In doing so, the mediator should stay aware of these guidelines:

- Some questions are more appropriately asked in a confidential setting.
- The mediator's role is not to resolve contested facts.
- Mediation is a forward-looking process rather than a quest to assess responsibility or blame.
- The mediator's questions at the phase should never resemble "cross-examination" of a party.

Issue Identification and Agenda Setting

In the opening presentations, the parties will usually tell the mediator which "issues" they feel are most important. Indeed, most parties are eager to advise the mediator about the "problem" in order to achieve an acceptable settlement. The "position" of the party is typically very clear and explicit. The underlying "interest", or reason a particular position is important, is less so.

As a result, even though the parties may have defined the relevant legal issues to be addressed, those issues may not be the key to resolving the dispute. The mediator may need to go further to explore issues. Often the mediator is able to identify these special needs and interests through confidential discussions with the parties. Even though that probing will take place later in the process, the stage for that conversation can be set in this preliminary identification of issues and agenda setting phase.

Identifying the Issues

The mediator will begin developing a list of the party's issues, making an effort to reframe those issues in neutral language that both removes their partisan and inflammatory rhetoric and shifts perceptions in order to facilitate later negotiation. This "issues list" will serve as the "menu" or template of the negotiation dialogue that follows.

Reframing Examples:

Party Statement: "I refuse to work with him any longer!"

Mediator Reframe [i.e., what's listed on board]: "Supervision arrangements"

As the list is being developed, the mediator continues to review it with the parties to check for its accuracy and completeness.

Helpful techniques that the mediator should consider employing include:

- Writing the issues on a flip chart or board so that nothing is overlooked.
- Confirming with the parties that nothing is missing and stressing that list can always be expanded.
- Avoiding having a "single" issue list.

Setting the Agenda

Once the issues after been determined, the mediator's next task is to determine the order in which to discuss them. This is a strategic task and will involve re-ordering the items on the issues list rather than merely addressing them in random order as they appear.

Mediators employ a variety of strategies to set the agenda, including:

- Asking the parties which issues they would like to discuss first [their view of the order of importance]
- Having the parties alternate in picking the order of issues to address
- Beginning with the "easy" issue on the theory that resolution of a simple issue will be the first "victory" in reaching agreement and set the stage for larger settlement
- Beginning with the most difficult issue on the theory that if there is no possible resolution there, then a series of small agreements are meaningless
- Dividing issues by subject matter groupings, and then within each group moving from easy to hard [or vice versa]
- Identifying "building blocks" to a larger resolution

Parties' Negotiations

Joint and Separate Conferences

Following the parties' presentations, issue identification, and agenda setting, the mediator must decide whether to continue with the joint meeting or whether the parties should be separated for private, confidential meetings with the mediator.

These separate meetings, known as caucuses, are frequently used where:

- there is some animosity between the parties,
- where one or both parties request one,
- where each party needs a separate room to discuss negotiation bids and settlement options
- where the mediator needs to meet individually with one or both sides to seek clarity on an issue identified during the party presentations.

The caucus model provides an opportunity for parties to confer privately in developing their negotiating bids and make responses. It also allows the parties to vent feelings of anger or frustration in a private session with just the mediator present. During the caucus session, the mediator may translate into "neutral language" the parties' bargaining bids and responses and offer encouragement for their continued negotiations. If an impasse should develop during this bargaining stage, the mediator may call the parties together in a joint meeting for the purpose of discussing their next course of action.

Gathering Information

During the course of the negotiating process, the mediator continues to gather and analyze information. This information gathering is important, because most parties, during their opening presentations, will have concentrated only on the information they believed to be important. In subsequent conversations, the mediator should review the information received in the opening presentations and explore with the parties whether there are additional facts bearing consideration. In this way, the mediator begins to identify and bring to the surface other issues and interests which may motivate the parties in their efforts to reach an acceptable settlement.

Restating and Analyzing Positions

In the course of gathering this additional information, the mediator may restate the parties' positional statements in neutral language and help them analyze the merits of their positions. This reframing [restatement] process serves several purposes: it is an active listening technique that shows the parties they are being heard and someone understands their point of view while defining the issues and interests from a perspective that aids the parties in making an objective evaluation of their respective positions, expectations and demands.

Obtaining and Transmitting Settlement Offers

After the parties have been given ample opportunity to express themselves, the mediator may encourage them to begin settlement negotiations. Usually, these negotiations are distributive in nature, so that one party, usually the claimant, makes a demand for money or other thing of value for the purpose of eliciting a responsive bid from the other party.

During these negotiations, the mediator serves both as a neutral messenger and as a neutral advisor. As a neutral advisor, the mediator may offer objective advice about the progress of the negotiations. The mediator also provides helpful information regarding the productivity of the bargaining process. In giving this advice, however, the mediator must maintain complete neutrality and respect the confidentiality of the parties' private communications. As the negotiations progress, the mediator may encourage the parties to explore new settlement possibilities, but the mediator should avoid recommending one particular option over another. The mediator's role at this stage is simply to encourage the parties to continue their negotiations and to help them decide which settlement option is to their best advantage.

Creating Settlement Options

In many cases, the parties will be able to resolve their dispute by negotiating a payment of money.

Some cases, however, may only be resolved through creative settlement agreements. In these cases, the mediator must work with the parties in brainstorming ideas about ways in which the dispute might be resolved. The parties should be encouraged to suggest a variety of ideas, no matter how ridiculous they might seem. If the mediator is able to establish a creative and collaborative atmosphere for the problem-solving effort, the parties themselves usually will find their own solutions. The term often used when referring to this kind of problem solving is "*thinking outside of the box*." The mediator should serve as the facilitator and motivator for the process, but should avoid suggesting specific options too early in the brainstorming process. What may appear to the mediator to be a most reasonable and viable solution may not seem appealing to one or both of the parties.

In this brainstorming process, the mediator should encourage the parties to think "laterally" and *"outside the box*" so their creativity is not limited by the apparent parameters of the dispute. In appropriate circumstances, the mediator may ask questions to solicit additional options that may have been overlooked. Throughout the problem-solving exercise, the parties should be challenged so that they cooperatively look for mutually advantageous solutions.

Brainstorming techniques include an environment in which the participants are told:

- There should be no criticism, either of your own suggestion or someone else's.
- All ideas are worth thinking about, even if they seem unusual.
- Talking about an idea is not the same as adopting it.
- It is permissible to build on someone else's suggestion but not to edit or modify it.
- The decision-making process will come later.

Testing Settlement Options

Whenever one party suggests a particular solution, the mediator should help that party analyze, test, and evaluate the option. By asking questions, the mediator should help the parties decide whether the suggested solution is realistic. These questions should be open-ended as opposed to directive in nature in the beginning. Once it is apparent the parties begin to see realistic value in a given solution, the questions may become more narrow and directive. When a mediator assists the parties in analyzing their options through a series of open-ended questions, this process is referred to as "*living in the question*." Only after this initial

testing and evaluation should the mediator propose the option (in neutral terms) to the other side in the form of a question. Once the parties have tentatively agreed that a particular option is acceptable, the mediator should return to the option again and discuss its pros and cons in detail with both sides. At this point, if all parties agree, the mediator is ready to help the parties close their agreement.

Closing the Agreement

When Agreement is Reached

If the parties' negotiations result in a settlement, the mediator will assist them in reducing their agreement to writing. Sometimes, the complexity of the dispute will require further documentation. If that is the case, the mediator should encourage the parties to reduce the terms of their agreement to a "*memorandum of understanding*", which will serve as a benchmark for their continuing discussions.

