

# **A Mediation Skills Workshop with David Levin**

## *Working with Being Stuck*

### **Topics**

1. Introduction
2. Framing the Workshop – Opening Questions
  - a. When and why do people get stuck?
  - b. How do people come to mediation?
  - c. How do people come to work place mediation?
3. Three Common Places to Get Stuck
  - a. After opening
  - b. People who are fixated
  - c. Going in circles
4. Creating a Mediation Environment
  - a. Safety and the relief response
  - b. Mediator presence, behavior, and being a model
  - c. A state of mind conducive for mediating
  - d. A supportive working environment
5. Tools
  - a. Tell me more
  - b. Acknowledgement
  - c. Overheard conversation
  - d. What do you want to do while you are here?
6. Using the Tools with the Three Common Places to Get Stuck
7. Tips, Traps, and Take Aways

### **Materials - printed**

1. Opening Questions
2. Mediator Behavior
3. Three Common Scenarios
4. Notes re Work Place Mediation
5. Mediation Dynamics
6. Acknowledgement – A Dispute Resolution Basic Skill

### **Materials – available on [nmadr.org](http://nmadr.org)**

1. Working with Heat – Slides
2. Working with Heat – Article
3. Power of Mediator Expertise - What is a Mediator to Do?
4. Power of Mediator Guidance - A Mediation Work Flow
5. Tanz & McClintock, The Physiologic Stress Response During Mediation

## **Presenter**

**David Levin** graduated from the UNM School of Law in 1977 and has been a trained mediator since 1987. David began his legal career as a civil litigator and general practitioner, later becoming a Board Recognized Specialist in Family Law and establishing a general private mediation practice. David has served as a court administrator of local and statewide alternative methods of dispute resolution programs, and has taught basic, family, and advanced mediation, as well as settlement facilitation.

## **Contact Information**

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

## **Inquiry #3: Getting stuck**

6. Where during mediation do people get stuck?
7. What does it look like when they are stuck?
8. Why are they stuck?
9. What can a mediator do?

## **Inquiry #4: Work Place Mediation**

10. How do people feel about coming to a work place mediation?

**MEDIATOR BEHAVIOR**

Creating a good environment & beneficial working relationships

1

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

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

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

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

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

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**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

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

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

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# Three Common Scenarios for Being Stuck

## Questions for discussion:

1. What might be going on?
2. What might a mediator do?

## Scenario #1: After opening positions

*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. Story-telling is typically filled with self-justification and attacking the other side.*

*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.*

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**Scenario #2: After endless story-telling**

*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.*

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**Scenario #3: After protracted back and forward between the participants**

*The mediation has moved along. The participants have expressed their initial positions. The mediators have acknowledged each participant and have used the loop of understanding to unearth emotions, needs, and interests. Mediation feels like it is working.*

*Then a repeating pattern begins to consume the time. The mediators repeatedly rewind and reset the process. Everyone works anew. Yet, the process gets stuck again at the same point, and the remaining time allocated for the mediation session is fast disappearing.*

*The stuck point can vary. For example, the broken record can be self-justifying story-telling. Or, the broken record can be a difference on which option for solution is right, where each participant is fixed upon a different resolution. Or, broken record can be about anything... The content does not matter. Going in circles is going to exhaust the available time. People go up to the brink, stop, and get stuck. Yikes. What can be done to salvage the mediation?*

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# Notes re Work Place Mediation

*Work place mediation often arises from an environment where power is aligned along a hierarchical organization chart and where how a person performs at work is evaluated.*

*People are often feeling trapped. They are required/need to work together. Their well-being, jobs, and careers are often dependent on what happens next with the dispute. They would rather have nothing to do with each other, but their futures are intertwined.*

*Work places are often highly structured. Organization charts, positions and duties, and performance standards may tightly control the work environment.*

*Work place mediation has its own challenging characteristics. "Name it, tame it" can be useful. How a mediator starts a work place mediation can be critical. How a mediator guides a discussion about a work place environment can be pivotal.*

