

PROLOGUE The Mediation Environment	ESSENCE OF MEDIATION Sparking a capability to mediate	A MEDIATOR'S OPPORTUNITY The role as gift	OPENING QUESTIONS The first 15 minutes of mediation Setting the stage for the mediation process
CAPABILITY TO MEDIATE The participant's responsibility to mediate	MEDIATOR POWERS Identifying mediator authority	NATURE OF THE SERVICE Resolving for the mediator's role	MEDIATOR BEHAVIOR Creating a joint environment
ACKNOWLEDGMENT/RESPONSE An essential skill	UNDERSTAND CONSIDERATION Active inquiry	MEDIATOR PRESENCE A constant presence	MEDIATOR VALUE/LEAD The power of observation
MEDIATOR GUIDANCE The power of leading the process	MEDIATOR UNDOING Resetting the table	HEAT QUESTIONS The heart of the process The heart of the process The heart of the process	WORKING WITH HEAT DURING MEDIATION Understanding Understanding Understanding

PROLOGUE
The Mediation Environment

2

- PEOPLE GATHERED IN A ROOM**
- | | |
|---|--|
| <p>Activity Dimensions</p> <ul style="list-style-type: none"> • Reasoning • Emotions • Physiology • Physical | <p>Activity Types</p> <ul style="list-style-type: none"> • Reactions within self • Interactions with others |
|---|--|
- 3

ESSENCE OF MEDIATION
Sparking a capability to mediate

4

PRESENTATION PURPOSE

GOAL: To expand our awareness of what we are doing in the mediation room

WHY: To offer better service to our clients

HOW: To have an additional framework for exploring what is happening during mediation

5

“ALSO KNOWN AS...”

**Unpacking 40+ years of lawyering,
30+ years of mediating and of
working with mediation programs,
to find what worked and what did not.**

6

A MEDIATOR'S OPPORTUNITY

The role is a gift...

7

MEDIATORS

We are privileged. People open their hearts and minds to us, their hopes and fears.

We are invited to sit within their conflict, to work with them to find a way out. We are asked to help where people have been stuck, to provide the means to move forward.

We are offered a sacred role.

8

OPENING QUESTIONS

- 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.

9

INQUIRY #1
How People Arrive for 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?

10

INQUIRY #2
A State of Mind for Mediation

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

11

INQUIRY #3
Building a Beneficial Environment

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

12

CAPABILITY TO MEDIATE

For a participant to meaningfully mediate...

13

ROLE FOR THE MEDIATOR

- Sparking the capability to mediate
- Providing a meaningful opportunity to exercise the capability to mediate
- Being aware of how the power of the mediator influences capability to mediate

For each participant

14

CAPABILITY TO MEDIATE

- An open, flexible, and creative state of mind
- An awareness of one's own needs, interests, values, and goals
- A sense of self-preservation and integrity
- An appreciation for practical reality, *and...*

15

CAPABILITY, CONTINUED

Ability to:

- Participate in the mediation process
- Know what needs to be decided
- Make informed and voluntary agreements
- Understand consequences, *and...*

16



CAPABILITY, CONTINUED

Ability to:

- Take responsibility
- Consider others
- Be open to all the possibilities
- Be willing to move on, *and more...*

17

CHALLENGE

-  • To support participants to acquire and to exercise the capability to mediate
-  • To use mediator power to empower the participants

18

MEDIATOR POWER

Identifying mediator influence...

19

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.

20

SOURCES OF MEDIATOR POWER

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

21

MEDIATOR BEHAVIOR

- Mediator behavior creates a powerful environment in the room and influences the parties' state of mind.

22

MEDIATOR PRESENCE

- Mediator presence is a model for party behavior.

23

MEDIATOR KNOWLEDGE

- How the mediator uses knowledge of the mediation process, the subject matter of the dispute, and the legal process

24

MEDIATOR GUIDANCE

- How the mediator guides the process and manages the work flow

25

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.

26

NATURE OF THE SERVICE

Boundaries for the mediator's role...

27

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.

28

MEDIATION IS

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

29

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...

30

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.

31

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...