A Memorandum of Understanding should be viewed as an initial draft of a more formal document – the Mediated Settlement Agreement. A Memorandum of Understanding is often drafted by one of the parties' lawyers or by the mediator before the end of the mediation session. At a minimum, the Memorandum of Understanding should:

- cover essential parts of agreement,
- ensure the parties understand the agreement,
- demonstrate the parties agreement that it is to be binding and enforceable, and
- be signed during the mediation session.

Since a Memorandum of Understanding sets out the basis for the final agreement, it should ensure that all relevant terms are incorporated. The goal is to ensure that the ultimate agreement does not result in another dispute.

The mediator may assist the parties in assuring a concise Memorandum of Understanding by addressing the following issues:

1. The basic terms of the settlement
2. Promises to perform or not perform certain actions
3. Specific provisions regarding the payment of money
4. The actions required to carry out the agreement
5. Designation of the persons responsible for carrying out each action
6. A schedule for implementing actions
7. Criteria for measuring the effectiveness of compliance
8. Future relationship, if any, between the parties
9. Identifying any special conditions required for final approval
10. Specific representations relied upon as material inducements to the settlement
11. Confidentiality
12. Release Terms
13. Dismissal
14. Enforcement procedures
15. Procedures for resolving remaining issues
16. Mechanism for resolving disputes that arise in drafting or carrying out the settlement agreement

Unlike an arbitrator, the mediator will never render an award or bind the parties to any agreement, but should assist the parties in outlining their points of resolution in a Memorandum of Understanding that will ultimately become a Mediated Settlement Agreement. If the parties to mediation reach a settlement, they may be bound by the terms to which they have agreed.

If an Agreement is Not Reached

If the parties do not reach a settlement, but the mediator feels that further negotiations will be productive, the mediator may direct the parties to:

(1) continue their settlement discussions and maintain contact with the mediator;

(2) resume the mediation at some later date;

(3) gather further information or engage in an evaluative exercise; or

(4) consider some other ADR process such as binding arbitration.

VI. Post-Mediation Communications

If the parties do not reach an agreement at the initial mediation session, the mediator should try to encourage the parties to engage in future negotiations. Because the parties will likely have a variety of settlement options yet available to them, it is probable they will be able to negotiate a settlement at some future date. A patient and persistent mediator is often rewarded by the passage of time.

Many complex mediations do not involve only one session with a mediator. The process may span several months. This is true for both domestic and international disputes.[9]

III. Communications

Good communication skills are the most effective tool that a mediator brings to the facilitated negotiation. Critical communication skills include more than the effective use of questioning, it also includes listening.

1. Types of Communication

1.1. Non-Verbal

Eye contact, hand gestures, facial expressions, body positioning, vocal tone, and pitch all convey messages to the receiver. These non-verbal communications are often more telling of a person's true feelings than verbal exchanges.

Communication theorists suggest that a speaker's words comprise only 7% of the message communicated to the listener. The bulk of a speaker's message, some 93%, is expressed in non-verbal communications:

- 38% is conveyed by tone of voice and facial expressions, while
- 55% is conveyed by the speaker's body language.

Because such a large part of people's communication is non-verbal, mediators must pay close attention to their own and to the parties' tone of voice, facial expressions, and body language.

By paying attention to non-verbal communications, mediators can ascertain both the substantive *content* as well as the *effect* of the speaker's message, thereby gaining a better understanding of the nuances underlying the dispute.

1.2. Verbal

Verbal communication has two equally important components – speaking and listening. An effective mediator must cultivate both skills sets.

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[9] For example, the International Chamber of Commerce [ICC] explains this process as: If no agreement is reached at the end of the mediation session(s), the mediator may, with the agreement of the parties, continue to work with them over the following days or weeks to assist them with their continuing negotiations. This further assistance may be provided in any way that is convenient and practical, for example through follow up telephone discussions, emails, videoconferences or meetings. http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Rules/Mediation-Guidance-Notes/

2. Listening Skills

The mediator's active listening technique not only assures the parties they have been heard and encourages them to give additional information, it provides valuable feedback to the parties and serves as a model for them to follow in their negotiations with one another.

2The mastery of active listening requires practice and concentrated effort. Even experienced mediators sometimes are distracted by thoughts of their next moves. Effective mediators must be able to clear their mind of these distractions and listen actively to the party's verbal and non-verbal communications.

2.1. Non-Verbal Active Listening

In active listening, the listener's *demeanor* tends to encourage the speaker to keep talking. By a simple nod of the head, the listener can show active interest and urge the speaker to continue. Traditional non-verbal aspects of active listening include:

- Silence: providing the space for a party to collect thoughts, respond to questions
- Body language: typically an open and relaxed posture
- Eye contact
- Gestures of support: for example, nodding, leaning forward rather than pulling back
- Facial expressions

Listening for details is also a part of the active listening process. Therefore, the mediator must balance the importance of taking notes with the need to maintain eye contact verbal communications with the speaker.

2.2. Verbal Components of Active Listening

Active listening can serve as a "mirroring" process, which plays back the speaker's message and feelings in a neutral, non-judgmental manner. By paraphrasing and summarizing the speaker's words, the mediator can show the speaker his or her message was understood and accurately interpreted. This "playback" in turn encourages the speaker to elaborate and clarify his or her position. This, together with reframing, can aid a party to begin to understand how the dispute might be perceived by an objective, neutral party.

It is important to remember that:

- Mirroring is not the same as agreeing.
- Empathy is not agreement.
- Active listening should not damage the party's perception of the mediator's neutrality and impartiality.

The verbal activities found in active listening can be grouped into four areas:

- Paraphrasing
- Summarizing
- Reframing
- Questioning

Paraphrasing

Paraphrasing involves repeating what a party has said without adding or subtracting information. It is not the same as "parroting" back the same wording. Instead, it uses language similar to the speaker's words and often seeks to reflect back emotional content as well.

Example: "I can't believe they violated the terms of our agreement"!

~~Parroting: "You can't believe they violated the terms of your agreement."~~

Paraphrasing: "You are angry about their conduct and feel disappointed".

1. Summarizing

This technique is typically used at the beginning or end of a major section. It is similar to paraphrasing. The mediator is attempting to condense and capture the essence of the information.

2. Reframing

Reframing is a restatement of what a party has said that seeks to:

- Temper partisan statements, by removing negativity
- Translate into neutral wording
- Show understanding of / empathy with the speaker's perspective
- Shift perspective

The mediator always wants to reframe for a purpose, but that purpose by vary. Consider the following example:

Original Statement:

Party, who is a bank representative, says, "They're complaining about our practices but they have no clue about what really happens in our industry!"

Purpose – Reframe to take out toxic [negative] words:

"You do not think their view accurately reflects industry practices."

Purpose – Reframe to show empathy: "You are frustrated because you do not think their view is accurate."

Purpose – Reframe to shift perspective:

"You want a fair proposal that is responsive to current banking practices."

D. Asking Questions

During the information-gathering stage of the mediation and throughout the negotiations, the mediator will ask questions encouraging the parties to provide information about themselves and the dispute. In the initial phases of the process, the mediator should resist any temptation to immediately narrow the focus of the dispute. In early sessions, the mediator should ask questions that are "open-ended" and call for clarification rather than "Yes" or "No" answers. For example, the mediator may ask:

- What do you think?
- How did you feel when...?
- Tell me more about....
- Could you explain...?

These and other open-ended questions usually elicit the broadest types of answers. The mediator may employ other types of questions to elicit specific information. Using the right type of question at the right time is something mediators learn through practice.

