

Family Mediation Training 2023

Training Materials

Online Resources

Available online - www.nmadr.org/training

I. Art of Mediation	
A. Mediation Dynamics	<u>3</u>
B. Acknowledgement	<u>21</u>
C. Trust the Process Diagram	<u>27</u>
D. The Beauty and the Curse of Forms	<u>28</u>
E. The Flip Chart Kit	<u>29</u>
F. The Art of Listening	<u>41</u>
G. Working with Heat	<u>51</u>
H. Power of Mediator Expertise: What is a Mediator to Do?	<u>58</u>
I. Power of Mediator Guidance – A Mediation Workflow	<u>64</u>
J. Basic Mediation Topical Outline	<u>73</u>

Mediation Dynamics

By David Levin

Introduction

There are currents below the surface. Hidden. Waves and wind define the view on the top. Filling what we see and blinding us to what is beneath. Below, there is energy and force. Factors which help define our total experience. Mediators, at first, deal with the noisy activity of the surface. There is more than enough to be overwhelming. Yet, there is far more going on.

A supervisor listened and watched his employee over the long course of the mediation session. Both men were entrenched in locked positions. Their experiences and beliefs hardened. No mediator tactic seemed to budge anything. Then, as the session was about to end, each man was given an opportunity to offer final thoughts. The employee effectively summarized what he wanted and why. The supervisor, who was more reticent to talk, started his time with silence. Then he spoke. He had been adamant about his side throughout the morning. The two co-mediators and the employee were stunned when he spoke. He said that he was a religious man. He explained that he had listened to the employee with his heart. He apologized for having hurt him. Unbeknownst to all, underneath he had been moved. Although the mediation ended without an agreement, the world had shifted between the two participants. Going forward was going to be very different between them. Who would have known...

Mediators are trained in communication skills, techniques, and stages of mediation. There is a large quantity of knowledge to learn, understand, and to convert into actual practice. This education and practice development are essential. And, there is more. Beneath the surface, the human experience within each person, along with the fluid relationships and interactions among members of the group, may be hidden. Unseen these forces may shape what can happen in the room. After acquiring the more formal skills needed to navigate the storm on the surface, mediators need to nurture an awareness of the currents below. This workshop is one foray into exploring what happens underneath the surface, when a group of humans gather in a room to work on resolving a conflict.

* * * *

Human beings are complex organisms. A fluid collection of physical and mental states of being. We are aware of some influences on our state of being, such as emotions, physical sensations, and thoughts. Other influences are unconscious, such as hormones, neurological reactions, impacts of past events, and survival instincts. All these dimensions are active at once. Continuously changing. In every experience, whether we know it or not, complex mechanisms are at work.

An example. An interaction with another person triggers a physiological stress response. Cortisol floods the system. Mental functioning becomes impaired. Neither does your face show, nor do you feel, what is happening inside. Yet, there is an impact on what you do and think.

Another example. An unknown environment, which is potentially harmful, looms before you. Self-preservation instincts are activated. Your defense mechanisms are triggered. You are on a high state of

alert for danger. Thinking narrowly focuses on threat assessment and responsive action. Parts of your functioning shut down as you concentrate those needed for survival.

A party to a mediation is entering an unknown environment where an adversary awaits. There is an unresolved conflict dominating everything. Mediating will be a highly challenging experience.

* * * *

A group of human beings may be viewed as a collective organism. Individuals react to one another and to the group. There are many, many dimensions of conscious and unconscious interactions at play. The number of relationships, all simultaneously influencing the environment, is large. There is impact on the whole group, and the experience of the whole group will also impact each member. Ever changing, the environment will be dynamic and will influence what can happen.

For example, consider a baseball team. Each player is a distinct person, with emotional and physical attributes which will affect their performance - an individual organism. An observer might describe the player as a confident and steady performer, or as an insecure and less reliable asset, etc. The same may be said of the whole team: some pennant contenders are confident and overcome adversity, while others may be known to fold and choke under pressure. Functionally, there are both individual and collective organisms involved in what happens on the field.

People gathered in a mediation room to work on a conflict are similar. There are individual organisms and a collective organism. Yes, people will come with different roles, such as mediator, party, or advocate. Their respective roles will influence their behavior. However, everyone is also a member of the group. Each person's presence and behavior will influence every other person, as well as the group. In turn, the experience of the group will also influence every individual.

* * * *

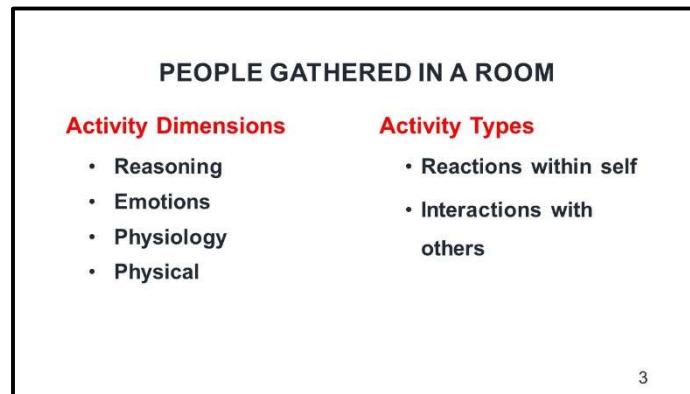
The role of the mediator is both to facilitate the mediation and to participate as a member of the group. On one hand, in the formal mediator role, there are process stages to navigate, such as explaining mediation, obtaining an agreement to mediate, facilitating opening remarks, setting an agenda, and guiding the work towards a possible resolution of the dispute. On the other hand, there are human relationships and interactions to help manage. Mediator presence, behavior, guidance, and power, as a participating member of the group, will influence the nature of the working environment and relationships in the room. These intangibles will shape what can happen during the mediation. Both dimensions, the formal role and participation in the group dynamics, are essential.

The role of the mediator includes to be responsible for self and for the group. A mediator should be aware of the state of their own organism, and of how they are influencing each person and the group. The task is to provide a state of mind and an environment which is conducive for mediating. As a participant in the experience, and more as the assigned guide, the mediator needs to attend to the human dynamics in the room, both in terms of relationships and behavior. There is multi-tasking to perform: to provide the skills, stages, techniques, of mediation, and to respond to individual and group interactions.

* * * *

Mediation is only one method for dispute resolution. However, the format is more fluid than a trial. The potential benefit for working in the heat of conflict to create open, flexible, mutually beneficial thinking between adversaries is enormous. Simultaneously managing a multi-dimensional, complex set of human interactions can be hugely challenging. There is a need to be aware of the dynamics of each moment, and to respond accordingly. There is a concurrent need to guide the direction of the interactions in a meaningful direction. The mediation process is not a set of specific plays to follow. There is a need for lifelong learning. This workshop is an opportunity, for the presenter and the participants, to explore the art and privilege of being a mediator. Thank you for coming. Welcome.

Summary of Elements in the Room



* * * *

Questions

Instruction. The task is to assign *a descriptive word or short phrase* to a part of an experience. You may pick one, two or three words or phrases. The purpose is to generate a list of concise terms to describe the key elements which may be present.

Inquiry #1: How people arrive for a mediation

1. How may parties feel about coming to mediation?
2. What may parties expect:
 - a. About the other side?
 - b. About the mediator?
 - c. About the process?
3. How may you feel as the mediator coming to the mediation?

Inquiry #2: A state of mind for mediation

4. What are the characteristics of a state of mind which are conducive for mediating?

Inquiry #3: Building a beneficial environment

5. How may a mediator help the parties acquire a state of mind conducive for mediating?

Creating a State of Mind & an Environment Conducive for Mediation

Testing & Reacting. Upon entering a foreign, possibly dangerous, environment, a person continuously tests for safety, assesses what happens, and reacts to the results. Coming to a mediation, a person is already on alert and expecting danger. Coming from an experience of conflict, the person has already learned the world is not safe. Mediation is an unknown place, the mediator is a stranger, and the other party is an adversary. A person will probe, test how their presence, words, and behavior are received.

A Stress Response. Emotional, cognitive, and biological stress responses have already been triggered simply by coming. A person may expect to be attacked, ridiculed, disrespected, minimized and told that they are wrong. This is a hyper-sensitive state. Any signs of danger will heighten a fixation on self-preservation. Aggressive defensiveness will be elevated. Fight, flight, freeze, or other behaviors may result. Any of these occurrences are not conducive for mediating.

A Relief Response. What happens when the probe evokes a neutral, or even a friendly, response? What happens when the mediator shows interest, wants to understand, is non-judgmental, is accepting, and wants to know more? What happens if successive probes bring back similarly “friendly” information? Is it possible for the person’s state of mind to shift?

A Safe Place. A person’s state of mind to meaningfully mediate needs to be open, flexible, and creative. While remaining wary for danger, cautious about the other side, and vigilant to safeguard self-preservation and integrity, a person needs to feel safe. Safe enough to venture out of the fortress of aggressive defensiveness. Safe enough to shift from a purely defensive stance to a more multi-dimensional position – where collective problem solving can co-exist with self-preservation. There is a sweet spot where a person can feel both safe and open to more possibilities than just winning or losing. And, one safe response is not enough. Repeated probing needs to find a reliable environment of safety.

Where Can Safety Come From? The other side is not offering safety. Mere words, “you are safe here,” from the mediator can ring hollow. Safety must be experienced. In the gut, as well as in the mind. Words can be so superficial. Mediators can offer a sense of safety. Mediator presence, demeanor, and behavior, as well as words, will be tested for safety. How the mediator responds will be critical. Yes, a mediator can create a safe, working environment. A safe place to work on a dispute may be the greatest gift a mediator can provide.

* * * * *

If a mediator does nothing else...

MEDIATOR BEHAVIOR

Creating a good environment &
beneficial working relationships

1

HOW PEOPLE ARRIVE

Elevated Stress Response

- ★ • Prepared to advocate and to defend
- ★ • Anticipating a hostile response
- ★ • On high alert for danger
- ★ • Locked down

2

WHAT PEOPLE NEED TO MEDIATE

And may be compromised OR may be unsafe to do

- Ability to speak so that they can be heard
- Ability to listen so that they can understand
- Ability to think openly, flexibly and creatively

3

PEOPLE TEST THE ENVIRONMENT

Is it safe or dangerous?

They send a probe to see whether in response

- They will be wacked
- Or whether they will be safe
- The mediator's behavior in response will be key

4

TO SHIFT FROM AGGRESSIVE DEFENSIVENESS

To an Increased Capability to Mediate

Parties need to:

- Be heard
- Be understood
- Be respected
- *To experience a safe and receptive environment*

5

TO SHIFT FROM AGGRESSIVE DEFENSIVENESS

To an Increased Capability to Mediate

To feel safe, each party needs to experience

- That the mediator will be even handed
- That the mediator can work with the other party
 - Without betraying their connection with the mediator
 - Without becoming aligned with the other party

6

ROLE OF THE MEDIATOR

Stimulate a Relief Response

- Provide an environment where each person will feel incrementally safer to lower:
 - Wall of defenses
 - Clinging to positions
 - Fear

7





ROLE OF THE MEDIATOR
Stimulate a Relief Response

- Provide support for an increased capability to mediate, including:
 - A state of mind conducive for mediating
 - Behavior conducive for mediating

8

IF A MEDIATOR DOES NOTHING ELSE...

These mediator behaviors matter:

-  • Listen to understand
-  • Respect and acknowledge
-  • Ask to know more
-  • With an even hand

9

* * * * *

The supervisor, like the employee, insisted on telling the whole story. Every detail. Every episode, grievance and how right they were time and again. No budging from the narrative, although they did let the other speak. If every detail was told, then the mediators would understand. Judgment would be rendered in their favor. Each chapter from one evoked another chapter from the other. Endlessly. No short cuts allowed.

The mediators actively listened. Steadfastly reflecting the facts and emotions that the mediators had heard back to the parties. Demonstrating that the mediators had listened, worked to understand what was being said, and accepted each of them without judgment. Still, the supervisor and the employee persisted in telling their tales. Almost afraid if they stopped, if they did not justify and defend everything, that they would lose.

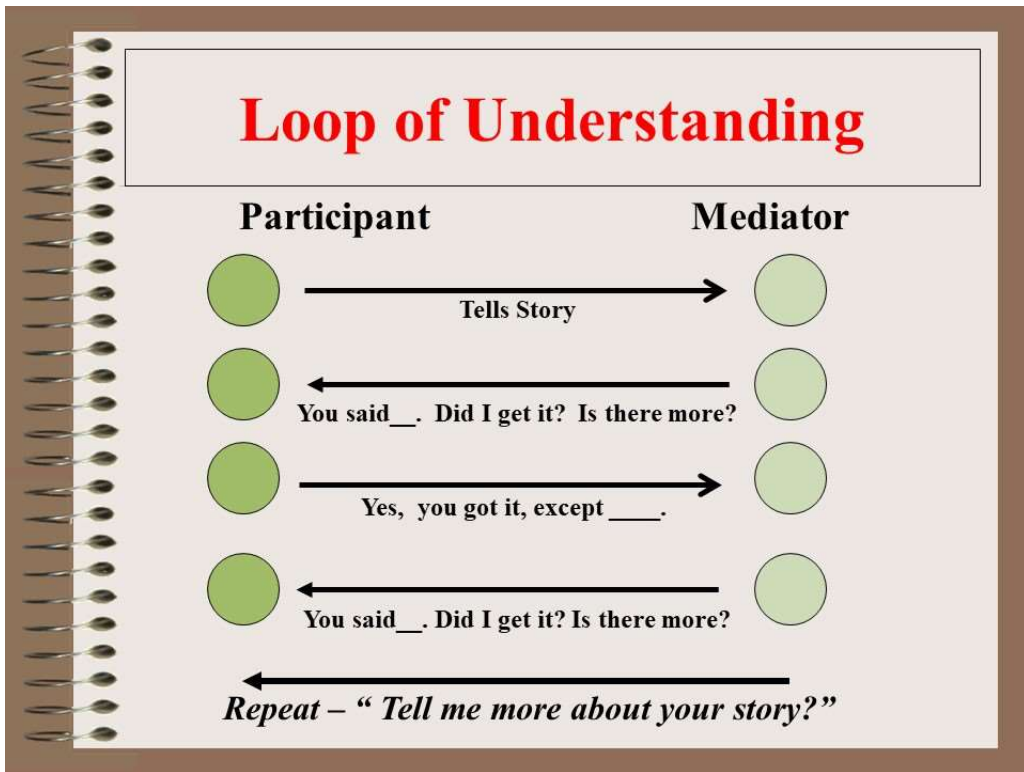
Slowly, the impulse to advocate and to defend softened. As if the supervisor and the employee were learning the acceptance and support of the mediators was real, unshakeable. Slowly, the discussions shifted. Personal needs, such as a need to be respected, and professional values, such as pride in high quality work, began to emerge. The historical narratives shifted from historical detail to what it felt like to have the experience. Feeling safe enough from being judged or being assigned fault, the supervisor and the employed began to open up.

The supervisor and the employee were no longer locked down in self-justifying story telling. Each experienced being acknowledged by the mediators. Each was now able to

listen to what was going on around them. No longer preoccupied with what they would say next in rebuttal, each began to hear and feel the experience of the other. They also began to experience their own reaction to what was being said. The situation was becoming humanized. They were no longer just adversaries with fixed positions, where the other was a wrong doer. Although outward appearances showed no movement towards resolution, inside things were shifting.

Remember this mediation did not result in any agreement. The supervisor and the employee remained locked within their respective experiences, or so it appeared. What shifted was what was being talked about. Fixation on positions and factual justifications began to give way to exploring emotions, needs, and interests. The behavior of the mediators had not changed. The mediators listened, reflected back, and actively tried to understand. What did change was the behavior of the parties. A relief response began to dissipate agitated and stressful defensiveness.

* * * * *



Hidden Power of the Overheard Conversation

For a party to overhear the mediator working with the other party, may shift everything...

OVERHEARD CONVERSATION

Hidden impact...

1

WHILE THE OTHER PARTICIPANT WATCHES...

- ★ While the mediator works with one participant,
- ★ What is the impact on the other participant?

2

INITIAL REACTIONS
Particularly when waiting to go second...

- Is the mediator becoming aligned? Am I at risk?
- Needs the mediator to acknowledge their fear
- Needs to be appreciated for waiting
- Needs to be know mediator wants to know them too

3

RELIEF REACTIONS

- As each participant sees the mediator give even handed, authentic attention to all,
- They learn the mediation environment may be safer than initially experienced,
- Their defenses can begin to lower, and they can feel safe enough to listen more openly.

4

LONG TERM REACTIONS

There may be no outward clues,

- That the listening participant is taking in what the other participant is expressing...
- That listening brings new understandings...
- That the listener's state of mind may become more open and flexible...

5

UNEXPECTED SHIFTS

➔ With time, the hidden learning is ready to surface, to the surprise of everyone else

- A position may shift...
- A new idea may be offered...
- An apology may be given...

➔ The overheard conversation can be powerful.

6

An apology happened in the mediation between the supervisor and the employee. Unexpected. Stunning. Everything shifted. Faces and body language. Feelings and thoughts. Still there was no agreement... For the supervisor and the employee with careers where working together in the future was likely, the terrible knot between them had been dissolved. Their previous friendship and mutual admiration reappeared. The mediation ended. What happened next is unknown to the mediators. And yet, a door of opportunity had opened. The certainty of an administrative, adversarial hearing was no longer the only possibility. The supervisor and the employee had used the mediation experience to create a far fuller range of resolutions between them. No doubt, the mediation program filed the case as "closed-no agreement." True success may be hard to measure...

Heat Questions

Instruction. The task is to assign *a descriptive word or short phrase* to a part of an experience. You may pick one, two or three words or phrases. The purpose is to generate a list of concise terms to describe the key elements which may be present.

Scenario. Think of an experience or imagine one. You are the mediator. Imagine that the mediation is going off the rails. Anger is surfacing. Agitation is rising. The parties are triggering each other. The heat of conflict threatens to become combat. You are alarmed.

Sample Scenario. A fictional example using the case of the supervisor and the employee:

You have welcomed the parties and invited them into the room. After explaining mediation, you have them sign an agreement to mediate. Everyone is being polite. Ready to proceed, you ask each party to give a brief description of the dispute. The employee goes first. Starting with derogatory comments about the supervisor, the employee forcefully narrates a parade of horrors. The supervisor looks shocked. The employee continues. You try to ask a question of the employee. You are ignored. The bombast continues. The supervisor's face becomes red, their back stiffens. Their eyes targeted on the employee. Accusation and counter accusations burst out. Both parties are talking at once. Verbal combat has exploded.