32

THRESHOLD CONSIDERATION


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

33

MATERIALS

Available at www.nmadr.org:

- Model Standards of Conduct for Mediators
- New Mexico Statewide Guidelines For Court-Connected Mediation Services
- Model Standards of Practice for Family and Divorce



34

MEDIATOR BEHAVIOR

Creating a good environment

35

HOW PEOPLE ARRIVE

Elevated Stress Response

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

36

WHAT PEOPLE NEED TO MEDIATE
And May Be Compromised

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

37

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

38

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
- Provide support for an increase capability to mediate

39

IF A MEDIATOR DOES NOTHING ELSE...


These mediator behaviors matter:

- ➔ • Listen to understand
- ➔ • Respect and acknowledge
- ➔ • Ask to know more

40

MATERIALS

- See “Acknowledgement, a Dispute Resolution Basic Skill.”

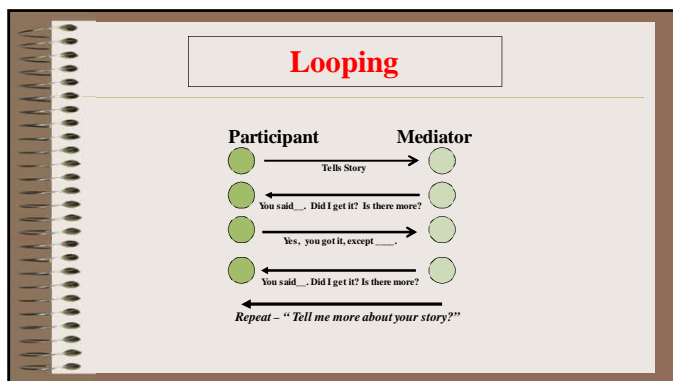


41

ACKNOWLEDGMENT REFRESHER

An essential tool

42



OVERHEARD CONVERSATION

Hidden impact...

44

WHILE THE OTHER PARTICIPANT WATCHES...

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

45

INITIAL REACTIONS
Particularly when waiting to go second...

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

46

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.

47

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...

48

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.

49

MEDIATOR PRESENCE

If a mediator is present...

50

HOW PEOPLE ARRIVE

Unfamiliar with

- ★ • How to behave during mediation
- ★ • What attitudes will be useful
- ★ • How to respond effectively
- ★ • What interactions will be safe & beneficial

51

MEDIATOR AS A MODEL

- where the mediator embodies the conduct and state of mind conducive for a meaningful mediation,
- where mediator presence is a model of behavior for the parties, and
- where mediator bias and baggage are acknowledged to be inherently present and the mediator works not to allow them to contaminate the process.

52

USEFUL MEDIATOR ATTRIBUTES

- Even handed treatment of all
- Realistic optimism
- Willingness to:
 - Work hard
 - Stay the course
 - Work with heat
 - Know when to stop

53

MORE USEFUL MEDIATOR ATTRIBUTES

Assumes nothing about:

- Anything, *including*
- Who the participants are;
- What happened;
- What is important;
- What might work.

54

MORE USEFUL MEDIATOR ATTRIBUTES

Authentically is interested and wants to:

- Learn about the situation,
- Understand everyone, and
- Respect & acknowledge each participant.

55

AND MORE USEFUL ATTRIBUTES

- Conflict as an opportunity
- Calm and steady in the heat of conflict
- Aware of own reactions, opinions, and beliefs
- Open to possibilities without premature judgment

Remembers the puzzle is for the participants to solve, not for the mediator to work out.

56

BOTTOM LINE
Mediation as attitude & interactions

- ➔ • The qualities needed for a participant to meaningfully mediate, and
- ➔ • The attributes needed for a mediator to provide a helpful process, are sufficiently similar
- ➔ • For the mediator to be a critical model of behavior for the participants.

57

INFLUENCE OF PRESENCE

- ★ • Beyond being a model,
- ★ • Presence influences
- ★ • How people relate to their conflict, themselves, and each other.

58

MEDIATOR KNOWLEDGE

The power of information...