Often a mediator needs to ask parties to clarify their statements. Some questions tend to invoke more focused response:

- Help me to understand why the automobile is not worth $2,000.
- What, specifically, about your health is your main concern?

To the extent possible, the mediator should avoid asking leading questions that suggest an answer. For example, the mediator should avoid closed-end questions such as:

- You've had back trouble before, haven't you?
- The red car was going over 70 mph, correct?

The use of closed-ended questions may sometimes be required to confirm a party's wishes regarding a particular matter or to elicit specific, factual information. For example:

- Tell me again, why do you want to continue working at the plant?
- How many years did you work for Tbilisi Power Company?

But a mediator should usually avoid asking compound questions such as:

- Should the government spend more on education and less on scientific research?
- How satisfied are you with your job and compensation?
- Is the software going to be interesting and useful?

3. Changing Perceptions

3.1. Cultural Perceptions

People of one culture often make broad generalizations or assumptions about people of other cultures. These assumptions can be based on a wide variety of factors, ranging from obvious differences such as age, gender, race, nationality, and ethnicity to more subtle factors such as personal values, education, economic or social status, and sexual orientation.

Mediators should be aware of the impact that such cultural stereotyping can have on the mediation process. There is a wealth of social science literature to help mediators become attuned to possible cultural differences that might arise during the mediation process.

Cultural Differences

3.2. International Differences

People from diverse cultural background often ascribe different meanings to non-verbal communications. For example, the American "okay" signal (index finger and thumb in a circle, with remaining fingers pointing up) might be considered

- vulgar or obscene in Brazil and Germany,
- impolite in Greece and Russia,
- as a sign for "money" in Japan,
- as a sign for "worthless" in France.

Pointing with the index finger may be considered impolite in some Middle and Far Eastern countries where pointing is often done with the open hand.

Personal space customs may also become relevant. In America, people tend to remain an arm's length apart, whereas in some other cultures a distance of eight to twelve inches may be the norm.

Similarly, people from different countries have various negotiation styles. In some countries, slight pauses simply allow time for thought and do not indicate either rejection or assent. In some countries, punctuality is considered a sign of respect; in others it may be acceptable to arrive at a meeting 30 to 45 minutes late. In some cultures, negotiators may use the terms such as "We will see" to actually mean "No." In other countries, negotiators may make implausible excuses or pretend not to understand English rather than having to say "No."

Cultural differences can impact a party's assumptions about a wide range of behavior and communication styles, such as:

- When is the proper time for expressiveness and reserve?
- What is the role of "apology" in interactions?
- How much socializing is appropriate before "getting down to business?"
- How should males and females properly interact?

- Where is the line drawn between appropriate concern or interest and unwarranted intrusion?
- What problem-solving style is dominant: cooperative or competitive?

Ender Differences

Even among people with a shared racial or ethnic cultural heritage, the issue of gender may play a significant role in negotiation. This may be manifested in nonverbal communications such as different way men and women may arrange seating at the mediation table.

Sociolinguists suggest that men may use conversation as a tool for status preservation. In contrast, women view talking as a tool for relationship building.[10]

Socio-Economic Differences

It is sometimes difficult for people from disparate socio-economic backgrounds to understand the other party's hopes and fears. These cultural differences may affect the mediation process and the mediator must seek to lessen any degree of discomfort felt by one party or the other. The mediator should take sufficient time to establish a rapport with all parties participating in the mediation and be sensitive to any effort to project one party's personal norms onto people from another culture. The mediator's role in reality checking and clearly defining the terms of any agreement should be given heightened importance when negotiating across cultural norms.

IV. Creative Caucus / Private Session

1. Nature of the Caucus

A caucus is a private session between the mediator and one of the parties to the dispute. It provides a venue in which parties may speak openly because the discussions remain confidential under the party expressly wants the mediator to relate something to the other side.

2. Determining When to Call a Caucus

A private session/private meeting/caucus can be called by the mediator or requested by any of the parties. If the mediator is calling for a caucus, that decision should be based on a reason stemming from the mediation itself.

Once a caucus has been called, there is no prohibition to the mediator's reconvening the parties in joint session.

There are advantages to caucus that span the range from building trust in the process to confronting deadlock, they include:

- Providing a venue in which a party can open up and be more comfortable discussing certain aspects of the dispute itself or factors impacting possible resolution.
- Allowing the parties to "cool down" following a high level of emotional venting or in reaction to an initial low/high settlement offer.
- Presenting offers.

Similarly, there are potential drawbacks to using caucus, including:

- Damaging settlement momentum if the parties are communicating effectively with one another
- Shifting the emphasis from the parties to the mediator.

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[10] Deborah Tannen, You Just Don't Understand: Women and Men in Conversation (1990).

3. Mediator's Activities During Caucus

- Asks for more information

Technique: "What will this mean to you if this settles? If it doesn't?"

- Probes about sensitive information that party may not initially wish to share in joint session

Technique: "Is there anything else you think I should know now that we're meeting in private?"

- Provides an opportunity for a party to "cool off", or, conversely, an opportunity to vent emotions privately

Technique: "Help me understand what's involved here from your point of view".

Technique: "Was there anything you heard in the joint session that surprised you"?

- Restates what was heard in joint session to confirm mediator's understanding

Technique: "If I understood what you said correctly, you believe/want/think/feel"…

Technique: Ask the party to restate what they just heard the other party say in the joint session.

- Reality tests the strengths and weaknesses of the party's position

Technique: "What do you think will happen if this goes to Court?" "What do you see as your biggest obstacles if this goes to Court?"

*Technique: "*What do you think they see as their best strength?" "If they say X at trial, how would you respond?"

- Gives honest feedback

Technique: Discuss with each party their Best Alternative to a Negotiated Agreement.

Technique: Discuss how party arrived at an "anchor" figure or offer. For example, how was the number developed, what research was conducted, what objective criteria was used, and what assumptions were relied upon by the party.

Technique: "If you were in her shoes, how would you respond"?

- Helps generate new proposals

Technique: If negotiations have stalled, ask party why they think they at an impasse.

Technique: Explore cognitive barriers to settlement such as risk aversion, selective perception, overconfidence bias, and reactive devaluation.

Technique: Reframe. For example, discuss "settlement" as a gain rather than a compromise.

Technique: "Expand the pie"

Technique: Brainstorm

Technique: Bracket offers to identify a range in which the parties could settle the dispute

Technique: "How have others resolved issues like this?"

Technique: "Are there independent standards that are commonly used in this situation"?

4. Process Considerations

Regardless of who requests the private session [mediator or a party], there are standard steps the mediator should follow:

- Always begin the first caucus with each party with a discussion of the confidentiality of the process. For example: "Nothing you say to me during this meeting will be shared with the other side unless you give me permission to do so".
- Always end with an express summary of the points [if any] that the party is prepared to share with the other side.

Additionally, there are some mediator techniques that can increase the effectiveness of private sessions:

- If meeting privately with one party, then meet privately with the other party as well. This promotes the appearance of neutrality because the mediator has mirrored the identical process for each disputant.

• Stay aware of how much time is spent with each party. If it is getting to be a lengthy session, the mediator should take a break and check in with the other party to advise them of next steps.

• Give the party with whom the mediator is not meeting an "assignment" relating to the dispute for them to be considering while the mediator is meeting with the other party. For example, "While I am meeting with X, I'd like you to consider what is likely to happen next if we don't reach a settlement today".