* * * * *

Inquiry #1: What risks to the parties and the mediation may be present?

Inquiry #2: What might be triggering each party?

Inquiry #3: What can you do?

Inquiry #4: What opportunities are present in the moment?

Working with Heat

Heat Aversion. One reason people come to mediation is that they cannot handle the heat of the conflict. When they try to work on the problem, they get stuck. Aggressive and defensive behaviors take over. Difficulties escalate. Progress towards resolution is stymied.

Many people are conflict adverse. They avoid conflict and run from it. Experience also shows people may avoid authentically addressing a conflict by hiding behind a mask of hostility and by getting stuck in combat. Either way, their hope may be that mediation will help them escape being trapped in a nightmare.

Mediators may also be conflict adverse. Experience shows mediators do avoid conflict, such as by jumping from a joint session to individual sessions, by trying to suggest solutions to the problem so that the fighting can stop, or by shutting down the heat, i.e., “just the facts. Check your emotions at the door.” Is a mediator who is afraid of conflict truly helpful to the parties? Is there another approach?

Is Heat Workable? Heat during a mediation is inevitable. Avoidance is not the only tool. The threshold issue is whether the heat is workable. For example, the parties may have always shouted at each other. Heated arguments work for them. A debate during mediation is just what they always do. No one is getting hurt. It is just how they talk. Loud language may actually be workable. All heat is not the same. A blanket response is to avoid heat. Is an indiscriminate reaction always useful? Would it be more helpful for a mediator to explore what is really going on?

Probe Assess & Respond. A mediation party will test the environment for safety. What happens to test probes will influence what happens next for a party. A similar approach may work for mediators.

Test the heat for workability. Probe the heat with an intervention. Assess the reaction. Respond to what you have learned such as by probing further, by shifting to another mediation tactic, by swiftly moving to protect safety, or by crafting a technique to fit the moment. Shifting to individual sessions, seeking solutions for the problem, or shutting down the heat, will remain viable options. The selection of an approach should not hinge upon mediator comfort but should be based upon what might be beneficial. Testing the heat and selecting an appropriate response may be more helpful to the parties and the mediation process.

Note: This process will be further elaborated during the workshop. Space on these pages is limited. For more information, see the online materials, “Working with Heat – Slides” and “Working with Heat – Article.”

Danger & Opportunity. First, do no harm. Heat can harm either or all parties. Heat can damage the mediator. Always and continuously test heat. Avoid the risk of harm. Intervene, even consider stopping the mediation, to keep everyone safe.

Second, heat can be an opportunity. Working with heat may unearth critical misunderstandings, unmet needs, or the unexpressed real reason why the parties are at odds. A mediator’s ability to work with heat may send a helpful message, such as explaining that “being angry in this circumstance is to be expected. Let’s work with it.” Normalize the situation. Heat is what mediation is intended to work with. Provide a safe and beneficial path forward.

Summary of Mediation Power

MEDIATOR POWER

Identifying mediator influence...

21

MEDIATOR POWER

- Is not to determine the outcome of the conflict.
- Is the ability to influence a party's state of mind and behavior.
- Is the ability to influence what happens in the room.

22

SOURCES OF MEDIATOR POWER

- Mediator Behavior
- Mediator Presence
- Mediator Knowledge
- Mediator Guidance

23

EXERCISING MEDIATOR POWER

- ➔ • How the mediator participates is not neutral.
- ➔ • A mediator's participation in the process has consequences for the parties.
- ➔ • A mediator needs to be level handed and needs to maintain the integrity of the process.
- ➔ • How a mediator uses power needs to be as intentional as possible.

28

* * * * *

Core Value of Self-Determination

SELF-DETERMINATION - STANDARDS

Complete documents available on www.nmadr.org. See Documents page.

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

American Bar Association • American Arbitration Association • Association for Conflict Resolution (2005)

STANDARD I - SELF-DETERMINATION

- A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed **choices as to process and outcome**. Parties may exercise self-determination **at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes**.
1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to **balance such party self-determination with a mediator's duty to conduct a quality process** in accordance with these Standards.
 2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, **where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices**.
- B. **A mediator shall not undermine party self-determination by any party for reasons** such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others. (*Emphasis added.*)

GUIDELINES FOR COURT-CONNECTED MEDIATION SERVICES

New Mexico Supreme Court (2016)

GUIDELINE III. General principles.

These Guidelines suggest minimum standards for all courts offering court-connected mediation services. Nothing in these Guidelines is intended to preempt any Supreme Court rule that addresses mediation or settlement facilitation.

...

C. Self-determination. In self-determination, **the decision-making authority rests with the mediation parties themselves**. Self-determination is the **core value of court-connected mediation services**.

- (1) Courts may mandate referral to mediation, but should not require mediation parties to settle. There should be no adverse response by courts to non-settlement by the mediation parties. For that reason, mediation parties should be permitted to opt out of mediation at any time.
- (2) A mediator should facilitate negotiations between mediation parties and assist them in trying to reach a settlement, but should not have the authority to impose a settlement on the mediation parties or to coerce them into settlement. (Emphasis added.)

MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION

Developed by The Symposium on Standards of Practice (2000)

Standard I

A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.

- A. Self-determination is the **fundamental principle of family mediation**. The mediation **process relies upon the ability of participants to make their own voluntary and informed decisions**.
- B. The primary **role of a family mediator is to assist the participants to gain a better understanding** of their own needs and interests and the needs and interests of others **and to facilitate agreement among the participants**.
- C. A family mediator should **inform the participants that they may seek information and advice from a variety of sources** during the mediation process.
- D. A family mediator shall inform the participants that they may withdraw from family mediation at any time and are not required to reach an agreement in mediation.
- E. The family mediator's commitment shall be to the participants and the process. Pressure from outside of the mediation process shall never influence the mediator to coerce participants to settle. (Emphasis added.)

Nature of the Service

NATURE OF THE SERVICE

Boundaries for the mediator's role...

29

MEDIATION IS NOT

- *A determinative process* where someone tells the parties what to do, such as trial and arbitration.
- *An advisory process* where someone recommends what parties should do, such as a lawyer or consultant.
- *A therapeutic process* where someone treats party personality and behavior, such as counseling and coaching.

30

MEDIATION IS

- *A method of dispute resolution* intended to provide parties with an opportunity to exercise self-determination in the resolution of their dispute.

31

CORE VALUE OF SELF-DETERMINATION

More than just determining the outcome, and includes:

- Choice of method of dispute resolution
- Deciding what to do during mediation
- Defining positions, needs, interests, values, and
- Finding options for agreements...

32

SELF DETERMINATION IN ACTION

For example:

- Do not tell a participant that they cannot afford an option for resolution
- Help them explore their own budget and economics
- Provide an opportunity for them to draw their own conclusion.



33

WHAT IF OTHER SERVICES ARE NEEDED?

- Whether the parties should be referred to another type of service provider, or
- Whether the mediator may shift roles...

34

THRESHOLD CONSIDERATION

-  • Understanding the baseline foundation for a mediator's role
-  • The starting point for this presentation

35

Acknowledgement, a Dispute Resolution Basic Skill

“From Clenched Fists to an Open Mind”

By David Levin

Mediation to work often needs for participants to feel heard and to navigate the heat of conflict. These needs can be separate or intertwined. Acknowledgement offers a key tool for achieving both.

Acknowledgement is a mediation communication technique. The format is simple. The mediator repeats back to a participant what the participant has just said, and asks, “Did I get it? Did I miss or misstate something?” After the participant responds, the mediator may say, “Can you tell me more about ____ (what was said) ____?” This simple technique can have significant benefits, including:

- Getting out more details, needs, interests, emotions, and resolution options;
- De-escalating heated emotions; and
- Dissolving impasse.

This essay will explore what is acknowledgement and how acknowledgement may be used. The essay is intended to be read in conjunction with, Tanz and McClintock, *The Physiologic Stress Response During Mediation*.¹ Neuroscience offers an awareness of how the physiologic stress response can impact the mediation response, and how acknowledgement can be used to navigate the biology of the mediation experience.

Acknowledgement can be useful in any style of mediation, and at any stage of the mediation process. The use of acknowledgement can be brief or extended. Acknowledgement is a useful tool in a mediator’s toolbox. The actual use of acknowledgement will depend upon the mediator and the ever-changing dynamics of the mediation process.

The Power of Being Heard

How to get “From Clenched Fists to an Open Mind?” Being heard is a key. People often feel no one is listening to them. Their reaction is to repeat themselves with ever increasing vigor. The result, escalating conflict. Simply saying “I understand” will not work.

Mediation training includes many communication techniques known collectively as “active listening.” A primary objective is to have a mediation participant feel heard. While many individual communication skills are presented during mediation training, the skills in practice will often overlap. Mediation practice is often a blended flow of many different communication tools.

Acknowledgement is one of those techniques. Acknowledgement may also be known as validating or emphasizing. Acknowledgement may be used in conjunction with other active listening skills, such as clarifying, summarizing, asking open ended questions, restating, paraphrasing, reflecting emotions, and reframing. Acknowledgement specifically targets how a person may experience being heard.

Acknowledgement offers more than just saying, “I heard you.” Acknowledgement is a communication technique which affords the participant a fuller, almost physical, experience of being heard. The mediator demonstrates with acknowledgement that he or she has heard the participant.

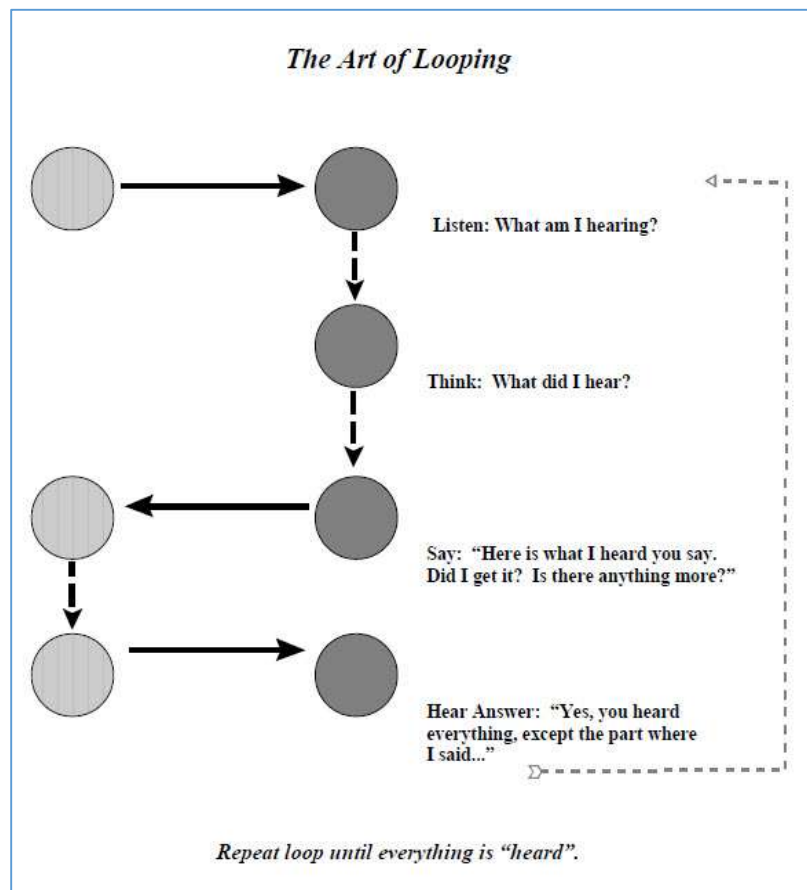
As a result, the participant can feel that the listener “got it.” There is relief. Finally, someone listened. The imperative to advocate can subside. The participant can feel safer to have a more open mind.

What Acknowledgement Is and Is Not:

- Acknowledgement is conveying your understanding of emotional and substantive content;
- Acknowledgement is not saying you agree or disagree with what has been said;
- Acknowledgement is demonstrating your interest and respect for what is being said;
- Acknowledgement is allowing the participant feel safe to tell you what the participant needs to say without being judged or attacked; and
- Acknowledgement must be authentic. To be an effective mediator, your interest must be genuine, and you need to be able accept inconsistent truths from the participants. When the participants tell their respective stories, you need to offer full attention, interest, and respect to each. The mediation environment needs to be a place where everyone feels safe to be heard.

Loop of Understanding

Acknowledgement has been described by Gary Friedman as the loop of understanding. The technique can be diagrammed.ⁱⁱ



The Power of “Tell Me More”

“Can you tell me more about _____?” This open ended question is an effective tool. The response will often provide previously unexpressed information and will move the mediation forward. Stuck at any time? Ask a participant to “tell me more,” and then, use the loop of understanding. “Tell me more” is this author’s first choice technique to solve many a tough moment.

Literal Looping

A recent case spiraled towards impasse. One participant was absorbing all of the mediator’s attention. The other participant was feeling ignored and discounted. The other participant was about to leave the mediation process, both mentally and physically. The mediator, sensing a potential disaster, turned to the other participant and asked:

Mediator: I would like to be sure that I understand what you have been saying. You said, a, b, d, e, and f? Did I get that part right?

Other Participant: Yes.

Mediator: Then you said, u, w, x, y, and z. Did I get that part?

Party: Yes, but you missed v.

Mediator: Thank you. Got it. Can you tell me more about your experience?

What happened next:

- The mediator and the other participant had a profound discussion of what had happened from the other participant’s perspective. The other participant began to feel heard, opened up with more details and concerns, and re-engaged in the mediation;
- The participant who had been absorbing all of the attention and who had experienced being fully heard by the mediator, became quiet and listened to the conversation. Listening, the participant was affected by what was being said; and
- Later, when a joint conversation resumed, the participant surprised both the mediator and the other participant by offering new understandings and new possibilities for resolution. The mediation had side-stepped a possible impasse and moved forward.

To repeat back verbatim what you have heard may feel silly. However, the impact on the participant telling you his/her story can be powerful. The participant will know that you are interested, that you worked to understand him/her. Just saying “you said a, b and c, right?” can work. Do not be self-conscious about using what can be beneficial.

The Power of Hearing What You Said

For a participant to hear what he/she just said can be powerful. The experience is analogous to writing an article. The writer can become absorbed in the words on the screen or on the paper. If the writer asks another to read aloud what is written, then the writer can hear the words from another perspective. Listening to one’s own words can help a person assess what he/she has written. The writer may see what

needs to be clarified, rephrased, or further explained. Further, the writer may discover that what is written is not what was intended to be said, or that what is written may lead to a new understanding of what needs to be said. A participant in mediation can have a similar experience when the mediator repeats back what the participant has said. The participant has an opportunity to listen and to learn from his/her own words.

Invisible Impact

The impact of acknowledgement on a participant is frequently invisible at first. Even if the impact on the participants may not be immediately visible, the movement towards resolution can be profound. For example, a participant may be tightly holding on to a fixed position. After experiencing being heard and acknowledged, the participant may gradually move toward being open to considering more possibilities. The movement can be happening silently within the participant and may not be visible to the mediator or the other participant. Then, seemingly long after the use of acknowledgement, the participant may become more ready to shift his/her position and/or attitude, and may express the change. A trap for the mediator can be to solely judge the impact of acknowledgement based upon the immediate results from its use.

The Overheard Conversation

The other participant is listening while a mediator is acknowledging a participant. For the other participant, the impact of the “overheard conversation” can be real and substantial. There are traps and benefits to consider.

For example, watching the mediator work to understand a participant, the other participant may believe the mediator is becoming aligned with that participant. The other participant can also have an adverse reaction, such as being angry or insulted by what the participant is saying. An unintended consequence can be that the other participant shuts down or worse.

A mediator must monitor the other participant’s reaction and must work to preserve the other participant’s good will. A mediator may need to reassure the other participant, such as by saying, “Thank you for letting work with (the participant). I look forward to working with you to more fully understand what is important to you,” or “I know you see things differently. I look forward to learning more about your view.” The essential elements of reassuring the other participant include:

- Acknowledging their patience;
- Expressing your interest in what they will say;
- Asking them to be patient; and
- When observing that further listening will be detrimental to the other participant, changing what is happening to restore balance to the mediation process.

One benefit from an overheard conversation is for the other participant to observe how the mediator is fair and balanced, and how the mediation is safe and constructive. As the other participant feels acknowledged and heard from his/her own interactions with the mediator, he/she may relax enough to listen, rather than to be preoccupied with defending and promoting his/her position. Slowly the other participant may come to understand more than his or her own position, and to listen with a more open mind.

Acknowledgement, © David Levin 2019, page 4

The impact of the overheard conversation can shift the entire mediation. At first, the impact may be hidden. The other participant just listens. Then, the other participant's understanding of the situation can begin to grow. Finally, the other participant may express something new. Another possible solution may come to mind for the other participant, or a barrier to a specific agreement raised by the other participant may vanish. To the surprise of everyone else, the other participant may even acknowledge the experience of his/her "opponent." Mutual ground can begin to emerge.

Flexible Use of Acknowledgement

How much should a mediator use acknowledgement and the loop of understanding? Too much can get in the way of a meaningful discussion. Too little can prevent a meaningful discussion from ever happening.

- Using acknowledgement during the early stages of mediation can be important for initially building rapport and a good working environment;
- Using acknowledgement early can build a reservoir of trust and rapport between the mediator and a participant for when a tough moment appears later. When a difficult point comes up, a touch of acknowledgement can resurrect an earlier feeling of trust and safety which can help de-escalate the situation;
- Using acknowledgement when the heat of conflict explodes or impasse looms can be helpful; and
- Using acknowledgement at any time can be beneficial.

Acknowledgement is often an overlooked or forgotten tool. Mediation can be intense. Mediators can get caught up in the action. Jumping to the heart of the matter or to the bottom line can seem more appropriate, and actually might work. Still, the "bricks and mortar" of mediation is to help the participants to feel heard and to feel safe to have an open mind. Acknowledgement is a key tool for a mediator to always keep at the ready.

Getting Stuck

A challenge for mediators is to be comfortable sitting with conflict. A common experience illustrates the problem. Mediators often get "stuck" after each participant initially tells his or her story. Here is what may happen:

The mediation has been going smoothly. The mediators have greeted the participants, explained the mediation process, and the agreement to mediate has been signed. The interaction has been comfortable and easy. Both the mediators and the participants are beginning to settle in – they are beginning to know each other and to ease into conversation together. Then, each party is asked to briefly explain what brought them to mediation...

Each party has been thinking about coming to mediation for a while. Apprehension can build. Mediation can be unknown, and going into an unknown experience can be daunting. The prospect of sitting down with an adversary can also be challenging. Typically, each party has spent time anticipating how to present and to defend his or her position. After initially telling their stories, there should be no surprise that the gulf between them will seem deep and wide, that they are on the brink of open conflict, and that heat threatens to come into the room.