59

HOW PEOPLE ARRIVE

Lacking information of:

- ★ • Process of Mediation
- ★ • Subject Matter of the Conflict
- ★ • Legal Context

60

ECONOMIC REALITY

Participants may not have:

- Access to information
- Money to acquire information
- Educational background to use information

61

LACK OF INFORMATION

- Creates fear, false assumptions, and unrealistic expectations
- Creates power imbalances
- Decreases capability to mediate
- Decreases realistic options for resolution
- Creates Vulnerability

62

CHALLENGE

- Mediator may have the knowledge
- Mediator and participants will want to access mediator knowledge
- Risk of dependency upon mediator knowledge
- Dependency can be disempowering for participants
- • How to inform parties while preserving self-determination

63

TRADITIONAL MEDIATOR APPROACHES

<p>Ask questions:</p> <ul style="list-style-type: none"> • Open areas for discussion • Draw out what they already know • Identify needed information • Understand how information might be useful • Identify how to get the information 	<p>Refer participants to:</p> <ul style="list-style-type: none"> • Reading materials • Websites • Advisors • Organizations • Workshops • Etc.
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64

CONTINUUM OF MEDIATOR ADVICE

From Acceptable to Beyond Role

General Information

Range of possible implications

Apply expertise to facts and tell what to do

65

A QUESTION OF BALANCE

It depends:

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. See *"What's a Mediator to Do?"*

66

THE "HOW" MATTERS


Factors to balance:

- ➔ 1. General information v. interpreting the information
- ➔ 2. Preserve even handedness and self-determination
- ➔ 3. Protect the nature of the service
- ➔ 4. Be transparent regarding any shift in mediator role
- ➔ 5. Venture no further than necessary and safe

67

MATERIALS

- See "What is a Mediator to Do?"



68

MEDIATOR GUIDANCE

The power of leading the process...

69

HOW PEOPLE ARRIVE

- ★ • Stuck
- ★ • Strangers in a strange land
- ★ • Unable to navigate what to do

70

WHAT NEEDS TO BE DONE

- Who is in the room?
 - Identify positions, perceptions, emotions, history, facts, needs, interests, values, preferred outcomes...
- What is possible?
 - Discover and evaluate every available option...
- What is next?
 - Identify what is mutually workable, detail and reality test the option, create a written document, and make any agreements...

71

MEDIATORAS GUIDE

- Leads the process:
 - Set agenda
 - What to do
 - How to do it
 - How long to do it
 - What to do next
- Leadership decisions matter

72

RIGID OR RESPONSIVE

For example, while detailing a particular and promising option, a previously unstated strong emotion bursts out...

- Set aside emotion and stay on task?
- Set aside task and work with emotion?

73

DIRECTIVE OR EMPOWERING

Another example, when a task appears finished...

- Tell the participants what is next?
- Suggest what might be next?
- Ask what the participants would like to do next?

74

MANAGEMENT OF STYLES

And further, how does the mediator pace the process when:

- One is a quick thinker and is ready to make a final decision, and
- The other is a slower thinker and needs to ponder what is best?

75

WHAT DO PARTICIPANTS NEED TO TRUST THE PROCESS?

To believe that the mediation process is

- Helpful
- Fair
- Worth doing

And, that the mediator is a trustworthy leader.

76

MEDIATOR AS LEADER

- ➡ • The mediator embodies the process.
- ➡ • To trust the process, one must trust the mediator.
- ➡ • The mediator needs to be a creditable guide.
- ➡ • To be creditable, a guide needs to be flexible to the needs of the participants,
- ➡ • While knowing how to manage the work flow to get somewhere.

77

MATERIALS

- See "A Mediation Work Flow."



78

MEDIATOR UNDOING

Holes I have fallen in...

79

WANTING TO

- Resolve the conflict myself
- Be faultless (perfect)
- Show off my expertise
- Know what is best for them
- Tell them what to do

80

BEING INATTENTIVE TO

- My own bias, reactions, baggage, and power
- When I get triggered by someone or something
- Nature of the service
- Boundaries of the role
- Self-Determination

81

FALLING VICTIM TO

- My own discomfort, fear, and avoidance of heat
- Emotions as the enemy
- Anger as threatening
- Loss of control as devastating
- Judging people

82

HOLES HAPPEN

- ➔ • Be aware
- ➔ • Be transparent and responsible
- ➔ • "It is not what you have done, but what you do next"
Jonathan Bolton, MD
- ➔ • Everything is an opportunity

83

HEAT QUESTIONS

- 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.

84

**QUESTIONS
When Heat Arises**

1. What risks to the parties and the mediation may be present?
2. What might be triggering each party?
3. What can you do?
4. What opportunities are present in the moment?

85

**WORKING WITH HEAT
DURING MEDIATION**

Heat as an Opportunity
Acknowledgment as a Tool

86

WHAT IS HEAT?