V. Confronting Impasse

1. Impasse Happens

No matter how skillful the mediator, occasionally one party will reject the other party's last offer and decline to make a responsive offer. When this occurs, the parties have reached an apparent *impasse* in their negotiations. This impasse does not mean, however, that further negotiations will fail; it means only one or both of the parties are unwilling to make any further negotiation bid *at that time.*

An impasse is a common occurrence in mediations, and the mediator should not be discouraged when one occurs. Indeed, the mediator should simply accept the fact the parties are then unwilling to proceed further with their negotiations and analyze whether further negotiations are advisable. Usually, the parties do want to settle their dispute and are frustrated with their inability to reach a settlement. It is the mediator's job to encourage further communications and to help the parties overcome the communication blocks that led to the impasse.

1.1. AImpasse Avoidance

Often, the mediator may help the parties avoid the negative aspects of impasse by *teaching* them, at the beginning of the mediation, how to deal with barriers to their settlement negotiations. By educating the parties about the dynamics of the negotiation process, the mediator may prepare them for the potential of impasse so they do not overreact if one should occur. Thus, the mediator, when obtaining the parties' commitment to negotiate in good faith, should ask for their commitment to continue their communication even in the face of an apparent impasse.

1.2. When Impasse Occurs

If the parties do find themselves in an impasse, the mediator should look for new and creative ways to help them overcome their communication barriers. Sometimes the mediator may simply encourage the parties and their counsel to search harder for possible solutions. Frequently, the parties and their lawyers will come forward with solutions the mediator has overlooked. Moreover, when parties have reached an impasse, they often become more attuned to the consequences of not reaching resolution. Thus, in the face of such consequences, the parties may be more inclined to give consideration to issues of risk, time, cost, and emotional stress. In essence, they may be more willing to consider their BATNA, weighing the consequences of not settling against what they consider to be an undesirable settlement. The mediator should also remind the parties that their decision to litigate removes them from the position of being able to decide their own destiny and that a judge or jury whom they have never met will make the ultimate decision in their dispute.

Sometimes, the parties are unable to distance their emotions from the business aspects of the dispute. In such a situation, the mediator should give the parties another opportunity to vent their emotional frustrations, and then try to persuade them to look at the dispute from a business perspective. The mediator may also ask the parties to restate their respective positions, so the issues may be rephrased in a different way. This sometimes enables the parties to move away from their previous "stonewall" position and to change their bargaining stance without appearing to "give in."

Finally, the mediator may decide to re-examine areas possibly revealing interests not previously discussed. This may be especially useful if the parties have not fully discussed their interests and, instead, continue to argue the facts and the law. This exercise goes hand in hand with the process of discovering the parties' real motivations and getting past their emotionalism.

2. Specific Barriers to Settlement

In today's litigation environment, the mediator faces a number of barriers to settlement which are inherent in the adversarial process. Below are some specific barriers and some possible ways a mediator may avoid or overcome them.

2.1. Lack of Adequate Settlement Authority

An impasse may occur if one of the party's representatives appears at the mediation without adequate and ultimate decision-making authority. When a party's representative is given only limited settlement authority, this limitation tends to "anchor" the representative's negotiation ability and destroy the flexibility of the bargaining process. Once the parties perceive their position as being inflexible, their negotiations often result in a stalemate.

Solution: The mediator should determine, in advance of the mediation if possible, all parties and make sure their representatives have adequate authority to settle. The mediator need not obtain a commitment of settlement authority for the full amount of the other party's demand; however, the mediator should be sure settlement authority exists within the *framework* of the demand. If an ultimate decision-maker cannot attend the scheduled mediation, the mediator may elect to postpone the mediation until the person is available. However, if both sides want to go forward with the mediation, the mediator may decide to proceed on the assurance that the ultimate decision-maker: (1) will be available by telephone, and (2) usually will follow the party representative's recommendations in deciding whether a particular settlement is advisable.

2.2. The Party Advisor

Sometimes a party will arrive at mediation with an *advisor*, such as a spouse, a son or daughter, a boy-friend or girlfriend, or simply an interested acquaintance. In cases where there is insurance coverage, an in-house adjuster or an adjuster often accompanies the defendant from a separate firm. A corporate defendant or claimant may arrive with a plethora of people who are supposedly knowledgeable or needed in the decision-making process. Depending on the personality and role of the party advisor, their participation may either help or undermine the mediation process.

***Solution*:** The mediator should carefully consider whether the party will be a help or hindrance to the mediation process. Mediation is a confidential process, and only those persons having some legal connection to the dispute are entitled to attend. Therefore, unless the mediator is persuaded that a party's "friend" or "advisor" will contribute to the mediation process, the mediator may decide not to allow the advisor to participate. In such a case, the mediator may simply advise the parties that only those persons having some direct interest in the dispute will be permitted to attend the mediation.

2.3. Economic Problems

Mediators have expressed concern about the increasing difficulties of settling civil litigation. With costs of litigation steadily increasing, what action may a mediator take to encourage obstinate parties to engage in good faith settlement negotiations?

Solution: The mediator may first explain to the parties the practical advantage of a settlement. Instead of describing mediation as a "procedural alternative," the mediator may explain how it is an "eco-

nomic opportunity." For example, in the opening statement, the mediator may emphasize the money savings aspects of mediation and focus the parties' attention on their pocket books. Throughout the mediation, the mediator may continue to stress the economics of litigation, discuss the present dollar value of cases heard by recent juries, consider the length of time it will take to get the case to trial, and make a list of all the expenses involved. The mediator should also explain there is an economic reality to everything, including a civil trial. While conducting these discussions, the mediator should concentrate his or her attention on the persons who likely will be the decision-makers in the case.

2.4. The Secret Weapon

During private sessions with the mediator, it is not unusual for one or both of the parties' counsel to tell the mediator about some dramatic evidence capable of destroying the other party's case. Generally, this "smoking gun" evidence exists only in the unbriefed recesses of the lawyer's mind and seldom has the explosive impact described to the mediator.

Solution: To meet and counteract such "hidden evidence" arguments, the mediator should encourage the parties to exchange all evidence and legal authority relevant to the mediation session. This gives opposing counsel an opportunity to challenge and respond to the legal or evidentiary arguments. In addition, the mediator may stress the uncertainty of litigation and point out the opposing counsel has not yet tested the issue. In these discussions, the mediator should encourage the parties to engage in realistic, deductive reasoning to test and evaluate their respective positions.

2.5. The Time Problem

Sometimes a party or the party's counsel may use the "bottom line" negotiation ploy: "I don't have any more time," or "My last offer is my bottom line. I'm out of here." The mediator should usually disregard such expressions, because the passage of time is an essential part of mediation process. After the parties are given a sufficient amount of time to express their hurt, anger and frustration, they are much more apt to start thinking realistically about money and how they may reduce their losses. So the parties will have adequate time to "process" their dispute, the mediator should avoid imposing arbitrary time limitations on their negotiations.

Solution: Arbitrary time barriers generally arise at some point after a settlement offer has been made by one of the parties. To neutralize the impact of a time barrier, the mediator may often distract the party asserting the barrier by asking questions that do not relate to the settlement amount. These questions generally help the mediator prolong the mediation and focus the parties' attention on realistic settlement options. Some types of distractive questions are:

- How much discovery remains to be done before trial?
- Do you plan to use an expert?
- What do you estimate will be the remaining cost of discovery?
- What will the expert charge?
- What will have to be submitted to the jury for you to prevail?
- Who are the witnesses you intend to use?
- What amount of recovery in cases like this have you experienced in the past?
- What is the worst case scenario?
- What about the discount factor in not getting your money now but several years from now?

If the mediation process is being conducted pursuant to a court order, the mediator may also advise the parties the court expects the parties to remain in attendance until the mediator has declared an impasse or a settlement has been reached.