This moment is an invitation for the mediation to get stuck. The participants can just argue their perspectives endlessly, reinforcing and escalating the conflict. Mediation can grind to a painful halt. The chasm between the participants can seem huge and impossible to bridge. What is a mediator to do? Jump to solutions? Jump to caucus?

Getting Unstuck

Acknowledgement can help. Work with one participant and then with the other participant. Repeat to each participant what you heard the participant say. Ask, “Did I get it? Did I miss or misstate something?” Then ask, “Can you tell me more about ____ (what was said) ____?” The frozen moment can be replaced by the momentum of an on-going conversation. The mediation can get past an awkward pause and can continue.

Mediation & Self- Determination

Mediation is based upon a core value of self-determination, where the parties work together towards a mutually acceptable resolution. In other methods of dispute resolution, such as a trial or an arbitration, there is less of a reason for the participants to work together. Each side makes their pitch and a judge or arbitrator makes a decision. In contrast, rather than just exercise advocacy, mediation participants are confronted by the challenge of working together to make a decision.

Participants coming to mediation may be constrained from exercising self-determination. They are prepared to advocate and defend their position. They are intent on winning. They are in the posture of “clenched fists.” In a strange, new and unknown environment they can be apprehensive whether they will be heard and respected.

To exercise self-determination to find a mutually acceptable resolution requires the capacity to preserve one’s own integrity while making an agreement with an adversary. Thus, the mediation process needs to support each participant’s ability to move to “an open mind.”

Summary

People come to mediation because they are stuck. They are in a conflict that they cannot resolve. Mediation is an opportunity for making progress. A mediator can offer an environment and a process for working on the impasse. There are many methods of mediation. There are many techniques to use during the process. There are moments in any format of mediation, when a participant does not feel heard or understood. Among all of the obstacles found within a dispute resolution process, feeling unheard and/or misunderstood is one that can become an impenetrable barrier. Acknowledgement is one tool for working on this problem. Mediators at any level of experience and expertise will benefit from using this basic communication skill.

ⁱ Tanz and McClintock, The Physiologic Stress Response During Mediation.¹ which is available at <https://chicagomediationservices.com/wp-content/uploads/2017/04/The-Physiologic-Stress-Response-Published-Form.pdf>.

ⁱⁱ Gary Friedman has conducted several trainings in New Mexico. This diagram was produced from his trainings and has been reviewed by Gary Friedman. See also Gary Friedman and Jack Himmelstein, “Challenging Conflict: Mediation through Understanding,” American Bar Association, 2008.

Mediation Process

Entry

Intake

Agreement to Mediate

First Agreements

Information Gathering

Generate Options

Drafting

Closing

Intake

Connecting

Concerns Telling & Agenda

Story Telling

Common Interests

Design Solutions

Departure

The Beauty and the Curse of Forms

The reality is that divorce and family law is a legal process. A court order is required for completion. There are requirements for the steps to be taken. There are specifications for what issues need to be addressed and how. Procedures and forms are the result.

A reality is that self-represented parties are the overwhelming percentage of those utilizing the legal system for divorce and family law. To navigate a legal system, legal knowledge and training is required. A law degree and license has been the traditional prerequisite. Today, the vast majority of those served by the legal system lack the necessary expertise and experience to effectively participate in the process.

A reality is that mediators may be non-attorneys or may be without the necessary subject matter expertise. Use of forms might be a tempting substitute for actual knowledge and training.

Forms may be a beautiful resource. Well written instructions and forms may guide a non-legally trained through the process.

Forms may be a curse. One size may not fit all. A mechanical use of a form may preempt thoughtful consideration of the issues. Simplicity may overlook essential details.

Mediators need to be aware of how to use forms.

A trap is to mediate based on the forms. To go straight to the forms will overlook exploring needs, interests, emotions, and options. A process designed to simply fill out forms may be useful. However, it is not mediation.

Written agreements are a part of mediation. This step is typically a later stage in the process. Forms can be useful. However, the structure and language of the form may be unduly restrictive.

Forms can be a useful tool. Forms may identify issues to address. Forms may meet the requirements of a legal system. Forms may help self-represented litigants and non-attorney mediators to navigate the system.

There is a balance to achieve. On one hand, forms may be a useful aid. On the other hand, forms may negate good work. For mediator, forms should be a useful adjunct, but not a substitute for the mediation process nor a substitute for subject matter expertise.

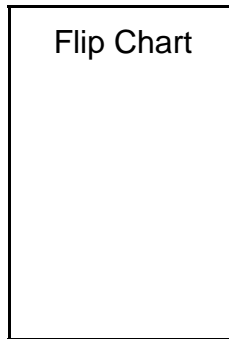
An essential consideration is that mediation participants, at least the self-represented, will confront the requirement to use court forms.

These issues raise provocative questions regarding the nature of the service of mediation. As a method of dispute resolution, mediation focuses upon self-determination and a process for exploring what agreements may be mutually acceptable.

Today, many mediation participants may also need the services of what a paralegal or attorney may provide. The mediation participants may only have a mediator to assist them.

The challenge is how may mediation maintain its core values while addressing contemporary realities? In an ever-changing environment, how may mediation continue to evolve? This challenge will require lifelong learning and thoughtful consideration.

The Flip Chart Kit



A Tool Without Instructions

A Graphical Tool. What is written and displayed is powerful. Words, diagrams, and pictures will shape thought processes. For a mediator, the flip chart can be a critical tool.

Mechanical Choices. Think of the mechanics for using a flip chart, even before considering what purposes to address:

- **How much do you write?** Key words, longer text, summary text, or everything spoken...?
- **How do you write?** Too small to see? Too big to say much? Lists? Columns? Clearly or scribbled? Will you use size to vary emphasis?
- **When do you write?** When you turn to write and people shift to watch you, what happens to the flow of discussion?
- **What do you write?** People ascribe importance to what the leader finds important enough to write, and ideas may be devalued when they are not written.
- **Can you write?** On the spot, without a speller checker and a calculator? Legibly?
- **What color marker do you use?** Are colors used to organize data? Do colors invoke emotional responses?
- **What geometrics will you use?** Circles, squares, arrows, etc...?
- **How do you use space?** When do you want a crowded page filled with ideas? When will succinct words surrounded with “white space” be helpful?

- **Will you reframe what you hear?** When do you use their actual words? When do you reframe what is said and how?
- **How do you keep the flip chart neutral?** Will writing a controversial statement appear to align the “public word” with one side?
- **Will you check out what you have written?** Is this what you said/meant? Am I capturing the picture? What is missing?
- **Can you use the flip chart to look outside the “box” of the immediate discussion?** What can you write to advance the process, as well as content of the discussion?
- **What about supplies?** Do you have enough pages, markers, tape for hanging completed charts...?
- **Do you want more than one flip chart?**
- **Where do you want to place the flip chart?**
- **May participants write on the flip chart?**
- **When do you remove the flip chart?**
- **Will you have a means to make copies?** Do participants make notes? Do you photograph the charts? Do you dictate a summary? Does a designated group reporter write it all down?
- **Will you hang completed flips charts on the walls?** Or would you rather just flip them over and keep going?
- **Who will keep the originals?**
- **How did use of a blank page become so complicated?**
- **Did you write the case name, date and page number of each flip chart sheet?**

A Tool With Purpose

A Part of the Process. A flip chart is an active ingredient of mediation. Consider the following roles:

- ☆ **“The Bin.”** Items which pop up during discussion of one issue, may be acknowledged and listed for later discussion. A tool for staying on track and for preserving important issues and ideas for their own time later.
- ☆ **“Collective Memory.”** A chronological wall of flip chart sheets taped around the room may provide an important history of the mediation process.
- ☆ **“Reminders of Context”.** “Goals” or “agendas” flip chart sheets may help participants and mediators remember “why we are here”.
- ☆ **“Expressions for Other Tools”.** A flip chart sheet may be ideal for making concrete the progress made with less tangible and less visible mediation tools, such as validating, reframing, clarifying, listing options, looping, and active listening.

Critical Contributions. Flip charts may offer critical components for a successful mediation process.

- ☆ **“Visual Thinking”.** Individuals learn many ways: reading, listening, seeing, feeling, etc. “The Kidney Stone” (true story) and “Visual Thinking” are on the next pages as an illustration.
- ☆ **“Setting the Tone”.** How do you start a mediation? Passions, positions, or interests. An actual case example follows to show how a chronic, high conflict problem found a positive setting.
- ☆ **“Drawing the Problem” as a First Collaboration.** The value of this exercise is to turn conflicted parties from facing each other with a personalized problem, to stand side by side facing a common, more objectively framed problem. As a summary:
 - ✓ If you can draw the problem on a flip chart as the participants list the issues,
 - ✓ Then the participants may stand together before a common problem,
 - ✓ To ponder: “what are they going to do with this mess,”
 - ✓ To see what needs to be done, and
 - ✓ To decide if they want to work together to solve the problem.

- ☆ **“Drawing the Process” as a Consensus Tool.** After the problem is drawn, the agenda, homework, and process methods may be easily discussed and added to the chart.

- ☆ **“Brainstorming” an Agreement.** A list of options, based upon “no bad ideas” and upon “one idea may lead to another”, is a powerful tool for discovering the range of possibilities, setting priorities and building an agreement.

The Kidney Stone

EMERGENCY ROOM, 11:30 P.M. In a dark room, I lay alone on a gurney. Exhausted, drugged, and frightened. My body had merged with the thin mattress.

A young, pleasant medical person floated in like a spirit. She, I think she was a woman, began to speak. She began to review the events of a very long day. I faded in and out, catching a word or a phrase every once and awhile. Mostly, I just listened to the music of her voice.

“You have to decide.”

What operation? Down where? What? I tried to focus. I remembered something from law school about informed consent...

“Do you have any questions?”

Huh? I struggled up a long tunnel, attempting to reach the surface where the medical person waited but, I slid down.

A miracle. Out of the fog figures appeared: my wife, who is a physician, and two doctor friends. I was safe. One last crawl up the tunnel. “I consent to whatever they say.”

Exhausted, I slid back into oblivion.

LAW OFFICE, 10:30 A.M. - INITIAL CLIENT INTERVIEW. I recognized her expression. It was just how I felt in the Emergency Room. Lost and overwhelmed. Down in the tunnel.

I walked around the desk, and sat down beside her in the second client chair. Grabbing several colored markers, I pulled up a flip chart.

In a first column, I began to list every wish she had mentioned. “Freedom to choose my own groceries, my share of the retirement, peace from phone calls, my photos...” Together, we helped the list grow.

Next, in a different color, we made a new column. The legal methods to obtain each wish. To the far right, in yet another color, we listed the estimated cost for each method.

We “stepped back”. There it was. The fog from our heads outlined. Taking another color, we set priorities, and began to work.

HOME OFFICE, Wee Hours A.M. - RUMINATING. If you could draw it, when your overwhelmed head is spinning, you could see it. If you could see it, then you could act. How could I draw it for my clients, for people wondering what was happening to them? *Is a path finder possible?*

Visual Thinking

Flip Charts. Drawing a problem may change the issue from the vague to the clear. Consider the client who wanted to choose her own groceries. A portion of her flip chart could be as follows:

11/1/98 Sue Sample (Black)		
<u>Goals</u> (Blue)	<u>Methods</u> (Green)	<u>Legal</u> (Red)
1. Buy own groceries	1. Agreement	1. RESTRAINING ORDER
= need access to \$	2. Court Order	= you use house & car
= need freedom of movement		= he stays away
		2. INTERIM ORDER
		= division of income
		= who pays what

Visual Thinking. Thinking with a flip chart, grease board or easel, has many uses in any case, including:

- ☆ **Diagnosing Problems.**
- ☆ **Exploring Options.**
- ☆ **Making Decisions.**

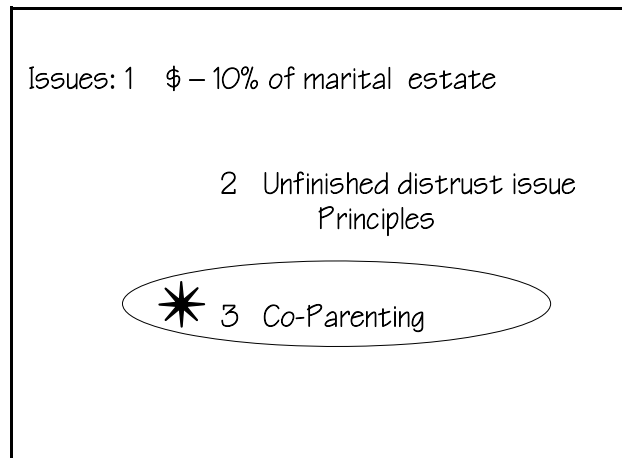
Every step of the mediation process may be visualized. If you can see it, then you can work with it. Visual thinking should be considered a useful tool for any part of the process.

Examples. The following examples are fictionalized from actual cases and compositions of cases. Names and identifying facts have been altered. Photographs of re-created flip charts show overall format. Content is reproduced in text boxes for easy reading.

Example 1: Defining the Problem and Exploring Methods for Resolution

John and Rebecca had just completed a lengthy, contentious, and very expensive divorce process. One measure of their difficulty is how high each of their respective attorneys' fees and costs had risen. This is not a lawyer or court bashing story. Everyone involved was decent, well motivated, and interested in achieving resolution.

There was one issue left. A sizable estate had been divided. A parenting plan for their children had been achieved. The remaining issue was whether either John and Rebecca owed the other a relatively small sum of money over a relatively small issue. The case came to mediation with a prophecy from both attorneys and both parties that mediation would be a waste of time. The case settled completely in forty minutes.



The use of the flip chart was critical. After each party told his or her story we listed the issues on the top part of flip chart. The first issue was the amount of money at stake. It was recognized that the amount of money was less than 10% of their marital estate.

The second issue was powerful. John and Rebecca had raging distrust towards each other and carried deep unhealed wounds about the marital breakup.

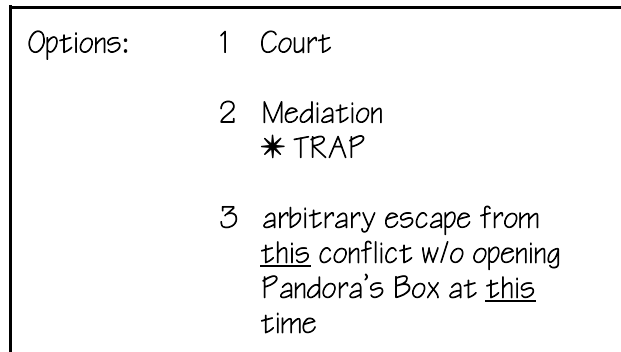
The third issue which evolved was that both John and Rebecca were dedicated to working together to co-parent their children. Understanding the risks to children of divorce let alone high conflict divorce, John and Rebecca were dedicated to doing well by their children. Discussion helped emphasize how the first two issues could contaminate the possibilities of the best co-parenting efforts.

John and Rebecca looked at the flip chart. They agreed that the three dimensions of the problem were real. *They understood for the first time that the issues were enmeshed.*

Discussion moved to what options existed for achieving a resolution. On the bottom half of the flip chart we began to list options. "Court" was the first option listed. John and Rebecca responded to the word "court" with vehement statements regarding how they did not want to return to that path.

The second option listed was “mediation.” However, when we discussed this option, John and Rebecca saw that mediation could be a trap. They were exhausted. Sitting face to face to work through the unfinished issues of distrust between them, and the personal principles which were involved was more than they could face.

A third option was listed : “arbitrary escape from this conflict with/out opening Pandora’s box at this time.” As the mediator wrote this option, he began a discussion with the parties regarding what this option would look like, when it dawned upon John and Rebecca that maybe they didn’t have to have the “fight”, and that an arbitrary peace without dishonor could be healing.



In minutes, John and Rebecca agreed to find an arbitrary resolution which would be “neutral” regarding the underlying issues. They settled upon a compromise number to be paid almost instantly.

The flip chart was a vehicle for John and Rebecca to see what the issues were between them and what the options were on how to approach the issues. The flip chart became a clear visualization of their choices. Realizing that their experience was too raw and unhealed, John and Rebecca chose to work on a deeper peace later and to disengage from the fight for the immediate future in order to allow each of them to recover and go forward.

Later, John reported that this was the “fairest” process they had experienced during the entire divorce. For the mediator, the key was to provide an opportunity for John and Rebecca to collaborate to see what issues were between them and to be empowered to choose the most appropriate process for them at that time. The experience allowed John and Rebecca to work together without dishonor and to exert cooperative control over what happened to them. The key tool was the flip chart.

Mediator’s Role. The session began with the mediator listening and asking probing questions. The top part of the flip chart was created by the mediator reframing what he had heard, and asking the parties if he had “got it.” The parties told stories, the mediator listened, and then the mediator synthesized what had been said. Without *active* listening and *active* reframing on the flip chart by the mediator, the multiple dimensions of the situation may not have been set out.

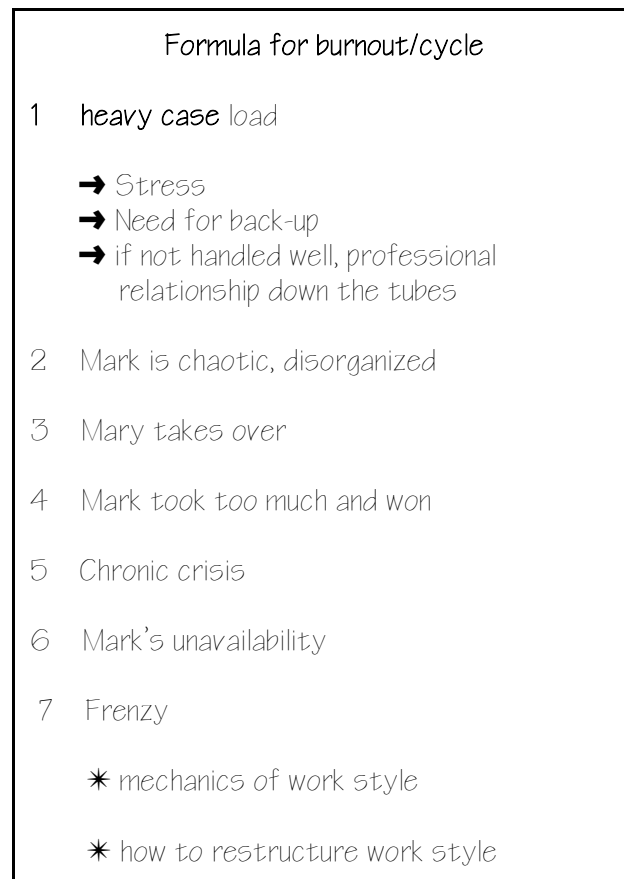
The bottom part of the flip chart began with the mediator asking what process options were available. The mediator then *actively* guided the discussion but, *once the picture had been collaboratively drawn, the mediator stepped aside and the parties had the opportunity to decide what to do.* This is a clear example of process directive mediation.