- Heat is when the conflict feels ready to explode, to derail the mediation.
- Heat may be irrational.
- Heat may have brought the participants to mediation.
- Heat can be loud and overt, or quiet and subtle.
- Heat can be the heart of the conflict, the obstacle to resolution.
- Heat must be dealt with, one way or the other.

87

SAFETY FIRST

- Heat can be harmful.
- Heat can harm everyone – the mediator, the other participant, and the participant expressing the heat.
- A mediator must monitor everyone for safety, including the mediator.
- A mediator must know when and how to intervene, if safety is at risk.

88

**TENDENCY TO REDIRECT MEDIATION
AWAY FROM HEAT**

- Jump to solutions.
- Jump to caucus.
- Change the subject.
- Suppress the heat.
- Adjourn and return on another day.
- End the mediation.
- *And more...*

89

**POTENTIAL BENEFITS FROM
WORKING WITH HEAT**

- Discover what is really going;
- Discover needs, interests, values, and critical information;
- Discover what could make mediation unsafe;
- Dissolve a major emotional or other barrier to resolution;
- Normalize a situation so that the participants may work with it;
- Reduce physiological stress response;
- Shift the participants' mindset;
- Discover motivations and options for resolution;
- Discover the dynamics of conflict ;
- Discover whether the dispute can be mediated and if so, how;
- Discover how to make heat workable;
- *And more...*

90

IS HEAT WORKABLE?

- Heat can be viewed from many perspectives:
 - *Counselors and therapists* look to diagnose causation and to prescribe treatment.
 - *Trial attorneys and negotiators* may seek to comprehend the heat of a conflict for the purpose to gain an advantage for winning.

91

IS HEAT WORKABLE?

- *Mediators* are offering a dispute resolution process.
 - The mediator is looking for how heat can impact the mediation process – whether the mediation may go forward, safely and constructively.
 - A mediator needs to explore whether the heat is workable, and if so, how to work with the heat.

92

HOW TO EXPLORE HEAT

1. Safety checks constantly
2. Observe what is happening
3. Select a technique to try
4. Use the technique
5. Observe what happens
6. Repeat as needed

93

WHAT MAY BE UNDERNEATH

<ul style="list-style-type: none"> • Low blood sugar • Lack of sleep • Exhaustion, physical or emotional • Pain • Fear • Anger • Disappointment • A sense of loss • Biological stress reactions • Past trauma/core injuries 	<ul style="list-style-type: none"> • Physical impairments • Substance abuse • Mental illness • Unmet needs • Unheard needs • Misunderstanding • Differing information or lack of information • <i>And more...</i>
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94

TECHNIQUES FOR WORKING WITH HEAT Acknowledgement

- A participant can become heated when, the participant feels unheard, not respected, devalued, ignored, or insulted.
- If a participant experiences being heard by the mediator, then the participant will experience:
 - The mediator is not responding with hostility;
 - The mediator is listening with interest; and
 - The mediator is validating that their experience is real for them.

95

TECHNIQUES FOR WORKING WITH HEAT Acknowledgement, continued

- For the participant who experiences being heard:
 - the need to defend or attack may lessen,
 - because being respected, accepted, and understood may allow the participant to experience a safer environment,
 - and, heat may begin to dissipate.

96

TECHNIQUES FOR WORKING WITH HEAT More Techniques

<p><i>Problematic Techniques</i></p> <ul style="list-style-type: none"> • Venting • Enforcing a Rule • Suppressing • Avoidance 	<p><i>Helpful Techniques</i></p> <ul style="list-style-type: none"> • "Name It, Tame It" • Reframing • Normalizing • Preempt • Caucus • Take a Break • Eat • Come back another day • <i>And more...</i>
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97

TECHNIQUES FOR WORKING WITH HEAT Know when to stop

- A mediation can rapidly change.
- At any time heat can become unworkable.
- When heat is unworkable, it is time to stop what is happening and to change course.

98

A MEDIATOR'S ASPIRATION

I need the ability to be comfortable working with heat during mediation, rather than to be afraid when heat comes into the room. Being conflict avoidant myself is not helpful. I wish to bring more tools than avoidance to the process. I am committed to learning when and how to work with heat – to understand how to navigate the heart of a conflict – to provide the parties with a safe and meaningful opportunity to move forward.

99