2.6. Matter of Principle

It is not unusual for a party or their representative to become inflexible in their negotiation position, because of a "matter of principle". For instance, an insurance adjustor may say that, "I have been handling these cases for 30 years and I've never paid as much as $20,000 for a soft tissue injury." Or, a corporate executive may state: "If we pay this one, we'll have everybody suing us." These "matter-of-principle" positions present serious problems for the mediator, because the decision-makers are often so emotionally tied to the position that rational thinking is very difficult.

Solution: Perhaps the best way to deal with this problem is with the formula: "Tenacity + Time +Doubt = Settlement." The mediator should try to persuade the parties to undertake realistic risk evaluations and should focus the parties' attention on the economic advantages of settlement as opposed to the cost and risk of litigation.

2.7. Multi-Party Problems

The mediator will likely have special difficulty trying to resolve multi-party cases, particularly those where various parties are denying responsibility or trying to shift blame to other defendants. Such cases usually involve complicated legal theories, and in many such cases, counsels' discovery battles seriously drain the parties' coffers and challenge the court's patience. What may the mediator do to bring the parties and their counsel toward a realistic settlement?

Solution: Again, the mediator must try to focus the parties' attention on the economic realities of the case. Also, the mediator should ask the parties to give their "worst case" scenarios about what a judge or jury would likely do regarding the law and equities of the case. This kind of discussion will often give the mediator valuable information about the parties' views regarding the value of their case.

2.8. Angry Parties

Often one or both of the parties are so angry and frustrated that their anger prevents any rational consideration of the problem. In a contested divorce, for example, both parties may be very angry and upset, and they may also be very afraid, because the divorce jeopardizes their economic stability. Quite often, these angry parties simply want the mediator to transfer their hurt and angry feelings to the other side. This, of course, is beyond the scope and purpose of the mediator's role.

Solution: The mediator should try to direct questions in an encouraging manner so that the angry party has an opportunity to vent. As the venting progresses, the mediator may explain how anger can be a barrier to resolution, typically resulting in increased party costs. The mediator can then reality test, asking which is more important to the angry party: (1) holding on to the anger and keeping the dispute alive and a financial and emotional drain, or (2) ending the matter now and being free from the economic and emotional burden. It is very important that the mediator be a good listener, because an angry party usually wants someone in an official capacity to hear their opinion about the dispute and about the other party.

2.9. The Law Argument

A mediator is often faced with issues of law in which the two counsel are diametrically opposed, each relying solely on his or her own undeveloped interpretation of the law. The legal issue may be quite simple or it may relate to some obscure and unsettled field of law. Regardless of the complexity of the issue, both sides often will contend their position is *clearly* right as a matter of law. What should the mediator do to help the parties resolve their legal dilemma?

Solution: A stalemate over a legal position often continues until the parties begin to doubt the strength of their positions. This doubt may be created in one of various ways.

- The mediator may recess the mediation until some future date so that counsel may brief the law or submit the matter to a neutral case evaluation process;
- The mediator may suggest the parties research the issue while the mediation continues in progress;
- The mediator may try to neutralize the problem by focusing the parties' attention on the equities. Questions such as, "Is it your opinion that even though your client entered into a written agreement to perform these services, and the plaintiff paid the full amount of the money provided by the contract, your client may convince a judge, as a matter of law, the agreement is legally enforceable? Are you basing your whole case on this position?"
- The mediator may stress that if both sides have reasonably strong legal arguments, the court's decision is essentially unknown and the parties should consider the certainty of settlement.

Using these methods, the mediation can encourage the parties to think more realistically and objectively about their positions. The mediator could also stress the point that a party does not always win a lawsuit simply because of their confidence in the merits of their position.

2.10. The Rambo Personality

The mediator occasionally will be faced with a party or a lawyer who knows only how to succeed through intimidation. In such a case, the mediator must be firm and even-handed. From the very beginning of the mediation, the mediator must caution the parties and their counsel the mediation rules prohibit any form of disrespect or brow beating, and each and every participant must address the other in a civil manner.

Solution: If one side begins to intimidate the other, the mediator should bring the mediation to a halt with a courteous but firm admonition: "Please remember we are here to try to settle this matter, and name-calling will not help us reach our goal." If necessary, the mediator should take the party or the attorney aside and speak to them apart from the other side.

2.11. The Economic Disparity

What should the mediator do when the damages are high but a party cannot pay? Even if liability is demonstrated, and damages are clear, the targeted party may have little or no financial ability to respond to damages.

Solution: In this situation, the mediator must reach into his or her "bag of tricks," and try to inject some new ideas for the parties to consider. The mediator might ask the parties if they have considered an installment payout represented by a note, or perhaps a structured settlement. Or, the mediator could ask if the doctors and chiropractor might be willing to discount some of the medial expenses. In some instances, the mediator might suggest the possibility of a bank loan, or finally, a consent judgment for an amount equal to or in excess of the settlement. Often the claimant does not believe the defendant is really insolvent, and sometimes a financial statement or audit will be necessary to convince the other party of that fact. Hence, the mediator's job is to encourage the parties to exchange enough information that they develop trust in one another's positions.

2.12. The Unfit Parent

One of the most difficult areas of mediation involves the custody of children. The mediator seldom will have an "easy" custody dispute, and many custody cases will be settled only through litigation. Frequently, neither parent feels the other is a fit parent, and one party may have deeply bruised the ego of the other. Thus, a custody suit may not really be about children but about "getting even." Sometimes, custody cases are resolved by the passage of time, because of changes in the parties' lives. Intervening factors such

as job changes, financial problems, one or both of the spouses' involvement with a third party, children getting older, and other such life changes may cause the parties to rethink their intractable positions. But what may a mediator do to help the parties expedite this rethinking process?

Solution: The mediator must endeavor, by lengthy and specific questions, often in private caucuses, to remove the parties from the "here and now" of the dispute. The mediator should encourage the parties to look into the future and try to predict how the continued stress between them may affect the children's lives. The mediator may also point out to the parents that the children need both of them. Using economics as a driver, the mediator should explain how devastated both parties will be if they pursue their vendetta against one another. Sometimes getting the attorneys alone may help. The laundry list of the reality factors the mediator may stress includes:

- Economics – the parties cannot afford extended litigation;
- Bitterness will destroy them and the children;
- Look toward the future, toward new horizons;
- "Time" is what life is made of and it is being wasted;
- Consider the needs and desires of the children;
- Joint custody is not so awful;
- Both sides simply cannot win;
- Children need both parents.

Custody cases are difficult for everyone, and the mediator will need a full measure of imagination and patience to bring settlement to fruition.

3. Conclusion

There is not one simple solution for every kind of settlement barrier. Most such barriers simply represent a "mind set" on the part of one or both parties. Generally, the mediator should continue to stress the economics of the case, focus the parties' attention on the equities, and try to get them to recognize there is always some doubt about the outcome of litigation.

As soon as the mediator perceives the existence of an impasse, the situation should be acknowledged in the presence of the parties, who should be asked to assist in finding ways to renew the settlement negotiations. In most instances, the parties and their counsel will respond affirmatively to such a request and will assume some of the responsibility for finding solutions. Once the parties begin to look upon the impasse as a common problem and to focus their collaborative energies on it solution, their cooperative actions often yield a solution.

Finally, the mediator must realize that some cases simply are not going to be resolved by mediation. The mediator must not feel personally responsible for the failure of the parties to resolve their problem if he or she has given the time and attention it deserves. However, the mediator must be tenacious, and the mediator should never give up just because a dispute is not ripe for resolution on a particular day. Impasse should not be viewed as a failed mediation. Rather, impasse may simply mean a case was not yet ready to settle.