Example 2: Drawing the Problem

At the beginning of mediation, two of the objectives are to diagnose the problem and to explore whether a collaborative process is possible. A flip chart is a key tool for this process, particularly when the conflict becomes highly personal.

Mark and Mary worked together. Mark was a litigation attorney and Mary was the “chief of operations” as his legal secretary. Their working relationship had deteriorated to the point where they may no longer be able to work together. This fate was not acceptable either to Mark, Mary, or to the firm where they both worked. All three stakeholders in the deteriorating relationship were pessimistic about the future.

The flip chart was used as a tool to find a basis for collaboration. As one point, Mary, Mark and the mediator were sitting as a group before the flip chart working together to describe the problem. *The list which emerged on the flip chart clearly indicated that the cause for the deterioration of the working relationship was situational not personal.* Mary and Mark agreed upon seven characteristics of their circumstance. Looking at the list, they labeled it a formula for a burnout cycle.



They agreed that their concerns focused upon the inherent mechanics of the work style for heavy litigation and how to restructure the work style mechanics. Mary and Mark agreed upon a goal to “talk in a nondestructive manner to accomplish a positive resolution.” Previously, Mark and

Mary had been unable to ride in the same elevator because the silent, bristling tension was too uncomfortable.

GOAL: Talk non-destructive manner to accomplish positive resolution

Mark and Mary experienced a change in the frame of their perception of the problem. The flip chart provided a tool for a collaborative effort to break the problem into parts. Once the problem was described to their mutual satisfaction, they were able to see what was really going on. Respect and friendship were not the issues. The mechanics of work style was what lay between them. Now, having collaborated to identify the problem, Mark and Mary now had an opportunity to tackle what was really between them.

Mediator's Role. Draw the problem. Start with individual issues. List them all. Step back with the participants and absorb what has been written. List common characteristics (“mechanics of work style.....”). Place problem in a frame (“Formula for burnout....”). All steps are based upon the mediator providing the participants with an opportunity to work within a process. All steps are based upon input from the participants, and upon looping and reframing by the mediator with the everyone's participation. Guide the process.

Example 3: Anchoring “Why We Are Here?”

The flip chart may also provide a useful point of reference for making progress during mediation. George and Wanda were divorced. George had a new wife and Wanda a new husband. The warfare between the new households over George and Wanda’s child had grown to the point that the police had become involved.

As the guardian ad litem for Richard, I decided to do a mediation style intervention. For the first time ever, both parents and both step parents agreed to meet. Richard’s therapist also agreed to join us. At the beginning of the meeting, everyone was on a hair trigger alert for war.

The first words spoken were a suggestion to list what everyone in the room individually and together wished for the Richard’s future. The parents, step parents, and therapist created an inspiring list of fifteen items, which are recreated in the illustration below. You could see each participant soften and speak with a warm heart regarding Richard and the hopes for his future. The group became proud of the list.

- Richard

 - 1 *good teenage experience*
 - 2 ** good education **
 - 3 ** values **
 - 4 *happiness*
 - 5 *Love*
 - 6 *self-esteem*
 - 7 *Family & extended family*
 - 8 *siblings*
 - 9 *good friends*
 - 10 *safety*
 - 11 *health*
 - 12 *freedom to be Richard*
 - 13 *failure as a growth exp.*
 - 14 *his own future/family*
 - 15 *right to play*

After the two page list was taped to the wall, we worked our way into the heart of the conflict. At times, everyone’s button was pushed. At one point, the father and step father stood face to face like angry animals ready to butt heads in a turf fight. At each moment of fierce intensity, attention was drawn to the list on the wall. Was this problem, was this opinion, was this idea, consistent with the commonly sought future for the Richard. It worked. Everyone in the room, including me, was amazed at how the list brought everyone back to a common goal: Richard’s best future. Slowly, the discussion moved towards the start of building bridges between the households; a process which extended far beyond the first session. The flip chart had served well as a visual point for inspiration and collaboration.

Mediator's Role. The mediator set the initial frame and context for the session. The participants were given an opportunity to make a collaborative list of wishes for Richard. The flip charts on the wall provided a potent visual reminder. The anchor point had been set: not warfare between two households but, a shared vision for Richard.

Brainstorming.

Mediation works towards the brainstorming of ideas for possible resolution. The flip chart can be used as a major tool in this process. The first step is to achieve an agreement that “there are no bad ideas” and that “one idea may lead to another.” In this light, the flip chart may become invaluable.

In one case, the parents were in conflict regarding where the children should attend school and whether the children needed to be consistently with one parent during the school week. The flip chart grew to include the following items:

1. Weekdays at Mom's house.
2. Weekdays at Dad's house.
3. Attending a residential private school.
4. Alternating weeks between the two households.
5. Flipping a coin to determine where the children would live.

As the list grew, the parents recognized some options, such as a residential private school, were unacceptable to them. They began to recognize options which appeared more acceptable. By discussing each of those options, sublists began to grow of the favorable characteristics of each alternative. Soon the agreed upon list of favorable characteristics led the parents to find the option which provided the best balance of their favorable characteristics.

The flip chart had served as a vehicle for brainstorming. Everything was written down. Everyone could look at the evolving possibilities. As a framework for discussion, the words of the flip chart stimulated thought, unearthed common values, and eventually led to the creation of a resolution. The power of visual brainstorming should never be underestimated.

The Art of Listening

Opening Opportunity. Mediation is intended to assist parties in going beyond “default answers”, pre-conceived notions, and locked in expectations. The Art of Listening assists parties in opening creative opportunities.

Communication Skills. Basic communication skills form the heart of mediation, as well as for many other forms of dispute resolution. “Listening” is taught in many fields. The parts of “listening” are the same but, may have different names in different settings.

Facts & Emotions. These are resources to help make the puzzle addressed in mediation more workable. Listening needs to address both.

“Assertion, Taking-in, and Engagement.” Gary Friedman views communication in mediation as a means to support a connection between the parties on a core level of understanding:

- **Assertion:** Assist each party to assert his or her view;
- **Taking-In:** Understand each party’s view, and demonstrate that understanding to each party;
- **Engagement:** Assist each party to understand the other’s view, and to demonstrate that understanding the other’s view.

To support core connections, Gary Friedman views the dynamics of mediation and communication to be:

- Build Safety and Maintain Contact
- Maximize Parties’ Responsibility
- Support Parties’ Autonomy
- Develop Constructive Communication
- Encourage Mutuality

Nutshell. Here are the primary listening skills for the course:

“Clarifying”. The asking of questions to clarify what has been said. A data gathering process.

“Validating”. To feel heard is essential. A skill for acknowledging a party

“Looping”. This form of “active listening” strengthens the ability to hear and understand what the other participant is saying.

“Reframing”. By *mirroring, summarizing, or rephrasing* for assisting a party or parties to feel heard in a manner which opens the door of opportunity.

Course Emphasis. These basic skills and tools will be used through the course, separately and in combination. The purpose is to assist each student have these basics become second nature in a way which fits the style and personality of each student.

Course Materials. There are many effective expressions of these and related basic skills and tools. To bring many views to the course process, as you would in a mediation, we have included ideas and materials from many resources. There is no one way to approach mediation. After you learn the basic steps, then each of us needs to learn to dance in our own way. Mediation is both a trade and an art form.

The Art of Validating

“Being heard” may be the core skill at the heart of mediation.

People Need to Know They Are Being Heard. Not being “heard” may cause a person to keep fighting, often yelling even louder is a desperate effort to be heard. A listener may be trapped. How can I show I have heard the speaker without having to say “yes, I agree”?
Validation is a technique to support the integrity of both the listener and the talker.

Consider:

- If you do not feel heard, how can you listen? If you do not feel heard, how can you listen? How can you avoid being defensive?
- If you feel heard, you may be freer to be open and flexible.
- “Active Listening” and “Looping” allow participants to be heard.

ACTIVE LISTENING: Understanding the speaker so completely that the listener could have said the same.

LOOPING: Repeating a statement back to the speaker until the listener “gets it.”

- Active Listening means more than thinking up what you will say next.
- Active Listening means you really have to hear what is being said to repeat it.
- Active Listening means you must think outside of your own blinders.
- Active Listeners learn more, think clearer, and make better agreements.
- Keep looping until you each “get” what the other is saying
- Saying you “got it”, does not mean you agree.
- “Getting it” only means you listened and understood.
- “Getting it” conveys empathy for the other human being, without compromising neutrality or another party’s position.
- “Getting it” opens the door for the power of validation.

VALIDATION: I feel heard. Now I can listen.

Simple Example

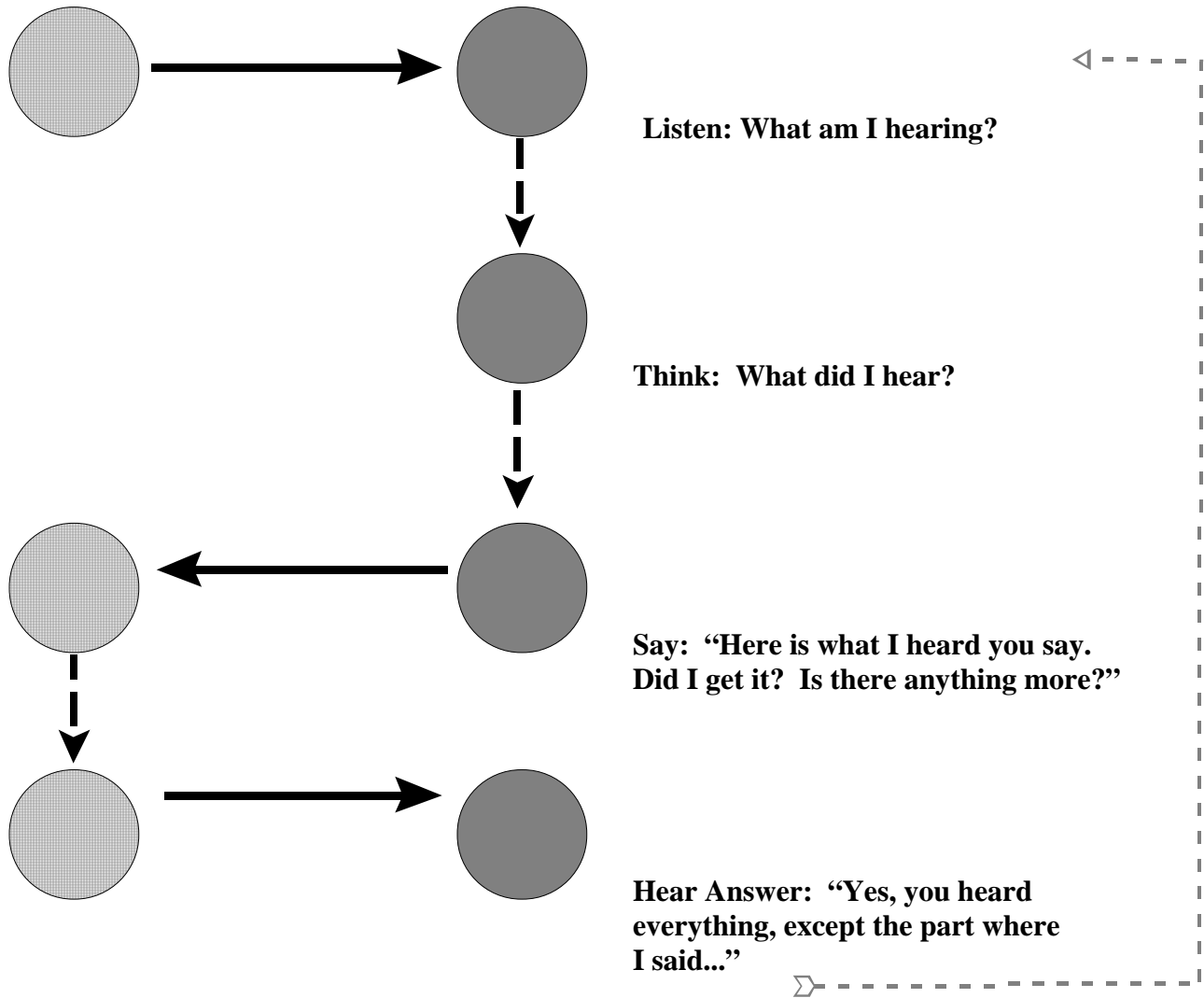
EMPLOYER: You said X. Did I get it?
WORKER: Almost. I said X and Y.
EMPLOYER: You said X and Y.
WORKER: You got it!
EMPLOYER: Now, I see how you see it.

True Story

George: “!#!*!*!*! There she goes again. I hate it. She never listens!”
Mediator: “ You feel like you are talking to deaf ears?”
George: “Yes! She does not care what I think! Her mind is made up!”
Mediator: “You feel devalued, like you don’t count?”
George: “Yes, you got it.”
Mediator: “So, we need to work on being heard.”
George: “Yes.”

Validation is an extension of looping. By validating, you acknowledge that you *hear* what is important to the speaker. You can diffuse the hot energy of rage. By using reframing, you can redefine the issue. The next step in this session, would be loop Cindy and ask “tell me how George is feeling.”

The Art of Looping



Repeat loop until everything is “heard”.

Looping Schematic:

The schematic of Gary Friedman's model of looping is straight forward:

Step 1: Mediator inquires of ---> Party

Step 2: Party responds and asserts to ---> Mediator

Step 3: Mediator demonstrates and confirms understanding to ---> Party

Step 4: Party responds whether "got it" to ---> Mediator

If yes, loop if complete

If no, go back to Step 1

Language "I heard X. Did I get it?"

Ideas: "Is there anything else?"

"How do you feel now?"

Notes: As a Party talks, Mediator fills self with Party's view.

There is room inside Mediator's self for both Parties..

As a Party talks, Mediator finds room in self for other Party

As a Party talks, Mediator monitors other party for safety.

Source: Discussion of Gary Friedman's concepts based upon *Dynamics of Conflict in the Mediation Process Training Program*, Sunrise Springs, New Mexico, September, 1997. Notes by David Levin.

Looping Example

Looping is a powerful technique. This true example shows how a conflict would have escalated but for the application of looping and clarifying.

Mediator: “Cindy, are you every willing to stop fighting?”

Cindy: “I think I will eventually forgive him.”

George: “What! She’ll never forgive me!”

Mediator: “George, what did Cindy say?”

George: “That she will never forgive me!”

Mediator “Cindy, did George get it?”

Cindy: “No, I said that I thought I would eventually forgive him.”

Mediator: “George, what did Cindy say?”

George: “That she thought she would eventually forgive me.”

Mediator: “Cindy, did George get it?”

Cindy: “Yes.”

Reality Check Communication. People can falsely assume what they heard, without checking to see if they really “got it”. “Mishearing” perpetuates conflict. Looping is the antidote.

Looping Deeper

Looping may offer an opportunity to safely exploring the deeper dimensions of the problem and the people.

Going Deeper means after completing one loop, the mediator asks a question which opens the door to looping on deeper level.

Example. Consider Cindy and George's looping on the preceding page. What if the next question to George was:

Mediator: "George, hearing that Cindy would eventually forgive you, how do you feel?"

Other Questions. Looping deeper has no particular formula. Some useful questions by the mediator include:

- "How do you mean X?"
- "Help me understand? Can you tell me more?"
- "Help me understand what X looks like to you?"
- "Could you tell me more how you feel about X?"

How Deep to Go? Follow the comfort level of the participant. Distinguish between struggle to find expression and resistance. Be totally aware of the speaker. Offer validation, empathy, and safety. Follow your instincts and your own comfort level.

Going Back Up. Avoid leaving the participant open, raw, and vulnerable. Find a way for the speaker to regroup and restore balance.

Loop the Other. Observing the mediator and other participant loop deeply is impactful to the observing participant. The observation experience may open a door for deeper looping with the observer. Further, an observer will be carried to new awareness about the situation.

Reframing Example - Simple Story

Reframing is a technique to guide the discussion in a positive direction, to help move the discussion from positions to interests to opportunities for resolution. Here is a condensed dialogue from a mediation:

Mediator: “I understand the issue is where Joe goes to school?”

Mother: “Yes, he needs to be in my district, near his mother!”

Father: “No, he needs to be in my neighborhood school district!”

Mediator: “Tell me about Joe.”

Father: “Like I said before, a good child, who has problems with school work.”

Mother: “He tries hard but, he keeps falling behind.”

Mediator: “Are you saying Joe needs help to receive a good education, and that is important to you?”

Both: “Yes.”

Mediator: “How would each school address Joe’s special needs?”

Both: “We could go check them out.”

Next Session

Both: “We checked out the schools. We have agreed that Evergreen Elementary would best suit his needs.”

The Art of Opening Opportunity

Solving the Puzzle Together

Foundation: Clarifying, validating, looping, reframing, and moving from positions to interests are communication skills intended to offer an environment where more options for resolution may be considered. Even during while generating options, use of these techniques may be essential.

Opportunity Belongs to Participants. As mediators, we open the door for opportunity. Whether the participants take advantage of the open door and how, belongs to them. This is the gift of mediation.

Working with Heat

“From Conflict Avoidance to Constructive Conflict”

By David Levin

People come to mediation because they are stuck in a dispute that they cannot resolve. The heat of the conflict often is an impenetrable barrier. Unable to handle the heat, the disputants may be avoiding problem solving because interacting is too combustible, or because they may be locked in combat. Whatever the dynamic, and regardless of whether they understand what is happening, they are trapped with no exit in sight. However, for the disputants to go to a mediator, who is conflict avoidant or who is unable to handle conflict, is not helpful.

A challenge for mediators is to be comfortable sitting with heat of conflict. Being able to work with heat is imperative. To offer a meaningful service, a mediator should cultivate an understanding of heat and build an ever-growing box of tools for working with heat. Exploring these goals is the subject of this essay.

What is heat? Anger is an easy example. Anger can be expressed with name calling, abusive language, fighting words, physical and verbal hostility, or by obsessing with pain, perceived insult or wrong doing, and more. Heat can be loud and overt, or quiet and subtle.

Heat is often emotional. Heat is not always rational. Heat can consume and overwhelm other characteristics of a participant. Heat can seem silly and needless to another person, but it is always real to the person experiencing the heat. Heat is not the behavior of the “reasonable man” studied by students in law school.

Heat can be the heart of a conflict, which must be addressed to achieve resolution. Heat can destroy the capacity to be open, understanding, flexible, and creative - the traits needed to find mutually acceptable solutions.

An overstatement is to tell mediators, “do not be afraid of heat.” The power of heat must be respected. Just allowing the participant’s heat to rage unabated, or jumping to caucus to avoid the heat, can be equally futile. A more useful perspective is to understand the possibility of heat in a mediation – whether it is harmful or workable, and if workable, how to mediate in the presence of heat.

This essay will explore the cognitive framework for working with heat. The actual practice techniques will need a good training, mentoring, self-education, and/or other experiences to master.

SAFETY FIRST

Heat can be harmful. Expressions of heat, verbal and non-verbal, by one participant can adversely impact the other participant and even the mediator. Expressing the heat can also adversely impact the participant who is the source of the heat.

A mediator must monitor everyone, including her/himself. When heat is, or appears to be harmful, the mediator must intervene. Monitoring is not just a single event. Monitoring is an ongoing process throughout the mediation. The key is knowing when and how to intervene.

A MEDIATOR PERSPECTIVE: Is the Heat Workable?

Heat can be viewed from many perspectives. Some professionals, such as counselors and therapist, look to diagnose causation and to prescribe treatment. Other professions, such as trial attorneys and negotiators, may seek to comprehend the heat of a conflict for the purpose to gain an advantage for winning. Mediators are offering a dispute resolution process. The perspective of a mediator is based upon how heat can impact the mediation process.

The mission is to support the mediation process, to provide an opportunity for the participants to constructively exercise self-determination. A party must be capable of mediating. Heat can constrain or even eliminate the capacity to mediate. Heat residing within a participant can blind them. Heat directed at a party can blind that party as well.

The capacity and competency to safely mediate needs an open and flexible mind. Just as a critical lack of information may undermine the ability to mediate, heat may have the same affect. A paramount frame for a mediator is how heat impacts the mediation process and whether the process may safely go forward.

A trap for a mediator is a perceived need to diagnose and to fix the cause for heat. As will be seen, many roots may lie underneath. Some roots may need the assistance of other professionals, such as a mental health worker, a doctor, or an attorney. The mediator's province is the process. As will also be seen, some heat can help the process. The key diagnostic consideration is the impact of heat on supporting the mediation to go forward, safely and constructively.

The mediator's own comfort level with heat is important. Some types of conflict, as well as certain behaviors and personalities, can be difficult for an individual mediator. For example, a circumstance may trigger a feeling or a belief within the mediator, which may adversely impact the mediator's reaction to what is happening. A mediator may find he/she is having a strong like or dislike for a position or posture, which could adversely affect the mediator's ability to be fair, balanced, and supportive of all the participants.

Thus, in weighing whether heat is workable, the relevant considerations must include:

- (1) Whether the heat is personally disruptive to the mediator, and if so, whether the mediator is capable of mediating;
- (2) Whether the parties can work with the heat, and if so, how;
- (3) Whether working with the heat may further the mediation process;
- (4) Whether the mediator has the skills and experience to work with the heat, both for him/herself and for the parties.

UNDERNEATH THE HEAT

Heat can have many sources. Participants in one advanced mediation training identified many heat sources and were certain that there were more. These factors may also be present for a mediator. The list inspired many insights for causation, including:

- Low blood sugar
- Lack of sleep
- Exhaustion, physical or emotion
- Pain

- Fear
- Anger
- Disappointment/a sense of loss
- Biological stress reactions
- Past trauma/core injuries
- Physical impairments
- Substance abuse
- Mental illness
- Unmet needs
- Unheard needs
- Misunderstanding
- Differing information or lack of information
- And more ...

The list illustrates that all heat sources are not the same. How to work with a heat may be different from other types of heat. For example, low blood sugar may need food. A participant angrily repeating a point may indicate a feeling of not being heard, and acknowledgement may help. A misunderstanding can cause anger, and clarifying what was said may dissolve an impasse. However, an obsession with a delusional sounding thought may suggest a pathology which is a true barrier to mediating, and may need to end the mediation process.

A full diagnosis is less important than a functional one. As a mediator begins to perceive heat emerging, by trying different approaches for responding to the heat, the mediator can learn whether the heat is workable. The exploration is essential. Simply to avoid the heat forfeits the possibility of dissipating or benefiting from the heat. Mediators have to get their toes wet to feel the water. The wide range of what is underneath the heat suggests that exploring the heat may be important. After all, there may be no conflict without heat; there may be no resolution without dealing with heat.

WORKING WITH HEAT

There are many approaches for working with heat. Each approach can backfire or can open the way forward. When considering an approach to use, be purposeful. Sometimes a mediator grabs an approach out of desperation, hoping that a deteriorating dynamic may change for the better. This is a legitimate technique. However, when the mediator has time to be thoughtful, having a purpose in selecting approach can help guide the mediator.

For example, “I am observing this potentially harmful dynamic. I will try this approach to move the mediation forward.” These thoughts help the mediator have a sense of direction, to have an attitude of “I believe this technique may work. I will try it. If the technique does not work as well as I hope, then I will try another.”

This cycle is often referred to as the “Cycle of Resolution.” The dynamics of mediation can be highly fluid; the “stages” of mediation can be blurred. The mediation process can be viewed as an endless dance of energy, thought, emotion, and possibility. The progression can seem chaotic and non-linear. Repetition of the Cycle of Resolution is a critical part of the mediation process. A mediator should:

- Observe what is happening;

- Thoughtfully select a technique to try;
- Use the technique:
- Observe what happens;
- Assess what next technique may be beneficial; and
- Use that next technique...

A SURVEY OF SELECTED TECHNIQUES

There are many techniques for working with heat. For a mediator, the goal is to acquire as many techniques as possible in his or her toolbox. The goal is to assess each moment during mediation for what technique may be helpful. The more choices, the better the possibilities for a beneficial result.

ACKNOWLEDGEMENT

Acknowledgement is a preferred technique. In a nutshell, if a participant experiences being heard, then the participant may move from the stance of aggressive defensiveness to a state of open-mindedness. Acknowledgement offers more than just saying, “I heard you.” Acknowledgement is a communication technique which affords the participant a fuller, almost physical, experience of being heard.

The basic technique is to repeat back (loop) to the participant what the participant has said. Then, to ask the participant, “did I get it, did I miss or misunderstand something?” The emotional, biological, and intellectual impact upon the participant has been shown to be substantial. Often the impact can lead to the participant having a more open, flexible, and creative mind - the essential characteristics needed for effective dispute resolution.

Acknowledgement can transform heat. A participant can become heated when, the participant feels unheard, not respected, devalued, ignored, or insulted. For the participant, the moment can feel threatening and dangerous. The environment can be perceived as “unsafe”. Feelings of apprehension and fear can rise. A need to attack, flee, or freeze can flood the participant.

When a mediator offers acknowledgement to the participant, the mediator is expressing empathy. The mediator is validating that the experience is real for the participant. The mediator is also demonstrating an interest to understand the participant. To respond to heat with acknowledgement creates “safety”. c. For the participant, the need to defend or attack may lessen, and a feeling of being respected, accepted, and understood may begin to dissipate the heat.

Viewed another way, when a participant feels threatened, the participant can feel as though survival depends upon holding tighter to a fixed position. When a participant begins to feel safe, the instinct to fight for survival can begin to relax. When safety is repeatedly experienced, the participant can begin to lower his or her guard. While remaining vigilant, the participant can feel safe to venture away from the fixed position and to begin to consider other possibilities. Then, the mediation can go forward.

For a more comprehensive discussion of acknowledgement, please see the companion materials: Levin, *Acknowledgement, A Dispute Resolution Basic Skill: “From Clenched Fists to an Open Mind,”* and Tanz & McClintock, “The Physiologic Stress Response during Mediation.”

ATTRACTIVE TECHNIQUES THAT CAN BACKFIRE

Venting has long been viewed as a way for a participant to get something off his or her chest. The theory is that if the steam is let out, then the person will become calmer. However, contemporary neuroscience has discovered that venting more likely escalates heat. The participant who is venting can be ramping up her or his biological stress response. The other participant who is experiencing the heat of the venting can also be ramped up. The use of venting should be carefully considered. Dissipating heat through acknowledgement may be more beneficial.

Enforcing a rule can help, but can be problematic. At the beginning of mediation, rules such as “no name calling,” can be explained and can be agreed upon. Reminding a participant of an agreed upon guideline may be an effective way to redirect a conversation. Heat can be reined in. However, enforcement of a rule can also be accusing one participant of violating a rule and of wrong doing. Enforcing a rule can cause the participant to feel more defensive. Heat can escalate. Enforcement of a rule can be a tempting intervention. However, a mediator may need to tread carefully.

Suppressing the heat is another two-edged sword. A mediator may attempt to steer the process away from emotions to focus upon rational solutions. On one hand, by banishing the heat, the participants may be helped to drop escalating emotions and to turn towards a more reasonable discussion of the factual situation. By making the heat irrelevant, the resolution process may move forward. On the other hand, while heat may be suppressed, it may not go away. The undissipated heat may fester to explode later or to silently undermine the making of an agreement. This is a version of “pay me now, or pay me more later.” The mediator must use care whether to use suppression as a technique to deal with heat.

Avoidance is a technique which has the same risks as suppressing heat. However, sometimes participants are truly not ready to work through the heat. For example, the pain from what happened for two participants may be too fresh and too deep. In an actual case, the participants were not ready to work through the pain. Rather than to work through the situation, the two participants chose to agree upon the amount halfway between their two positions. For them, this approach offered a healthy way to move on without triggering more pain. They were not capable of participating in any other process. Thus, sometimes choosing not to engage the heat may be beneficial.

HELPFUL TECHNIQUES

“Name it, tame it” is a form of acknowledgement. A belief, feeling, thought, need, interest, or other concern expressed by a participant is named. For example, a mediator might say, “From what you have explained, what happened causes you to experience being disrespected, and being respected is important to you.” The named interest is a need to be respected. If the troubling aspect of the situation is named, then it can be addressed. This technique offers the possibility of transitioning the cause of heat into a more concrete, workable piece of the dispute.

Reframing is a communication technique where the mediator acknowledges a concern and repositions the concern in a more constructive light. For example, a parent may be angry because he or she feels left out of the child’s life. A mediator might say, “You feel left out of your child’s life, and you believe it is important for your child to know both parents.” The re-frame is to introduce a positive value, the interest in having a child know both parents. The positive value may become a meaningful aspiration for working towards a resolution. This technique often may render heat more workable.

Normalizing a situation can help lower heat. For example, a participant may be angrily disappointed that a business partnership has failed. A mediator might say, “People often experience disappointment when a business partnership does not work out.” The mediator is offering that disappointment is to be expected and needs to be acknowledged. Instead of being a disruptive intrusion into the dispute resolution process, strong feelings of disappointment become a normal and expected part of the situation to address.

A preempt is a powerful tool for anticipating heat and for reducing its negative impact. A mediator may sense that something may become inflammatory or explosive. The mediator can elect to deal with the heat before it unexpectedly ruptures. By opening an exploration of a problematic area, such as “I understand how you might be feeling disrespected by this situation,” a mediator can be prepared to make the issue and the response workable. An anticipatory intervention may be more productive than a salvage operation after being ambushed. However, a preempt may just unnecessarily light the fuse. To use a preempt to anticipate heat needs to be thoughtful and purposeful. A mediator needs to be ready if the technique backfires.

Caucus is a major technique for working with heat. However, the technique is more than simply meeting with a participant and letting him or her rant. Caucus is a change of venue from a joint session, and what happens there is critical and should be carefully considered. For example, caucus may be a better environment to use acknowledgement with an overheated participant rather than in the combustion chamber of a joint session. An individual session can be a good place to explore what is underneath the heat and to learn how to work with the heat. However, when heat unexpectedly explodes and the mediator does not know what to do, caucus can save the day.

PHYSICAL TECHNIQUES

When the participants sit too long with heat, the situation can meteorite. There is a temptation to power through the situation. The perceived need to “get it done now” may be seductive. Yes, there is a risk that if the participants leave the room, progress will be lost. However, the time to stretch, to eat, or to reflect may be precisely what is needed to make an informed agreement that will stick. Therefore, a mediator should keep in mind the option to:

- Take a break;
- Eat; or
- Adjourn and come back another day.

POTENTIAL BENEFITS FROM WORKING WITH HEAT

The reasons for working with heat go beyond preventing harm. There are potential benefits from working with heat, which can enhance the mediation process, including:

- Discovery of what is really going on and what needs to be addressed;
- Discovery of underlying needs, interests, values, and critical information;
- Discovery of what could make mediation unsafe and what safeguards need to be used;
- Dissolving a major emotional or other barrier to resolution;
- Normalizing or otherwise redefining a situation so that the participants may work with it;
- Providing an opportunity for the physiological stress response to be reduced;
- Providing an opportunity for the parties to safely shift their mindset;

- Discovery of what might motivate the participants and what mutual options for resolution might be possible;
- Discovery of what are the dynamics of conflict and how they might be addressed;
- Discovery of whether the dispute can be mediated and if so, how;
- And more...

Working with heat can help a mediation be meaningful and productive. For the participants, to experience that heat can be safely and effectively worked through, can help make the hopeless become manageable. The benefits can be immense.

SUMMARY

Heat lives within the heart of conflict. Heat can be a barrier to resolution. One reason participants may come to mediation can be their inability to work with heat. Mediation is based upon an exercise of self-determination by the participants to agree upon a mutually acceptable resolution. Heat within a participant or between the participants can undermine the ability to constructively participate in the mediation process. A mediator should come ready and able to deal with heat. A mediator should be committed to life-long learning on how to work with heat. This ability is fundamental to the art of mediation.

Power of Mediator Expertise

What Is a Mediator to Do?

Mediation is challenged by the unmet needs of the participants who seek mediation services. This issue has escalated in light of present economic circumstances. How mediators will respond to the challenge may determine the future for mediation in New Mexico. This article seeks to illuminate the challenge and to inspire a meaningful dialogue for finding solutions. I look forward to the discussion.

A family law example illustrates the issue:

- Imagine that a couple comes in for mediation. They have had a long-term marriage, over 30 years. Husband, who is well-educated, is a high-flying international corporate executive, with a very large income. He also has substantial employment benefits. Wife, only has a high school education, is a part-time librarian working for an hourly wage. She has no benefits from her employment;
- The parties appear amiable. They report having productive settlement discussions. As they report what they have done, it is clear that the issue of alimony has never been discussed;
- The mediator is a family law attorney. The parties have deliberately selected the mediator because he or she is a respected expert in the field.

Here are several options for how the mediator might proceed. The examples are exaggerated to illustrate the options and are only an initial sampling of problematic areas.

1. **Alimony is not discussed.** If the parties are happy with their discussions and proposed settlement, then the mediator should be happy. The mediator should not interject a potentially divisive issue which the parties have not considered.
2. **Alimony is raised and determined is to be awarded.** The Mediator raises the issue of alimony, explains the law, and authoritatively states that high dollar, permanent alimony would be awarded by a judge.
3. **Alimony awareness is questioned.** The mediator identifies alimony which is generally a topic for divorce mediation. The mediator asks each party what they know about alimony. The mediator acknowledges the imbalance of information.
4. **Alimony general information is offered.** The mediator explains that there is an alimony statute, which describes the factors a court should consider in determining the issue. The mediator offers a copy of the statute to the parties. The mediator explains that there are also alimony guidelines, which are only used as a starting point for settlement purposes. The mediator offers a copy of the alimony guidelines. The mediator recommends that each party might want to consult an attorney, a legal clinic, and/or other legal resources, including books, articles, and websites, to learn how the law applies to their case.
5. **Alimony general information is discussed.** The mediator, after providing an opportunity for the parties to consult other resources even if mediation is delayed in order for them to do so, facilitates a discussion between the parties of what they would like to do based upon their respective understandings of alimony.
6. **Alimony general information is explained.** The mediator goes through the statute and the guidelines provision by provision. The mediator shows how the circumstances of the parties apply to each provision. The mediator offers how application of the provisions may lead to a result or a range of results, including the amount, purpose, payment terms and duration of alimony.

7. **Alimony agreement documents.** The parties have reached an agreement. They have agreed to a dollar amount and a time. For the payments. The parties have asked the mediator to write up their agreement. Should the mediator only use the language of the parties? Should the mediator add the required language, “subject to the death of the recipient,” which is necessary to make alimony deductible to the payor and reportable to the recipient? Should the mediator explain the difference between including and excluding the required language?
8. **Alimony agreement documents, again.** The parties have reached an agreement. They agreed to no alimony. Assume the marriage is only 15 years in duration. Should the mediator raise the issue that unless alimony is awarded as zero per month, then the ability to later modify alimony is forever waived?

Discussion - Self-Determination & the Uninformed Participant

Mediation is built upon a core value of self-determination. The process of mediation is intended to impact the dynamics of conflict. The parties are presumed to be locked into positions, which compromise their ability to think open and flexibly and to work towards mutual solutions. The art of mediation is to provide the opportunity for the parties to shift. Active listening and acknowledgment are the primary tools. The goal is to allow parties to transition from aggressive defensiveness to a more balanced and well-grounded posture. The essential transitional tool is for the parties to experience being heard. Assuming that if the parties are able to shift the dynamics of the conflict, then they will be able to exercise self-determination. However, there may be other problems to overcome.

The subject matter of the dispute may also pose a barrier to exercising self-determination. Sufficient *subject matter expertise* may be lacking. There are multiple dimensions to consider. *Subject matter knowledge* means the ability to understand the issues which may underlie the dispute. *Subject matter skill* means the ability to effectuate an agreement. For example, the parties may not understand that a tax issue underlies the dispute, and the parties, even if they understand the tax issue, may not have the skill to craft a legal document which addresses the tax issue. This dilemma is further complicated by a power imbalance between the people in the room.

Mediators may have the subject matter expertise that the parties lack. By experience, education and/or training, the mediator may have acquired the ability to understand the issues and the ability to effectuate an agreement. Even if the parties are able to address the dysfunctional attributes of their dispute, they may still lack the competency that the mediator may have.

One solution is to help the parties acquire subject matter expertise. A traditional technique is to recommend that the parties consult with a subject matter expert, such as an attorney. Another technique is to recommend resources from which the parties may become more educated. These techniques are not always possible. Economics and other forces may constrain the parties from consulting with a subject matter expert. Access to resources and a lack of experience with learning, such as the experience offered by formal education, may render becoming more educated as unrealistic. Therefore, the parties may be left with the mediator as their only resource.