VI. Representation in Mediation

1. The Rationale of negotiation

Most disputes, whether civil or criminal, are resolved by negotiation. Mediation itself is the process of inserting a neutral third party into the negotiation, not to decide the dispute, but rather to assist the parties in what up to that point has been a failed negotiation. In order to be an effective advocate in mediation, the parties and their representatives need to know basic negotiation's concepts. So too, an

effective mediator must be able to recognize, respond to, and use negotiation techniques in her efforts to help the parties resolve their dispute.

1.1. Value of Negotiation Skills

We are all negotiators. In our personal and professional relationships, we negotiate almost daily. We negotiate with strangers, with our colleagues, and with our family and friends. Our negotiations range from bargaining with an automobile salesman over the price of a new car to a conversation with our spouse about where to go for dinner. Although these negotiations are important to us, most of us simply rely on intuition and personal experience when we negotiate. To become more effective as negotiators, we need to understand the conceptual theories of negotiation and learn how to apply these theories in our everyday practice.

1.2. The Negotiation Game/"Game Theory"

Negotiation is sometimes referred to as a *people game*. Because negotiation is motivated by both psychological and sociological influences, each negotiation is a unique experience. An effective negotiator will seek to adapt his or her negotiation strategies to fit the particular circumstances. Often, the key to a successful negotiation is the ability to be patient and persistent, allowing the negotiation process to unfold within the game's parameters.

Modern "game theory" refers to the study of strategic decision making. It is a method of applied mathematics, and is frequently encountered in economics, political science, psychology and logic. Its application to negotiation strategy is obvious: knowing the basis upon which decisions are made suggests that some negotiation approaches are preferable to others. One of the first applications of game theory was to the now famous concept of "zero-sum games" which are built on the model that one person's gains exactly equal the net losses of the other participants.

Negotiations are conducted in every conceivable format. Negotiations occur at home among family members, at the workplace, in courts and administrative agencies, and in public bodies and institutions. Although negotiation practices may differ widely according to the forum, there is little difference in the basic nature of the process.

2. Methods of Negotiation

2.1. Competitive Negotiation

One traditional negotiation concept has been termed *competitive, distributive,* or *positional bargaining.* This negotiation method assumes the negotiating parties are motivated by egocentric self-interests and that there are limited resources to be distributed. In a competitive negotiation, it is assumed that one side's gain necessarily results in the other side's loss. Thus, the competitive negotiator's primary goal is to maximize personal resources and satisfaction. The competitive negotiator is not particularly concerned about the potential impact of the negotiation on the parties' future relationship.

The stereotype of a *competitive (*or *hard)* negotiator is one who is tough, demanding, dominating, forceful, and unyielding. The hard negotiator has a strong need to win and tends to see any conflict as a contest of wills. Often taking extreme positions, the hard negotiator tries to hold out longer than the adversary.

Sometimes this "hard" approach is successful, and the competitive negotiator "wins." In that case, the other party will take less of the "pie" than if both parties had engaged in more cooperative negotiations. However, a competitive negotiation may not always be in the clients' best interest. Hard strategies can backfire, causing resentment and animosity, as well as heightened commitment of the other side to win the adversarial contest. Moreover, such tactics tend to create barriers to future settlement discussions, and when carried too far, such strategies may put an end to meaningful negotiations.

2.2. Cooperative Negotiation

Another method of negotiation, sometimes called *cooperative or collaborative negotiation*, assumes that all participants have certain interests in common and that these interests may be advanced by collaborative negotiations. Here, the negotiators seek to identify the parties' *underlying interests*, and having done so, work to develop solutions that will satisfy both parties' needs. If the parties' claims seem to exceed available resources, the cooperative negotiators look for ways to expand the size, amount, or value of the subject to be distributed.

The stereotype of a *cooperative (or soft)* negotiator is one who seeks to avoid personal conflict at practically any cost. The soft negotiator tends to value an amicable settlement over receiving a fair share of the item in dispute. Thus, a soft negotiator may make substantial concessions just to reach a peaceful agreement. Unfortunately, once a settlement has been reached, the soft negotiator may feel inept, exploited, and bitter about the negotiation process.

It is difficult to say which negotiation theory, *competitive* or *cooperative* will produce the best results in a given case. Studies have shown that each negotiation method has its advantages and disadvantages. Negotiators must be aware of the different approaches and be able to recognize and respond to the different negotiating styles.

2.3. The Principled Approach

Another negotiation method, the *principled* approach, incorporates some aspects of both the competitive and cooperative theories.[11] In this type of negotiation, the negotiators look for areas of mutual interest, and if those interests conflict, they try to agree upon the value of their respective positions according to some fair and objective standards. It has obvious advantages even where one negotiator has adopted a competitive approach.

In a principled negotiation, the negotiators work side by side, attacking the problem (and not each other); they focus on interests (not positions); they generate options to create mutual gains; and they test the viability of those options by some objective criteria.

To be effective in a principled negotiation, the negotiator must act rationally; try to understand the position of the other side; communicate effectively; and behave in a reliable and ethical manner. In essence, the negotiator must seek to establish mutual trust by accepting the legitimacy of the other party's motivation.

2.4. The Negotiation Style

Negotiators tend to adopt a negotiation style that is comfortably aligned to their individual personalities. However, negotiators should be versatile in their approach to negotiation and try to adapt their style to meet the needs of a particular situation. Thus, an effective negotiator will seek to develop negotiation strategies that protect the client's interests, while discouraging the opponent from engaging in unproductive gamesmanship.

Consider adding: Counsel's obligation to check with client and involve in decision

When a negotiator fights hard on a substantive issue, it often tends to increase the pressure for an effective solution. However, being firm in a position does not mean being closed-minded to the other party's point of view. Indeed, many successful settlements may be attributed to the ability of negotiators to maintain a firm position on the issues and an open mind on the arguments of the other party. When negotiators are *firm* and *cooperative*, they likely will be successful in their efforts.

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[11] Roger Fisher, William Ury and Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In (2011). The four basic principles focus on: 1. Separating the People from the Problem 2. Focusing on Interests, not Positions 3. Inventing Options for Mutual Gains 4. Insisting on Using Objective Criteria

3. Stepping Into the Other Party's Shoes

The role of a negotiator is not to make it hard on the other party to come to an agreement. Indeed, it is exactly the opposite. An effective negotiator will try to generate options that will be perceived by the other party as clear, appealing, and consistent with that party's needs and interests. How does the negotiator create such desirable alternatives? By gathering accurate information regarding the other party's needs and wants, and by placing himself or herself in the other person's shoes. Thus, an effective negotiator must work diligently to understand and appreciate the other party's meet those needs.

3.1. Different Perceptions

People tend to see the world from their own standpoint. When faced with complex information, they tend to emphasize facts that confirm their prior perceptions and to disregard facts that are contrary to their views. In view of this tendency, it is not surprising that a party to a dispute sees the conflict solely from his or her own perspective and refuses even to acknowledge the possibility that the other party's position may have merit.

An effective negotiator must be able to see the dispute as the other side sees it. In essence, the negotiator must try to *understand* the opposition's viewpoint, even if it does not appear to have much merit. Once the negotiator can examine the dispute from the opposing party's perspective, he or she is in a much better position to define the parameters of the conflict and to develop appropriate negotiation strategies.

3.2. Restating Positions

A negotiator should generally be willing to engage in frank discussions with the opposing side and to give objective recognition to the strength of the other party's position. The negotiator need not agree with the opposing viewpoint, but he or she should actively listen to and acknowledge an understanding of that viewpoint.