Mediators are not traditionally supposed to exercise subject matter expertise. To do so would shift the role of the mediator and would have the mediator cross potentially prohibited boundaries. For example, the mediator might use evaluative subject matter expertise to identify and to understand the issues. Further, the mediator might use subject matter skill to craft an enforceable, effective, and legal agreement. These additional roles have long been viewed as potentially undermining self-determination, because the well of understanding to resolve the dispute shifts from the parties to the mediator. This dependency may be debilitating to self-determination.

There is a harsh reality to confront. There may be no other resource than the mediator for the parties in the present environment. What is a mediator to do? How can a mediator enable the parties to use the mediator's subject matter expertise without contaminating self-determination? How can the mediator be the subject matter expert without usurping the active role of dispute resolver? How can the mediator rightfully resist helping those in need? *If the mediator does say "no," then are the parties left being lost?*

This inquiry goes to the heart of what is the service to be provided. Each professional role, such as attorney, accountant, real estate expert, family counselor, and others, provides a distinct service. The service of mediation has been primarily to provide a process for dispute resolution. The parties are assumed to obtain other services from other providers. Now, there may be no other providers. Is the mediator to expand his/her services to include dual or multiple roles? How is this possible without diminishing the original core values for mediation services?

This is a major challenge for contemporary mediation. There are no immediate answers. There are many avenues to explore to this multidimensional problem. However, there is an imperative for mediators to be aware and to explore how to approach these issues in a manner which will reserve the spirit and substance of self-determination. Since the resolution of a dispute often requires creative and flexible thinking. To find appropriate paths for addressing this conundrum will require no less for mediators. Mediators will need to explore this frontier with the same courage and open-mindedness that they wish for the parties before them. It is a paradoxical responsibility. Mediators are intended to support self-discovery in others. Here, mediators will need to self-discover the understandings and abilities needed to evolve mediation to meet present needs. How this challenge is handled may impact the future of whether mediation is viable.

In conclusion, one purpose for this Advanced Mediation Practicum is to raise and to explore these frontier issues - to begin the dialogue towards evolving mediation to address emerging contemporary needs in a healthy and effective manner.

Note: This discussion focuses upon a party's capacity and competency to mediate based upon subject matter expertise. There are other issues which impact capacity and competency, such as substance abuse, domestic abuse, mental or physical impairments, etc. This discussion also focuses upon a core value of self-determination. There are also other core values to consider, such as impartiality, confidentiality, and safety.

Metaphor - What is the Attorney/Mediator Warranting?

Document Preparation & What Are You Warranting? When considering performing a particular task during mediation, I ask myself, "What service am I warranting?" A mediator is to provide a process, which adheres to the core values of mediation. An attorney is to provide a legal service, which is to be legally correct, durable, and enforceable. A mediator warrants the process. An attorney warrants an opinion that a particular service is legally sufficient.

Consider the example of drafting a document. On one hand, a mediator may be called upon to prepare a document which memorializes the agreement of the parties in their own words. Here, the mediator is simply being a scribe.

On the other hand, a mediator may be called upon to prepare a document which will be acceptable to a court and be enforceable. This task may call upon the mediator to add provisions and/or craft how

provisions are stated. Here, the mediator arguably is warranting an opinion that the document is legally sufficient. Is this second role the practice of law? And if it is, does it matter?

Legal Information & Applying Law to Facts. Is there a difference between providing general legal information and applying law to the circumstances of the dispute? On one hand, general legal information can be generic and neutral. For example, a mediator might describe that child support in New Mexico must consider the child support guidelines and a final decree/court order must include a child support worksheet as an attachment.

On the other hand, beyond referencing the general area of law which might be considered, a mediator might describe how the law might apply to the circumstances of the dispute in question. For example, the child support guidelines provide specific and potentially complex requirements for how the respective income of a parent is to be treated. A mediator could be called upon to interpret how these requirements could apply to the circumstances of the parties. Is this the practice of law, where the mediator is warranting an opinion that a particular application of law to the facts of the dispute is appropriate?

New Mexico's Unique History

New Mexico is unique. New Mexico has two labels, “mediation” and “settlement facilitation.” The rest of the nation uses only one label for both services, and that label is “mediation.” National standards and advisory opinions use only the label “mediation.” The scope of these documents plainly covers the entire range of mediation methods, including those associated with each of New Mexico's labels. However, New Mexico's history is helpful to this discussion. Each label has acquired a larger than life ideological meaning. Each label sometimes gives rise to dogmatic followers, who insist that their respective method is the only acceptable way to mediate. Nevertheless, the labels provide a useful way to discuss these issues.

Settlement Facilitation. In the 1980s, Chief Judge W. John Brennan brought Settlement Week to the Second Judicial District Court. Districts around the state adapted this pioneer program for their own courts. The model was inspired by either the state of Arizona or the state of Ohio or both, depending on the story. Settlement facilitators were used to help the parties evaluate the case and to design settlements. The settlement facilitators were generally attorneys, although accountants, psychologists, and the other professionals were included in the pool of settlement facilitators.

Mediation. In the 1980s, community organizations, such as the Mediation Alliance and the New Mexico Center for Dispute Resolution, were offering mediation services. The model was inspired by the tradition of facilitative mediation. In other words, the mediators helped the parties discover their own solutions, and the mediators did not evaluate the case, make resolution recommendations, or provide legal information/analysis. The mediators were primarily non-attorneys, although attorneys were included in the pool of mediators.

Today's Confusion and Conflict. Today, mediators and settlement facilitators in New Mexico both often call their service “mediation.” Further, mediators and settlement facilitators both often believe their respective historical roots - facilitative mediation or evaluative settlement facilitation - are the only correct way. These common beliefs complicate consideration of these issues.

A Question of Balance and Boundaries

What may a mediator who is an attorney do? Where is the boundary between “mediating” and “practicing law?” Does the distinction even make a difference? If the distinction is relevant, then how does a mediator who is an attorney navigate the boundaries?

The two advisory opinions included in the materials provide a provocative discussion of these issues. Training participants are also recommended to review the other documents in the materials as well, including the national standards, the Resolution on Mediation and the Authorized Practice of Law, and New Mexico Rule of Professional Responsibility regarding lawyers serving as third-party neutrals. Please note that this essay is not a substitute for comprehensive research. The essay is intended to frame the issues for further consideration.

Definitions and a Spectrum of Services. Mediation is discussed as a dispute resolution process. The New Mexico Mediation Procedures Act has a similar approach, as provided in §44-7B-2.

§ 44-7B-2. Definitions As used in the Mediation Procedures Act:

- A. "mediation" means a process in which a mediator:
- (1) facilitates communication and negotiation between mediation parties to assist them in reaching an agreement regarding their dispute; or
 - (2) promotes reconciliation, settlement or understanding between and among parties;

The practice of law is broader. Attorneys may give legal advice, render legal opinions, advocate for clients, and draft legal documents. As a practical matter, providing legal information and preparing documents may be a part of both services. As a mediator offers additional services beyond simply facilitating the dispute resolution process, such as providing legal information and drafting legal documents, the question is how far to go. For mediators who are attorneys, the applicable boundaries may be obscure. However, there are factors to balance which do provide guidance.

Factors and Alternatives. The ABA Section of Dispute Resolution materials indicate several considerations for the mediator who is an attorney:

- **Other Resources.** The mediator should recommend that the parties consult other resources to provide legal information and to perform legal services;
- **Competency.** A mediator should consider providing additional services only if the mediator is competent to do so;
- **Self-determination.** A mediator should avoid undermining the parties’ self-determination when providing additional services;
- **Impartiality.** A mediator should avoid undermining his or her impartiality, as perceived by the parties, when providing additional services;
- **Disclosure.** If a mediator offers to provide additional services beyond facilitating the process, then the mediator should disclose that a role boundary is being crossed and the parties should consent to the additional services.

What Does This Mean? Consider the example of having the mediator who is an attorney prepare documents. Beyond a mere recitation of the agreement in the parties own words, the mediator is to prepare documents for submission to the court. The mediator may be using court-approved forms or may be preparing his or her own form. While this distinction may be important, the threshold considerations may be the same.

First, the mediator at the onset should disclose that he or she is an attorney but is acting as a mediator during the mediation. The mediator should explain the difference between mediation and legal services.

Second, the mediator should recommend that the parties consult attorneys. Even if the consultation causes a delay in the mediation, the opportunity to pursue this option should be given.

Third, the mediator should be competent to prepare the document. This is a determination to be made by the mediator.

Fourth, the mediator should be transparent with the parties regarding what is going to happen. If a court form is going to be used, or generic provisions are going to be added, then the parties should know that.

Fifth, the mediator should protect self-determination. For example, a mediator should not allow a “standard provision” to impose an unknown consequence on the parties or to impose an “outcome” on a part of the dispute.

Sixth, the mediator should protect impartiality. For example, the mediator should avoid the appearance that how he or she drafts a provision is perceived to favor one party or the other.

In summary, the mediator who is an attorney may provide additional services so long as the core values of the mediation process are preserved. A similar analysis would apply to providing legal information. This is a “facts and circumstances” test. There is no bright line. The ABA Section of Dispute Resolution acknowledges that a mediator who is an attorney may offer additional services beyond facilitating the process. Some of these services may look like “the practice of law.” There are risks and benefits. The question is to strike an appropriate balance.

A Personal Comment - Why Mediation is an Art Form. There is a spectrum. On one end, mediation is a process to make people happy. On the other end, mediation is a kinder and gentler process for people to have decisions made for them. Loosely stated, one end is “therapy” and the other end is “arbitration.” The “sweet spot” is in the middle. Rigid rules to determine whether a particular service is appropriate are not helpful. In mediation, the underlying needs, interests and values are teased out. Then, creative mutual solutions are designed. There is no “cookie-cutter” approach for mediation. The same is true for the expanded services to be rendered by the mediator who is an attorney.

One day case law, regulations, rules, and other authority in New Mexico may illuminate what is acceptable. Until then, mediators are left with a lifelong learning situation to learn (1) the core values of mediation, (2) what additional services may be provided within the scope of the core values, (3) how to be self-aware regarding the boundaries for wanting to help, and (4) how to continuously monitor the ever-changing texture of a mediation to know what may be appropriate in the moment. Thus, while mediation is a toolbox of techniques, skills, and processes, mediation is truly a form of art.

POWER OF MEDIATOR GUIDANCE

A MEDIATION WORK FLOW

By David Levin

A WORK ENVIRONMENT

Mediation can be viewed as a work environment. There is (1) work to be done, (2) a need for productive working relationships, and (3) a need for a productive method for doing the work.

The work to be done is to move a dispute towards resolution. However, this mission is not to drive the conflict to a conclusion and to close the case. Mediation, as a method of dispute resolution, is based upon a core value of self-determination. An over-arching drive to close the case can negate self-determination.

Mediation is more defined by assisting the participants to acquire the ability to resolve their own dispute, and by providing the participants with a safe and supportive environment for doing the work to seek a resolution. Success is more viewed as meaningful progress towards resolution than as achievement of a milestone.

The method of dispute resolution offered by mediation is aimed towards achieving closure. However, the nature of the service is to empower the participants to get there, rather than to force a conclusion upon them. This paradigm highly impacts how the work is to be done.

Productive working relationships need to be developed among the participants. The mediator's interactions with each participant, as discussed in preceding sections of this presentation, are pivotal in developing working relationships which will be conducive for dispute resolution. The focus of this section is how to get the work done.

WORK FLOW

Basic mediation training often describes the mediation process as a sequence of stages. This approach is effective for identifying steps to perform and the related skills. While each author and trainer may differently label the stages, there is fundamental information and practice advice contained in the descriptions of stages. An understanding of mediation stages and the skills to navigate them needs to be fully absorbed by a mediator. These tools need to become second nature to a mediator. The reader is referred to basic mediation materials and trainings for an understanding of stages. This training assumes familiarity with stages and related skills.

The objective here is to step back and to view the overall process. Stages and skills are parts. What is the purpose for the process? What are the big picture goals to be accomplished? Will the view from 40,000 feet help mediators navigate through the weeds found at ground level?

There are three core purposes underlying the stages of mediation:

1. To find out who is in room and what are their issues;
2. To allow the participants to explore what is possible to do about their situation; and
3. To allow the participants to discover what they might agree upon to do next.

© David Levin, 2018. All rights reserved. Use only with permission.

Work flow may be described as a map of what needs to be done, rather than stages which prescribe activities to perform. This perspective provides a sense of purpose for what is being done, a view for what needs to be accomplished. While stages and skills may provide the necessary tools, to understand the underlying purposes may provide a useful overall map.

One map is described in this section. There are other ways to map the process. The objective is to encourage mediators to step back and to view the overall process, to see how the pieces might fit together to achieve a purpose, and to discover a map of their own which works for them. If you can draw it, then you can understand and use it.

A couple words of caution. This is a map of goals, not an inventory of the skills needed to achieve them. The whole map can look complicated, because there are many moving parts. However, after viewing the whole map, specific sections will be enlarged and discussed. The focus on purpose is simpler: who is in the room, what can be done, and what agreements are possible.

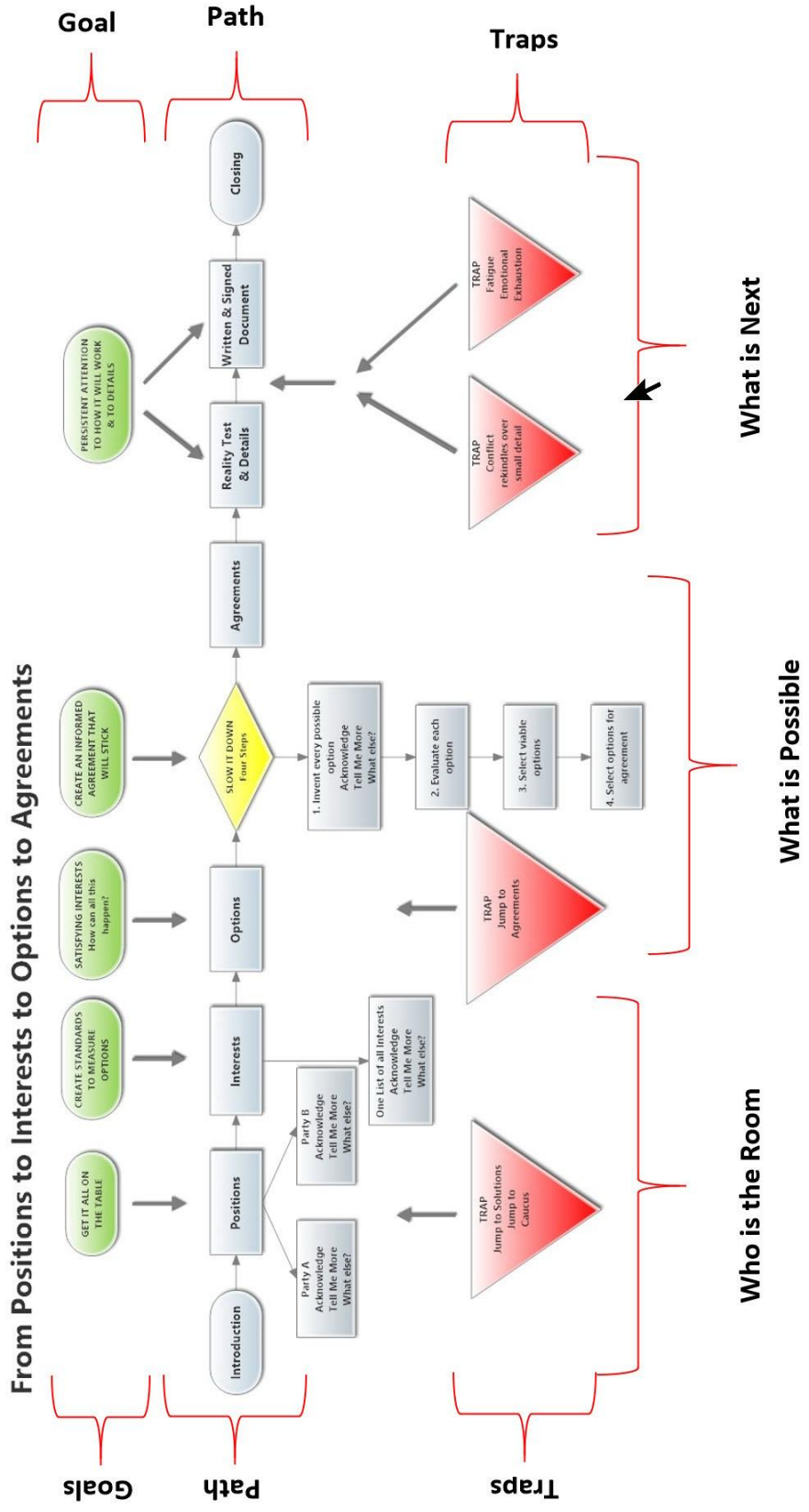
THE BIG PICTURE

“Path” represents the main work flow for the mediation process. The path is shown by a horizontal line of rectangles across the middle of the diagram. There are eight way stations along the path: Introduction, Positions, Interests, Options, Agreements, Reality Test & Details, Written & Signed Documents, and Closing. There is an objective to be achieved at each way station. However, as will be seen, progress along the path is not always linear. Work on an objective can happen at any time.

“Goals” along the path are the ovals on the top. The goals are what is hoped to be accomplished by performing the tasks.

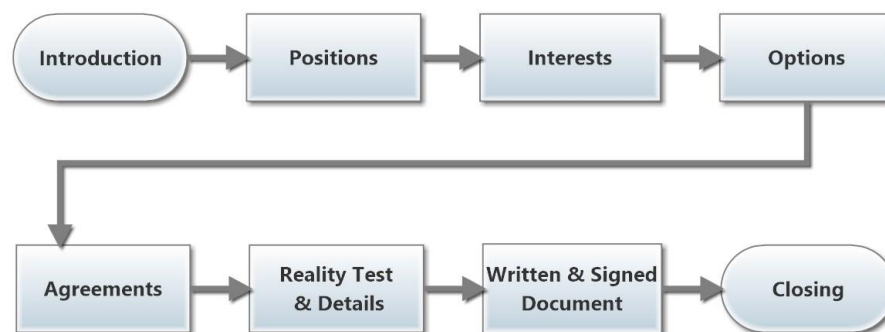
“Traps” along the path are the large triangles on the bottom. The traps identify common rabbit holes a mediator may fall in along the way.

Purpose. The relationship between “The Path” and the core purposes of mediation is show by the labels on the bottom: “Who is in the Room,” where information is gathered; “What is Possible,” where possible resolutions are explored; and, “What is Next,” where the participants may decide what to do with their dispute.