Some negotiators, as a matter of strategy, consistently ignore or refuse to concede any validity in the other side's viewpoint. Other negotiators, however, often do just the reverse and openly give recognition to the other point of view. Sometimes, the negotiator even restates the other party's position to show that their viewpoint has been heard and understood. After restating the other side's case in its strongest light, the negotiator may refute it with a reasonable analysis. This bold strategy tends to gives credence to the negotiator's own position, making his or her case seem even stronger, and helps the other side better understand the relative strengths and weaknesses of their case.

3.3. Identifying Mutual Interests

An effective negotiator must look beyond the other party's stated position and try to identify any underlying interests. When two people disagree and take opposite sides of an issue, they often assume that their interests are opposed as well. For example, a landlord seeking to raise a tenant's rent may assume he has nothing in common with the tenant, who wants to maintain the rent at its existing level. Such an assumption is usually incorrect. One common interest of both parties is stability. The landlord wants a stable tenant; the tenant wants a permanent address. Both want to see the apartment well maintained. Both are interested in a good relationship with each other. The landlord wants the rent paid on time; the tenant wants the premises kept in good condition.

Thus, even when parties have dissimilar interests, they share certain basic *human* needs:

- a need for security
- a need for economic well-being

- a need for a sense of belonging
- a need for recognition of their value
- a need to control their own destiny.[12]

These needs are always present even in disputes ostensibly about money. The negotiator's task is to identify which of these needs, in addition to or in lieu of money, are most important to the other party. If the parties may negotiate a compromise on the basis of shared interests, they may usually reach a mutually acceptable compromise. For example, the landlord might be willing to extend the term of the lease in return for an increase in rent, which in turn will enable him to refurbish the apartment units.

One-way to identify the other party's underlying interests is to ask questions. *Why does the landlord want a higher rental? Simply for more money? Or, does he want a higher rental to refurbish the apartment units?* Getting the answers to such questions helps the negotiator understand the landlord's demands and responds to them more intelligently.

4. Investing in the Outcome

4.1. Collaborative Problem Solving

When people seek to persuade others of the merits of their position, they may choose one of two paths: They may either invite the other party to participate in the problem-solving exercise or they may decide the outcome they want to achieve and try to persuade the other party of its merit. Too often, people choose the latter course of action.

Unless both parties participate in the problem-solving process, one may reject any proposal made by the other. Thus, no matter how meritorious the proposal appears, the other party=s resistance may usually be expected. Experienced negotiators are aware of the need to have both parties involved in the problem-solving effort so they both will feel they have designed the outcome.

People involved in a dispute are often loath to look at alternative solutions. Convinced that they are "right", they seek only solutions that tend to vindicate their positions. In most disputes, the parties are reluctant to consider alternative solutions, because they:

- have a strong mind-set that tells them their position is the correct one;
- seek only a single answer to the problem;
- assume there is a fixed "pie" of finite proportions;
- think solving *their* problem will solve the *only* problem.

The last reason may need some further explanation. People tend to focus on their own problems, not those of their adversaries. Therefore, in negotiating a compromise, people tend to look only to their own self-interest and are slow to recognize the need for a settlement that will serve the interests of both parties. An effective negotiator will try to elevate the negotiations above such self-serving influences and will look for settlement options that meet the needs of both parties.

4.2. Best Alternative to Negotiated Settlement

During negotiations, the negotiator will seek to further identify underlying interests and to clarify erroneous perceptions. The negotiator will also participate in the invention, testing and selection of viable settlement options. During this stage in the negotiations, an effective negotiator will continuously re-assess his or her "Best Alternatives To A Negotiated Agreement" (BATNA).

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[12] Consider Maslow's hierarchy of needs: *Physiological* [e.g., breathing, food, water, sex, sleep]; S*ecurity* [e.g. employment, family, health, property]; *Love/Belonging* [e.g. friendship, family, intimacy]; *Esteem*[e.g. self-esteem, respect by others, achievement] and *Self-Actualization* [e.g., the realization of full potential]. Abraham Maslow, *A Theory of Human Motivation* (1943).

This BATNA simply represents the negotiator's ultimate "fallback" position, requiring the negotiator to continuously ask himself the question: "What will be the consequence if I refuse to negotiate further?" By continuously making this BATNA re-assessment, the negotiator may determine whether and when to accept or reject the other side's proposals. The BATNA will change during the course of the negotiations as the negotiator gains additional information and insight.

The BATNA should include all relevant factors such as:

- risk evaluation,
- transactional and emotional costs, and
- time expenditure.

VII. Confidentiality

It is critical to the mediation process that parties have faith in the process, as well as in the neutral facilitator. Absent such confidence, it is often difficult, if not impossible, for the mediator to obtain the candid, confidential information needed for meaningful settlement negotiations. Because disputing parties often fear their disclosures may later be used against them, they frequently are reluctant to divulge confidential information to the mediator. Thus, the mediator must try to establish a confidential environment that will encourage the parties to be candid and make proper use of the caucus sessions.

The parameters of confidentiality in any given mediation may be shaped by external protections such as those imposed by domestic law or the rules of an institutional ADR service provider, or they may be the result of a contractual agreement between the parties.

1. Statutory or Institutional Protections

1.1. UNCITRAL

Article 8. Disclosure of information

When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party to the conciliation. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation.

Article 9. Confidentiality

Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.[13]

1.2. International Chamber of Commerce [ICC] Example

The ICC's Mediation Rules have express provisions addressing the issue of confidentiality both as to disclosure of settlement and use as evidence in subsequent proceedings. These rules represent the default position of the ICC and parties wishing to craft less restrictive confidentiality requirements must do so by agreement.

Article 9 Confidentiality

1. In the absence of any agreement of the parties to the contrary and unless prohibited by applicable law: a) the Proceedings, but not the fact that they are taking place, have taken place or will take place, are private and confidential;

[13] See *Steven Austermiller, Delaine Swenson,* Alternative Dispute Resolution: Georgia, Tbilisi, 2014.

b) any settlement agreement between the parties shall be kept confidential, except that a party shall have the right to disclose it to the extent that such disclosure is required by applicable law or necessary for purposes of its implementation or enforcement.

2. Unless required to do so by applicable law and in the absence of any agreement of the parties to the contrary, a party shall not in any manner produce as evidence in any judicial, arbitral or similar proceedings:

a) any documents, statements or communications which are submitted by another party or by the Mediator in or for the Proceedings, unless they can be obtained independently by the party seeking to produce them in the judicial, arbitral or similar proceedings;

b) any views expressed or suggestions made by any party within the Proceedings with regard to the dispute or the possible settlement of the dispute;

c) any admissions made by another party within the Proceedings;

d) any views or proposals put forward by the Mediator within the Proceedings;

e) the fact that any party indicated within the Proceedings that it was ready to accept a proposal for a settlement.[14]

1.3. United States - Texas Example

Texas adopted a strong public policy supporting the confidentiality of communications transmitted during an ADR process. The Texas ADR Procedures Act is considered one of the broadest confidentiality protections in the United States.

In essence, the Texas ADR Act provides statutory protection of confidentiality

- to both voluntary and court-referred mediations,
- whether before or after the institution of formal court proceedings.

The Texas ADR Procedures Act provides that, subject to certain exceptions:

- all communications and documents relating to an ADR process will be deemed confidential,
- not subject to disclosure, and
- inadmissible as evidence in any judicial or administrative proceeding.

As a result, generally the parties and the mediator may not be compelled to testify about matters relating to the dispute. Additionally, records used in the procedure are also considered confidential.

2. Contractual Protection

Parties to a mediation may also execute a confidentiality agreement which contains protections extending beyond the scope of the statutory language. The parties may create their own provisions relating to disclosure of information regarding the process, the negotiations and the terms of the settlement. Assuming that the parties enter such an agreement knowingly and voluntarily, the agreement will be enforceable to the extent that its provisions are not inconsistent with the statutory provisions. Such an agreement may deter the parties to the mediation from violating their confidentiality understanding and also deter parties from seeking confidential information. If a confidentiality agreement is incorporated into the settlement agreement, a breach of confidentiality is subject to a breach of contract suit just as any other term in the agreement.

3. Duties to Disclose

Communications protected under the confidentiality provisions of a statute may have to be disclosed if there is a conflict between the applicable ADR Act and some overriding law that requires disclosure. For

[14] See <http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/>

example, there may exist a statutory duty to disclose information relating to abuse [such as towards a child] or threats of imminent violence.

If such a conflict occurs, the typical mediator response is to present the issue of confidentiality to a reviewing court to determine whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure.

Similarly, a mediator may be confronted with the dilemma of a public policy statute or ethical guideline requiring disclosure of professional misconduct by licensed professionals. Or, the mediator might receive information regarding criminal acts, threats of imminent harm, or illegal behavior. In such circumstances, the mediator may be compelled to present the issue of disclosure to an appropriate court for guidance as to the duty to disclose.

VII. Ethics, Qualifications and Standards

1. International Examples

1.1. International Centre for Dispute Resolution (ICDR) [the international division of the American Arbitration Association (AAA)]

5. Mediator's Impartiality and Duty to Disclose

ICDR mediators are required to abide by the Model Standards of Conduct for Mediators in effect at the time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any provision of these Mediation Rules, these Mediation Rules shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, ICDR mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. ICDR mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time frame desired by the parties. Upon receipt of such disclosures, the ICDR shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.***

7. Duties and Responsibilities of the Mediator

a. The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

b. The mediator is authorized to conduct separate or ex parte meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

c. The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

d. The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the

mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

e. In the event that a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation conference(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

f. The mediator is not a legal representative of any party and has no fiduciary duty to any party.[15]

1.2. International Chamber of Commerce (ICC)[16]

In its definition of mediation, the ICC explicitly recognizes the central tenet of party self-determination. It is the parties, not the mediator, who decide whether or not to settle and under what terms:

Mediation – Under the ICC Mediation Rules, mediation proceedings are administered by the ICC International Centre for ADR…. Mediation is a flexible settlement technique, conducted privately and confidentially, in which a mediator acts as a neutral facilitator to help the parties arrive at a negotiated settlement of their dispute. The parties have control over both the decision to settle and the terms of any settlement agreement. Where successful, Mediation results in an agreement that is contractually binding but cannot itself be enforced internationally like an arbitral tribunal award.

A mediator's qualifications, together with his responsibilities concerning conflicts of interests, are covered by the ICC's mediator selection rules:

Article 5 Selection of the Mediator

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3

Before appointment or confirmation, a prospective Mediator shall sign a statement of acceptance, availability, impartiality and independence. The prospective Mediator shall disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the Mediator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the Mediator's impartiality. The Centre shall provide such information to the parties in writing and shall fix a time limit for any comments from them.

4

When confirming or appointing a Mediator, the Centre shall consider the prospective Mediator's attributes, including but not limited to nationality, language skills, training, qualifications and experience, and the prospective Mediator's availability and ability to conduct the mediation in accordance with the Rules.[17]

The ICC addresses mediator impartiality in its rules concerning the mediation process:

Article 7 Conduct of the Mediation[18]

1

The Mediator and the parties shall promptly discuss the manner in which the mediation shall be conducted.

2

After such discussion, the Mediator shall promptly provide the parties with a written note informing them of the manner in which the mediation shall be conducted. Each party, by agreeing to refer a dispute to the Rules, agrees to participate in the Proceedings at least until receipt of such note from the Mediator or earlier termination of the Proceedings pursuant to Article 8(1) of the Rules.

3

In establishing and conducting the mediation, the Mediator shall be guided by the wishes of the parties and shall treat them with fairness and impartiality.

4

Each party shall act in good faith throughout the mediation

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15 See <https://www.adr.org/aaa/faces/rules>.

16 See <http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/>.

17 See <http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/#Article_5>.

18 See <http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/#Article_7>.

2. European Example

European Code of Conduct for Mediators

1. COMPETENCE, APPOINTMENT AND FEES OF MEDIATORS AND PROMOTION OF THEIR SERVICES

1.1.

Competence

Mediators must be competent and knowledgeable in the process of mediation. Relevant factors include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

1.2.

Appointment

Mediators must confer with the parties regarding suitable dates on which the mediation may take place. Mediators must verify that they have the appropriate background and competence to conduct mediation in a given case before accepting the appointment. Upon request, they must disclose information concerning their background and experience to the parties.

1.3.

Fees

Where not already provided, mediators must always supply the parties with complete information as to the mode of remuneration which they intend to apply. They must not agree to act in a mediation before the principles of their remuneration have been accepted by all parties concerned.

1.4.

Promotion of mediators' services

Mediators may promote their practice provided that they do so in a professional, truthful and dignified way.

2. INDEPENDENCE AND IMPARTIALITY

2.1. Independence

If there are any circumstances that may, or may be seen to, affect a mediator's independence or give rise to a conflict of interests, the mediator must disclose those circumstances to the parties before acting or continuing to act.

Such circumstances include: any personal or business relationship with one or more of the parties; any financial or other interest, direct or indirect, in the outcome of the mediation; the mediator, or a member of his firm, having acted in any capacity other than mediator for one or more of the parties.

In such cases the mediator may only agree to act or continue to act if he is certain of being able to carry out the mediation in full independence in order to ensure complete impartiality and the parties explicitly consent. The duty to disclose is a continuing obligation throughout the process of mediation.

2.2. Impartiality

Mediators must at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation.

3. THE MEDIATION AGREEMENT, PROCESS AND SETTLEMENT

3.1. Procedure

The mediator must ensure that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it. The mediator must in particular ensure that

prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including any applicable provisions relating to obligations of confidentiality on the mediator and on the parties. The mediation agreement may, upon request of the parties, be drawn up in writing.

The mediator must conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible imbalances of power and any wishes the parties may express, the rule of law and the need for a prompt settlement of the dispute. The parties may agree with the mediator on the manner in which the mediation is to be conducted, by re

ference to a set of rules or otherwise. The mediator may hear the parties separately, if he deems it useful.

3.2. Fairness of the process

The mediator must ensure that all parties have adequate opportunities to be involved in the process. The mediator must inform the parties, and may terminate the mediation, if:

– a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment, or

– the mediator considers that continuing the mediation is unlikely to result in a settlement.

2.3. The end of the process

The mediator must take all appropriate measures to ensure that any agreement is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement. The parties may withdraw from the mediation at any time without giving any

justification. The mediator must, upon request of the parties and within the limits of his competence, inform the parties as to how they may formalise the agreement and the possibilities for making the agreement enforceable.

4 Confidentiality

The mediator must keep confidential all information arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or grounds of public policy to disclose it. Any information disclosed in confidence to mediators by one of the parties must not be disclosed to the other parties without permission, unless compelled by law.

3. United States Example

In 1994, the American Arbitration Association, American Bar Association and the Association for Conflict Resolution produced model standards for mediators. These Standards were revised in 2005 and serve as the model for mediations for many jurisdictions.

Preamble

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

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

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

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self- determination. Self-determination is the act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

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

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimums gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

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

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, and withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.