THE PATH

There are way stations along the path, each with an individual set of tasks and a different set of objectives. The sequence may be chaotic following the flow of an individual mediation or may follow a more logical progression. Nevertheless, each way station needs to be visited at least once.



Introduction. The purpose is to provide information about what it means to mediate and to seek the willingness of the people in the room to participate. At the beginning of mediation, and throughout the process, a mediator needs to educate, to be transparent, and to enlist engagement about what is happening and what might happen next.

Positions. The objective is to provide an opportunity for a participant to express, and for the other participants to hear, the positions, history, emotions, and goals that brought the person to mediation. This is an essential starting point. If this objective is not adequately addressed, a person may continue to be stuck on their starting position, talking louder and more forcefully in an effort to be heard and acknowledged.

Interests. The objective is to unearth and place on the table, the underlying needs, interests and values which a meaningful resolution would need to address for a participant. Addressing these realities will provide the building blocks for truer and more lasting result.

Options. The objective is to explore whether there are more choices than the starting positions of the participants. This place needs to offer safety - the freedom to non-judgmentally find new options without any pressure to agree to anything. A place where open, flexible and creative thinking is essential, and where the fruits of the preceding work may be found.

Agreements. The objective is to discover whether the participants will arrive at any mutual understandings of what to do next, even if the agreement is to disagree. Regardless of their respective motivations and beliefs, what are the steps which they can agree to take. This is the crucible where options can be measured against (1) the integrity of starting positions and (2) the furthering of needs, interests, and values. What can result is specific agreements, or a knowledge that the moment is not ripe for an agreement.

Reality Test & Details. The objective is to describe what details are required to accomplish the specifics

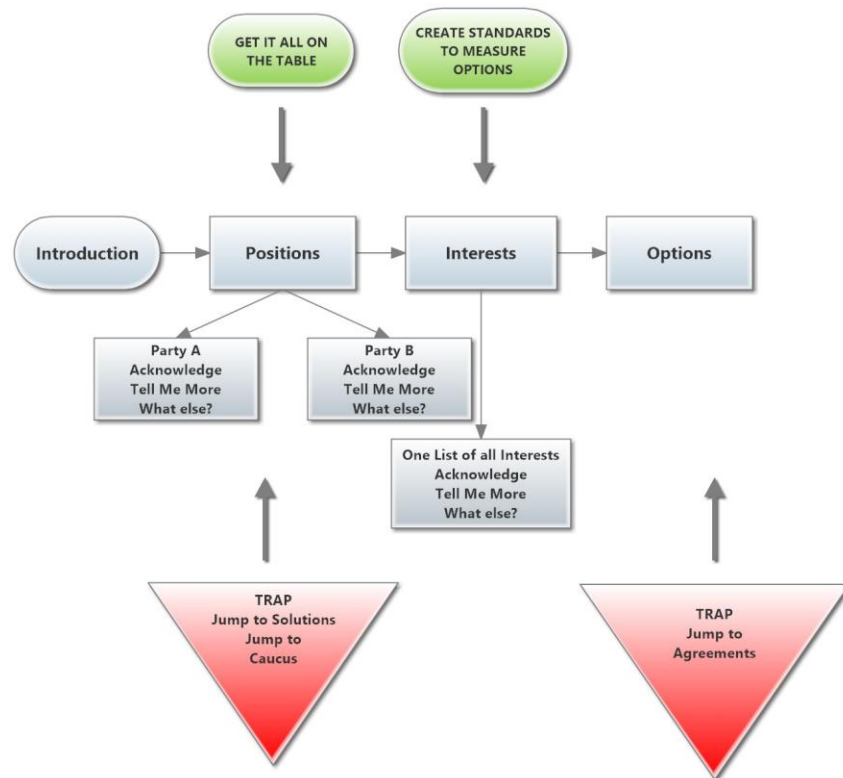
of the possible agreement(s) and whether it is realistic to believe those goals may be accomplished. This is the place to learn whether wishes can become fulfilled promises, or whether the parameters for agreements need to be recast.

Written & Signed Documents. There are companion objectives here. First, to clarify: If an agreement is not clear enough to be clearly stated, then the agreement is not yet complete. Second, to ratify intent: After clearly stating the agreement, to make a commitment to the agreement.

Closing. The objectives, whether achieved with brevity or ceremony, whether agreements were made or not, is to acknowledge what has happened. Closure may help the participants pack up who they are - to come to a place of balance after the usual upheaval of the mediation process.

This progression of tasks may not linear. For example, during "Written & Signed Documents," emotions can erupt, signaling the mediator that underlying issues may need to be revisited. This work may lead to the discovery for more options, and the mediation process may need to cycle back through earlier work. A task may be addressed during a stage of mediation, and unfinished work may surface at any time.

WHO IS IN THE ROOM



The purpose is to learn as much as possible about the participants and their individual circumstances. This is a time for each participant to experience being heard. A time for everyone to better understand who and what is in the room.

Goal: Get it all on the Table. The objective is to go beyond the positions presented by each party at the beginning of mediation. The opening statements may present only two divergent narratives of the situation and may only offer two diametrically opposed outcomes. There is little to work with at this point, only a

stalemate.

There are facts, history, emotions, needs, interests, values, fears, hopes, and more, which underlie a dispute. These elements are not often expressed up front. Yet, these elements are the components which may have created the conflict, and which must be addressed to resolve it. Opening statements may only describe a deadlock and a deep chasm between the parties. There needs to be more to work with for movement towards resolution to occur.

Key Tools: Acknowledgment and “Tell Me More.” These essential communication techniques are discussed in the companion article in the training materials, “Acknowledgement, a Dispute Resolution Basic Skill: From Clenched Fists to an Open Mind.”

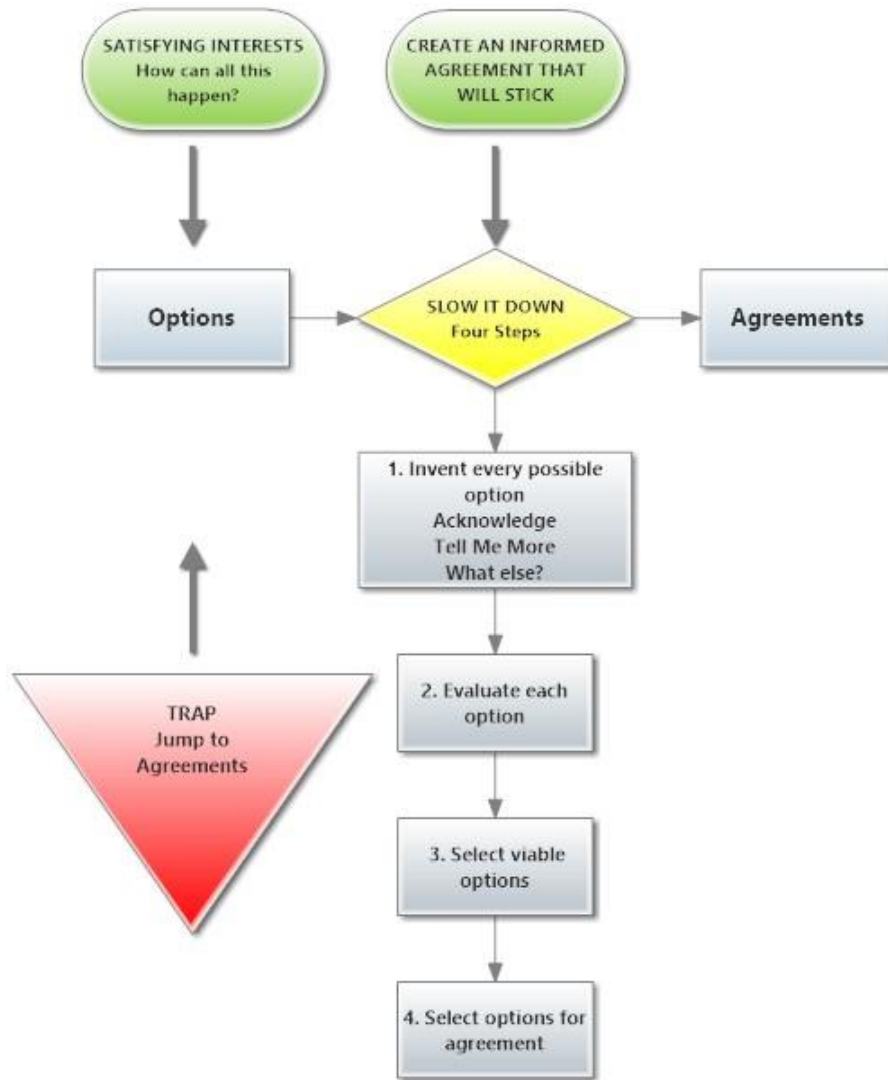
Goal: Create Standards to Measure Options. There is another goal, to create the means to later evaluate options for a possible resolution. The identification of positions and interests establishes key reference points. An option may be evaluated for how the option addresses positions and interests. A settlement package may be viewed for how the resolution balances positions, interests, and a workable agreement between the participants. Discovering the building blocks which created the conflict can also provide the means for achieving a mutually acceptable resolution.

Trap: Jump to Solutions. The deadlock and explosive potential of the conflict may appear intimidating after the opening statements. Rather than to work to bring information onto the table, a mediator may bailout. There is a temptation to suggest solutions for the dispute, to avoid a fight by solving the problem. While jumping to solutions may appear to provide a way out, the true benefits of mediation to achieve “an informed agreement that will stick” through self-determination may be lost.

Trap: Jump to Caucus. Another temptation to avoid an explosion between the parties is to jump to individual sessions. A caucus can be a powerful and helpful tool. However, a caucus as a conflict avoidance technique may prevent the real work from being done.

Key Tools: Working with Heat. The ability of a mediator to sit with the heat of conflict is essential. For a discussion of how and when to work with Heat, see the companion article in the training materials, “Working with Heat: From Conflict Avoidance to Constructive Conflict”

WHAT IS POSSIBLE



The purpose is to explore whether there are more choices than the starting positions of the participants, and whether mutually acceptable outcomes are possible. There is a need for an attitude that there are no bad ideas. One idea may lead to another. The discussion may lead to new creative ideas and combinations of options which were never thought of before. Frequently, the options which form a lasting agreement will have been totally unanticipated by the participants and the mediator.

Goal: Satisfying Interests, how can all of this happen? This challenge is the core question. The capability to mediate with an open, flexible, and creative mind, which is discussed in earlier sections of this presentation, is indispensable. Free range over every conceivable option is needed. The participants, before coming to mediation, may not have thought about their underlying aspirations, let alone what resolutions may be agreeable to everyone involved. The mediator may need to bluntly frame the task as “what do you want to do with this mess” or “how can you solve this puzzle?”

Goal: Create an informed agreement that will stick. Buyer’s remorse can be real. Participants need to fully explore what an option will mean for them. Participants also need to experience knowing all the available choices. There is no substitute for taking the time to carefully understand the options and to thoughtfully select which ones might work.

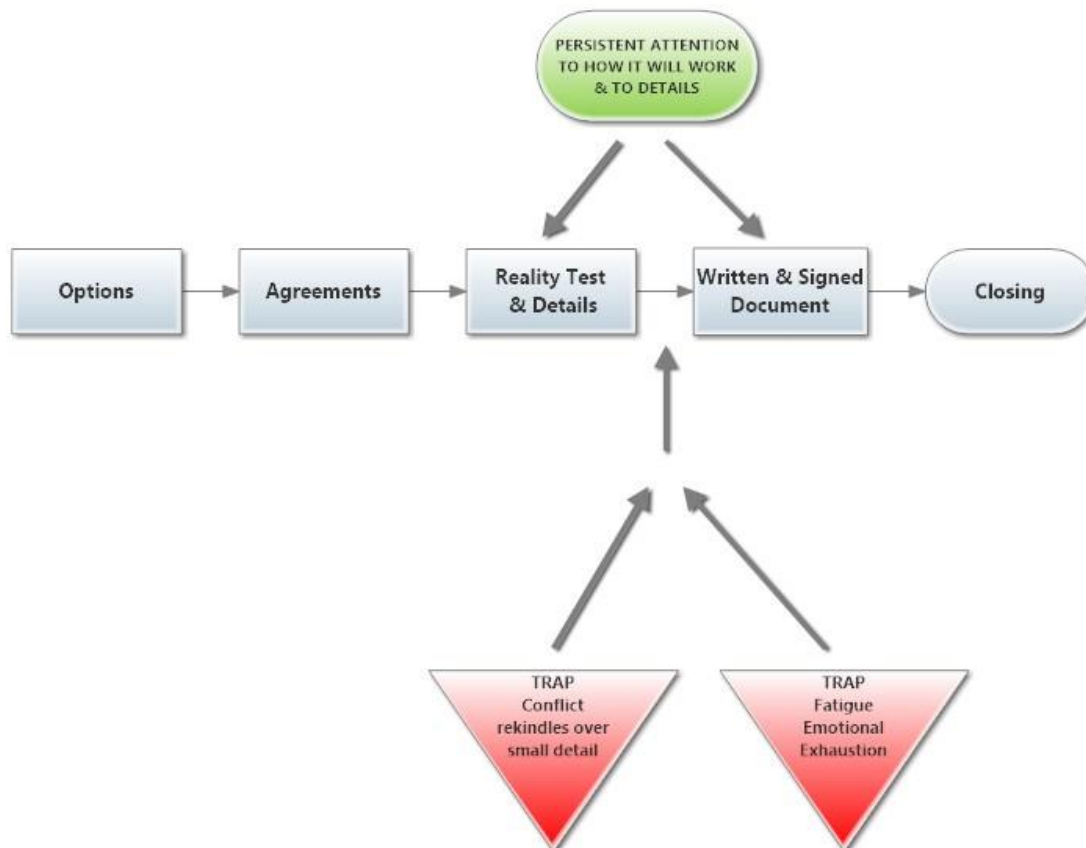
Trap: Jump to agreements. Impatience can lead to uninformed agreements that will not stick. There can be a rush to judgment, a need for immediate relief from the angst of the conflict. There can be a tendency to pounce upon the first ideas that come up. This is a trap to avoid

Key Tools: Slow it down, use a four-step process. In *Getting to Yes* by Roger Fisher and William Ury (Penguin Books 1981) a powerful four-step process is recommended, and may be paraphrased as follows;

1. Invent every possible option;
2. Evaluate every option (do not rush to judgment);
3. Select which options are viable;
4. Selection which option(s) may be agreeable.

Bottom Line: Take the time needed to perform the mediation process well; neither rush nor dally.

WHAT IS NEXT



The purpose is create an informed agreement that will stick. There can be an overwhelming temptation to jump upon a resolution as soon as it is stated. “We are done!” “We can get out of here!” This moment can be a false milestone. Truly, “the devil is in the details.” A failure to detail the of an agreement and

the specifics required for implementation can be a setup for a disaster. Further, the work to detail the agreement and implementation will reveal whether the resolution is workable and desirable. The remaining tasks can make or break a deal.

Goal: Persistent attention to how it will work & to details. This is a time when staying locked on the details can seem petty, irritating, and highly unpopular. Gentle persistence may be required, even for the mediator.

Trap: Fatigue and emotional exhaustion. Mediation is physically, intellectually, and emotionally draining for everyone in the room. The moment of agreement can feel like collapsing after crossing the finishing line of a long marathon, energy exhausted and reserves spent. A mediator must plan for this moment. To warn everyone, and to remember themselves, that this moment will come. A mediator must have stashed energy bars, both literally and figuratively, for completing the process.

Trap: Rekindled conflict. Almost invariably a seemingly trivial item will spark an explosion. Hot emotions will rush back. The initial precipice of disaster will loom one again. And, with fatigue and emotional exhaustion in abundance, the heat may seem fatal. A mediator must plan for this moment as well. Re-acknowledgment of each participant's positions, needs, and interests becomes essential. A revisiting of the heat of the conflict almost becomes a rite of passage. This moment is a true test of the capability of the mediator to support the capability to mediate for both the mediator and the participants.

Bottom Line: Stay the course, trust the process, and have the fortitude to get the job done.

BASIC MEDIATION TRAINING – FALL 2012

TOPICAL OUTLINE OF TRAINING

Process Parts, Skills & Art

This outline identifies the core content and process of the course. A topical “checklist” is provided to guide the course participants through the training.

We believe an outline offers a quicker reference tool than an extensive narrative text. The course materials and resource references will provide more comprehensive reading for the participants.

Our purpose is to be transparent. We intend for the Outline to serve as a structure for learning and as a practice guide for reference during an actual mediation.

This is a living document. The participants are invited to join the instructors to bring greater depth and breadth to the outline. The general headings are:

- **What is Mediation?**
- **What are Mediation Process Parts (Stages)?**
- **What are Mediation Skills?**
- **What Happens in Mediation?**
- **What is the Art of Mediation?**
- **Your Start for a Tip Sheet**
- **Afterword**

**David Levin, Philip Crump, & Laura Bassein
Trainers**

PART I – What is Mediation?

Mediation Summary

- THE BIG PICTURE
 - Mediation is a method of dispute resolution designed to foster an understanding of needs, interests, commonalities, options, and possible resolutions, where people work together with a neutral in a safe, non-adversarial, confidential environment to discover and to possibly agree upon mutually beneficial solutions;
 - This method of dispute resolution offers people, who have or may discover the capacity and competency to mediate, an opportunity to exercise collective self-determination for the resolution of a dispute;
 - The contribution of the mediator is to set aside a decision making role, and to support self-discovery of understanding and collective self-determination of a resolution;
 - Mediation is distinguished by this methodology from the traditional legal system, where people are represented by others and where a third party makes the decision;
 - In other words,
 - The idea is to offer a respectful opportunity to work together with a firm boundary of acceptable behaviors,
 - Based upon a preference to build, not walls between people, but respectful relationships,
 - Understanding that pushing on people may result in push back, and that being respectful may result in respect in return,
 - While acknowledging that this approach may not be for all people, for all situations, and for all times in the evolution of a dispute.
- “An opportunity for people to process together with a guide who listens with interest.” David Levin
- “A safe place where people can say what they need to say, in ways that allow others to hear and to respond.” Philip Crump

What is Mediation?

Mediation Summary

Mediation is

§ 44-7B-2. Definitions as used in the New Mexico Mediation Procedures Act:

- A. "mediation" means a process in which a mediator:
- (1) facilitates communication and negotiation between mediation parties to assist them in reaching an agreement regarding their dispute; or
 - (2) promotes reconciliation, settlement or understanding between and among parties;

A Mediator is

- A mediator participates in mediation as a neutral guide.
- A mediator is not an evaluator or a decision maker.
- § 44-7B-2. Definitions as used in the New Mexico Mediation Procedures Act:

E. "mediator" means an individual who:

 - (1) holds the individual's self out as a mediator and who conducts a mediation;
 - (2) the mediation parties agree to use as a mediator and who conducts a mediation;
 - (3) is designated by a mediation program as a mediator and who conducts a mediation...
- A mediator is aware of his or her own beliefs, emotions, biases, abilities, and limitations, and works to provide a balanced mediation opportunity for all of the participants.

What is Mediation?

Discussion Points

Mediation Components are

- Process
- Skills
- Art

Mediation Values include

- Understanding
- Self-determination
- Confidentiality
- Safety
- Balance and “Neutrality”

Basic Training is

- A survey course
- An opportunity

The format is

- to present parts of each area
- to provide experience working with each part

Each experience will be discussed to discover¹

- what worked
- what was problematic
- what made a difference

Students are expected to

- Examine the theoretical framework of process, skills, and art
- Participate in the experiences
- Effort and experimentation, not perfection, is the goal

¹ Friedman Factors

What is Mediation?

Discussion Points

Purpose is

- To engage with people in “conflict”
- To engage with people in making a decision where there is a difference of opinion
- To provide them with an opportunity to work together
- To support their self-determination to select an outcome

While understanding that

- People think, learn, and decide differently
- “Disputes” are more than the presenting problem
- Self-determination requires mediator discipline not to prescribe solutions
- What will happen is unpredictable
- Mediation may not be a linear process

Part II - What Are Mediation Process Parts (Stages)?

9 Core Process Parts Summary*

1. Pre-session

This process part begins when the prospective participant contacts you or when a referral is made to you. Here you have an opportunity to set the tone and expectations for the mediation. Screen the case for appropriateness for mediation. Set in motion preparation for the first session, including your decision regarding how much to communicate with each party before the session.

2. Beginning

At the beginning of the first session, explain what mediation is, how it works and what is expected from each party. Answer any questions about the process. An Agreement to Mediate should be reviewed and signed. This is when the parties decide whether to proceed with mediation and if so, to take care of administrative matters.

3. Story telling

The heart of mediation many people believe is for each party to tell his or her story. This is more than a monologue. This step requires the mediator to use active listening skills to help everyone understand what is important to each party. This process is an essential component for moving forward.

4. Information gathering

Here the focus shifts to identifying what needs to be decided and what information is needed to make an informed decision. There is more. By working with each party, explore what underlies his or her concerns. Identify each party's interests and needs--the building blocks for resolution.

5. Generating options

Each party will likely bring his or her initial expectation of a resolution. One of these preconceived results might work. More often, while giving respectful acknowledgement of each party's position, this stage sparks creative thinking of all things that are possible. Brainstorm possible options, without evaluating them. From each party's thoughtful preconceived position, combinations and/or unforeseen options frequently emerge.

6. Agreements

Options need to be reality tested. Each option should also be tested for how it meets needs, interests, and goals. Priorities will need to be set. Ultimately, what may be agreed upon and what may be left unresolved, both need to be identified. In other words, negotiations need to find closure.

What Are Mediation Process Parts (Stages)?

9 Core Process Parts Summary

7. Writing

Stamina is required. The parties and the mediator are not done. Details of an agreement and implementation need to be identified; both need to be clearly and completely stated in writing. Writings, not recollections, will preserve an agreement.

8. Closure

More stamina. Next steps need to be listed. Time to reflect and consult with an attorney and others may be considered. The agreement may need to be signed, and acknowledgement of how hard everyone worked should be offered.

9. Follow-up

As after every session, after completion of the mediation, the mediator debriefs what happened, what worked, what was problematic, and what made a difference. Parties also report that a mediator's inquiry as to how they are doing with unresolved issues is helpful – a follow-up contact may encourage more progress.

**Note: This is but one way to describe—in linear form—the nonlinear life cycle of a mediation; there are many other ways to consider the phases or steps in mediation.*

What Are Mediation Process Parts (Stages)?

Discussion Points

For each process part (sometimes called “stages”)

- Understand
 - What is to be accomplished
 - What will it take to get there
 - What will encourage progress
- From the perspective of the participant
 - What is needed
 - Why is it important
 - What and how to do it
- From the perspective of the mediator
 - What is happening inside yourself
 - What appears to be happening to the participants
 - What skills might help

Core process parts are

1. Pre-session

- Setting the tone
- Providing consumer information
- Screening
- Appointment setting
- Mediator preparation

2. Beginning

- Explanation of process
- Ground rules
- Agreement to mediate
- Identifying areas to work on
- Identifying possible goals
- Identifying a possible mediation plan

What Are Mediation Process Parts (Stages)?

Discussion Points

Core process parts are

3. Story telling

- Uninterrupted time for each party
- Thin line between hard and harm, between vent and punish
- Being heard
- Getting it out

4. Information gathering

- "Tell me more"
- Identify needs & interests
- Identify obstacles & conflict dynamic
- Clarify wants, needs, and interests

5. Generating options

- Honoring each party's initial proposals
- Moving on to find more
- Brainstorming
- Building from parts of many options

6. Agreements

- "An Informed Agreement That Will Stick"
- What options may work
- How each option may meet needs, interests, and goals
- Priorities may need to be set among needs, interests, and goals
- Reality testing
- What options may be agreed upon as part of an agreement
- What may be left unresolved
- What are the next steps

7. Writing

- If it is not clear enough to write...
- Details of expectations
- Details of implementation
- In their words

What Are Mediation Process Parts (Stages)?

Discussion Points

Core process parts are

8. Closure

- Time to reflect & consult
- Next steps
- Signatures
- Acknowledgement of the work done in mediation

9. Follow-up

- De-brief mediation
- Persist on unresolved areas
- Know when to stop

PART III - What are Mediation Skills?

9 Core Skills Summary*

Active Listening is the key skill of mediation. Effective communication skills are taught in many fields. In mediation, active listening is the essential means to open a dispute to the possibilities of resolution. In other words, the purpose is to get people talking to each other.

There are many labels for listening skills – and many useful labels are overlapping. We have selected several core listening skills. These are windows into the art of listening. Additional skills are important as well.

1. Acknowledging, Validating, Empathizing

A listener may offer to the speaker more than just being heard. We are not talking about a judgment that the speaker is right or that the listener agrees. The goal is letting the speaker know that the listener has heard what has been said (stories, values, feelings, etc.) and what is important. Being understood helps dissolve the pounding need to get one's point across and encourages the speaker's more open, flexible, creative mind. Acknowledgement and acceptance without agreement, judgment or reaction indicate respect and attentiveness. The mediator recognizes out loud the things that matter. Validating legitimizes the party's perspective, opinions and feelings without suggesting that these are "correct." Distinguished from sharing another's feelings (sympathy), the skill of empathy "involves experiencing the feelings of another without losing one's own identity." [Robert Bolton, *People Skills*].

2. Clarifying

What the speaker may have thought was clear may be confusing to the listener. Also, the speaker's intent may be different than what impact the words had on the listener. Confusion and misunderstanding may make the situation worse. Ask clarifying questions of the speaker. Ask the other party what he or she heard. Ask enough clarifying questions that the speaker's content and intended meaning are understood by both the mediator and the other party.

3. Summarizing

After a lengthy discussion, summarizing may be necessary to capture all that was said. Asking the parties to add to or correct your summary may help insure that nothing is missed and that everything is considered. Summarizing is also an effective way to help the mediator pace and focus the conversation. Summarizing also helps the conversation move beyond points where it seems stuck.

4. Open ended questioning

A "yes/no" question invites no discussion. An "open ended" question elicits more information. "Tell me more about" opens the door for anything. In trial testimony, questions are asked often to elicit specific answers, often "yes" or "no". In mediation, questions are asked to learn more than a simple statement of position. Open ended questions may lead to the underlying concerns, interests, and needs which are at play for the party – this is the information needed for the mediation to go forward.

5. Restating (or paraphrasing) content

Using the speaker's own words, paraphrasing (not "parrot-phrasing") what has been said may help both the speaker and the other party to hear again what was said; especially in the context of a dispute, the speaker and the other party may not be fully aware of what was actually said. To understand what a statement meant, you have to know what was said.

6. Reflecting emotions

When the listener reflects or "mirrors" the expressed feelings of the speaker, it not only acknowledges those for the speaker, it also helps the other parties at the table understand more of the speaker's human experience.

7. Reframing

Reframing is to look at the same situation from a different perspective. Being stuck during mediation may only indicate that a useful frame has not yet been found. For example, "We have been looking at which school district your child should attend from the perspective of your work schedules. What does the issue look like from the perspective of your child?" (The course materials include excellent reframing examples from Mark Bennett.)

People often come to mediation with only one view of the situation, i.e., that he or she is right and that the reason should be clear to everyone. If active listening--and particularly acknowledgement -- has been effective, the parties may find other views to consider. And, understanding different views may open the door to new options for resolution.

8. Looping

To feel heard, one has to hear more from the listener than "I understand." Looping is a technique where the listener repeats back what has been heard and asks, "Did I get it?" This leads to an exchange where the speaker actually sees the listener work to understand. Once the "loop" of understanding is complete, the listener may then ask a follow-up question which will loop the conversation deeper to learn even more. Looping is similar to a skill known as "peeling the onion." We will diagram the process during this course.

9. Shifting from Positions to Interests and Needs

People come to mediations often with positions. Simply put – positions are what people want to achieve and interests and needs are why. Position based bargaining may only invite further impasse. Behind the positions there are needs and interests, such as a need to be respected as a fine craftsman or an interest in building a business. When listening skills elicit needs and interests, then negotiating a resolution based upon commonality and creative options is more possible. A shift from position based bargaining to interest based bargaining is instrumental to mediation.

**As with the Process Parts, this is but one listing of core skills; there are other ways of looking at and describing what is core. This list will not lead you astray, but you may realize other skills that are important which should be added. Make you own list!*

What are Mediation Skills?

Discussion Points

Note: In the course materials there are several discussions and examples of listening skills. Please review these articles.

Skills are

- Listening - to learn
- Listening - to understand the feelings
- Listening - for relationships
- Listening - for what's important to the speaker
- Listening – for openings for connection and for movement
- Listening – for opportunities for people to shift to another place

Core skills for any process part are

- *Acknowledging, Validating, Empathizing*
- *Clarifying*
- *Summarizing*
- *Open ended questioning*
- *Restating content*
- *Reflecting emotions*
- *Reframing*
- *Looping*
- *Shifting from Positions to Interests and Needs*

What are Mediation Skills?

Discussion Points

Additional tools are

- Tell me more
- Reality checks
- Caucus
- Homework
- Breaks
- Silence
- Being a transparent guide (would you like to try this?)
- Encouragement
- Optimism, not naiveté
- Overheard conversation
- Listening, not telling
- Asking for participant feedback

Skills help with

- Allowing people to experience being heard and acknowledged
- Listening for
 - Presenting Problem
 - Underlying Conflict
 - Content
 - Emotions
 - Values
 - Priorities

What are Mediation Skills?

Discussion Points

Skills help with

- Identifying
 - Issues
 - Positions
 - Interests
 - Commonalities
 - What connects and what disconnects

Skills help working with obstacles, including

- Emotions
- Getting Stuck
- Impasse
- Power Imbalances
- Frozen Positions
- Mediator Imbalance & Partiality
- Lack of Information
- Different ways of thinking and deciding

PART IV – What Happens in Mediation?

People come to mediation often with positions. These are beliefs that they will defend and assert, aggressively if pushed. Positions can be fixed and frozen. They are the fodder of impasse.

A position may be fixed upon a result. For example, "I am entitled to _____, and there is no reason to negotiate for anything less."

A fixed result may be coupled with a fixed perspective. For example, "I am entitled to that result because _____."

The whole package of positions adds up to a personalized declaration that "I am right and you are wrong," and further, that "I am good and you are bad."

What may happen in mediation are shifts.

This may happen in "ah-ha" moments of understanding. Shifts may also occur through slowly building understanding. Understanding is the lubricant.

First, positions must be unfrozen. The shift is from being stuck in a rigid position to being in a state of openness. Being heard and acknowledged is the catalyst. Inside the person is no longer screaming for recognition. You, as a mediator, may observe the shift as a relaxing of body language, a softening of words, or the tranquility which follows a release of an emotional charge.

As an aside, "venting" is not enough. Venting is yelling to be recognized. Based in frustration, venting may be harmful. There is a thin line between a party's communication being a defensive attack and the communication being a constructive opportunity to be heard.

In venting, the object may be to hurt the other by defending one's inner self. In the experience of being heard, the object is to provide respect and empathy for one's inner self.

Second, once heard, parties may bring out more. They may be willing to find the interests and unmet needs which led to being frozen in a position. An interest or need is less of a result to be achieved, and is more of a value to be satisfied.

For example, a worker may have a position of wanting more money, but an underlying interest of pride of workmanship and a need for recognition of their effort.

Working with interests and needs opens the door to many options for resolution, because many results may address the interests and needs.

Third, after being heard themselves, parties may be able to hear the other party. They may begin to discover what drove the other party to a fixed position. They may begin to understand the other party's respective interests and needs

What Happens in Mediation?

Fourth, now the table is set to recognize mutuality. People may begin to understand what they have in common. A mutual need may be to have the dispute over. More profoundly, they may discover that they have interests in common.

Fifth, now there is a basis for evaluating options for resolution. How does an option meet the interests and needs of a party and of both parties? Now there is a new basis beyond “win/lose” for an agreement. This is where mediation truly offers an alternative method of dispute resolution.

To summarize, dispute resolution during mediation may all start with listening and being heard. This process is not about a resolution imposed by a higher level of authority. Mediation, at its best, seeks resolution from within the parties themselves.

Finally, perhaps only in retrospect, may an outside observer know what is going on, and what will work. This fundamental aspect of mediation may make unpredictable what will happen. This is why mediators are often heard to say, “trust the process.” This may be also why the legal system, which is based upon diagnosis and treatment of a situation by an outsider, finds mediation beyond understanding. This is what makes mediation worth doing.

PART V – What is the Art of Mediation?

What is the Art of Mediation?

Basic mediation focuses on fundamentals – making process parts and skills second nature. We believe that one must first be competent with the basics, before taking risks based upon instinct.

Mediation is more than a mechanical execution of cookie cutter steps. A mediator takes himself or herself into the heart of a conflicted human set of relationships and dynamics. The person of the mediator is inserted into the situation. This is more than a linear experience.

We believe the path of becoming a mediator begins with the basics and experience. Then, an expansion into the “art” may be ventured. Art is less “text book” and more of the heart, mind, and gut. Artfulness, many find, comes from experience, reflection, and study. Some may be “born” with an artful capacity, others may acquire artfulness, but all should proceed cautiously with a respect for the impact, beneficial and harmful, that a mediator may have on others.

Mediator “Gems”-- Discussion Points

- Know your presence as mediator impacts dynamics
- Understand the people and multi-dimensions before you mediate
- Develop skills as second nature
- Use skills as needed
- Respect the participants’ space
- Know resolution is not a linear process
- Do not own the outcome
- Trust the process
- Offer acknowledgement
- Be genuinely interested
- Understand yourself and what you bring
- Know when not to mediate
- Know how to have a person experience being heard
- Be patient
- Respect intuition

What is the Art of Mediation?

Discussion Points

- Know that some people and some cases are not good fits for you to mediate
- Be comfortable with chaos and conflict in the room
- Perceive when overload or harm is happening
- Sense timing
- Allow each person to process differently
- “Be humble.” Kyle Harwood
- Follow your curiosity
- “Own your ignorance.” Kyle Harwood
- Know how to guide without taking over
- Keep a place in your heart and mind for each person
- Live with ambiguity
- Gain the trust of one to work with the other (room to work without appearing biased)
- Understand mediation looks formless to others
- Work with emotions and rational thinking
- Understand boundaries, such as mediator, lawyer, therapist, arbitrator, evaluator
- Respect the difference between legal information and legal advice
- Recognize when to stop
- Encourage shifts in perspectives
- Model creating empathy
- Slow the process down for you and the participants to listen and to absorb
- Know that it always takes longer
- Know that resolution may unexpectedly happen at any time
- Provide gentle persistence

What is the Art of Mediation?

Discussion Points

- Know the end of mediation may be only the beginning
- Stick with the basic skills and tools
- Check your own perceived notions at the door
- Monitor your own reaction to process
- Be aware of how your feelings and body language may impact others in the mediation
- Let the parties, not you, put things on the table
- “Mine only what the parties put on the table.” Susan Barnes-Anderson
- Use “I guess that...,” to allow parties to affirm or correct your understanding
- “No mediator ever resolved a dispute, only parties do.” Wayne Brazil
- Mediation is not to “solve your problem,” but “to provide an opportunity to work on what is going on between you”
- Know the difference between creative intuition and reckless impulse

PART VI –Your Start for a Tip Sheet

9 Core Process Parts are

- *Pre-session*
- *Beginning*
- *Story telling*
- *Information gathering*
- *Generating options*
- *Agreements*
- *Writing*
- *Closure*
- *Follow-up*

Additional Tools are

- *Tell me more*
- *Reality checks*
- *Caucus*
- *Homework*
- *Breaks*
- *Silence*
- *Being a transparent guide*
- *Encouragement*
- *Optimism, not naiveté*
- *Overheard conversation*
- *Listening, not telling*
- *Asking for participant feedback*

9 Core Skills are

- *Acknowledging, Validating, Empathizing*
- *Clarifying*
- *Summarizing*
- *Open ended questioning*
- *Restating content*
- *Reflecting emotions*
- *Reframing*
- *Looping*
- *Shifting from Positions to Interests and Needs*

PART VII – Afterword

We, the instructors and the coaches, practice mediation, a process that often looks shapeless. We experience that mediation often works – an opportunity is offered for the parties to resolve their own dispute.

Success is measured in the quality of that process for the parties. An actual “result” may look different. A result may be a full or partial agreement. A result may be a more functional understanding of the situation, which may enhance the effectiveness of other methods of dispute resolution. Beyond the presenting dispute, a result may be that the parties further their communication skills and their capacity to problem-solve a dispute in the future.

We experience that mediation is a privilege, an experience where people may trust you, and where people may find safety to approach each other, not with fists, but with an open hand. People during mediation, regardless of the subject matter of the dispute, often share their private self with you.

Mediation is hard to “teach” and difficult to “learn.” Yes, there are process parts and skills. However, the multi-dimensions of the dynamics of conflict and the complexity of human interactions require mediation to be both a “science” and an “art.” We hope that you have found an opportunity in the course to experience both.

Finally, as we all have experience being people and interacting with others, having met during this course, we should go forward together as instructors, coaches, and students, to help all of us build a better understanding of how to make the human experience more nourishing.

Thank you for participating with us.