*A mediator needs to adjust their approach to meet where the people have been, where they are now, and where they might be heading. Context can be everything.*

## Beginning the Mediation – Mediator's Opening

**MEDIATOR'S OPENING** – Acknowledge the realities of work place mediation.

***Be transparent with parties about situation:***

- ❖ *Name how many, but not all, feel when coming to mediation*
- ❖ *Describe what happens here often, but not all the time*
- ❖ *Be open, honest, and upfront about this mediation*

**Assume each party feels:**

1. Uncomfortable with each other
2. Last communications failed
3. Fear career/job at risk
4. Fear retaliation
5. Stuck in unhelpful environment
6. Stuck needing to work together
7. Stuck in a mess with no way out

**Mediation is for each party:**

1. Unknown process/what to do/expect
2. Unknown mediators
3. Another place to be attacked



**Opportunity offered by mediation:**

1. A confidential discussion
2. An open exploration of the issues without judgment of right and wrong
3. A conversation about everyone being stuck in problem situation, and
4. A conversation about what might be done about being stuck
5. Where an open discussion may open unexpected possibilities
6. Where a party only agrees, if they want, to what might work and preserves integrity

**Outcomes:**

1. Better understanding of situation
2. Less about written agreements
3. More about relationships and ways to co-exist

**Bottom line:**

1. The mediator only offers the opportunity to explore the possibilities
2. How the parties choose to use the time is up to them

## Beginning the Mediation – Party's Opening

**PARTY'S OPENING** – Ask participants to address *both* their complaints and their hopes.

1. When the mediator asks each party to describe what situation has brought them to mediation,
2. Ask each party to include what they hold will happen today.

## Throughout the Mediation

**BACK TO BASICS** – Use the following core skills to continue to build a state of mind conducive for mediating and a working mediation environment which is supportive throughout the mediation.

1. Acknowledge
2. Ask “tell me more”
3. Demonstrate interest, acceptance, respect, wanting to know more, and wanting to better understand

## When Mediation Is Stuck on What Is Wrong

**REDIRECT THE DISCUSSION** – There is a need during mediation to hear and to acknowledge what went wrong. Often there comes a time when the stories tend to repeat and repeat. Is there a respective way to redirect the discussion? Here is a technique which has often been helpful.

1. Ask if the parties would like to discuss what a good work place would be like? Be encouraging. If they agree, then,
2. Ask each party to describe what characteristics they would like for a good work place environment to have.
3. Spend time on #2. Bring out many, many attributes. Allow the atmosphere to fill with aspirations. Take the time to reset the tone of the discussion from what was wrong with the work place to what could be good from a work place.
4. Ask – how could this happen? What could you do to help this happen?
5. Ask – how could others help this happen? What could they do to help you?

## When Mediation Is Going Nowhere and the Clock Is Running Out!

**RETURN OWNERSHIP TO THE PARTICIPANTS** – When mediation appears to have stalled at an impasse, consider offering mediator feedback to designed re-empower the participants to decide what to do. It is their conflict to solve, not the mediator's. Stop the going in circles. Explain that going in circles is going nowhere. Ask the participants what to do next. Suggest that going in circles should end. Make them decide what they would like to do with the remaining time – return ownership of what is next to them.

1. Offer to provide a mediator's view of "where we are;" if accepted, then
  - a. Summarize each participant's position, needs, and interests – use the loop of understanding technique
  - b. Summarize they are where in the mediation process
  - c. Offer observations, if this can be done safely and even-handedly, regarding the dynamics of the conflict environment and the interactions in the room
2. Ask how they would like to use the remaining time
  - a. Open a discussion of options for going forward with the dispute, such as adjudication, mediating, just leaving, etc.
  - b. Be clear that the mediator does not own a preferred option and is willing to just call it a day and stop
  - c. Use silence to evoke thought and reflection
3. Return self-determination regarding what to do with the conflict back to the parties
  - a. What to do is an individual decision for each participant, and
  - b. What the individual decisions are will determine the options for the group, and,
  - c. What to do as a group is a group decision.

# 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.

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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.

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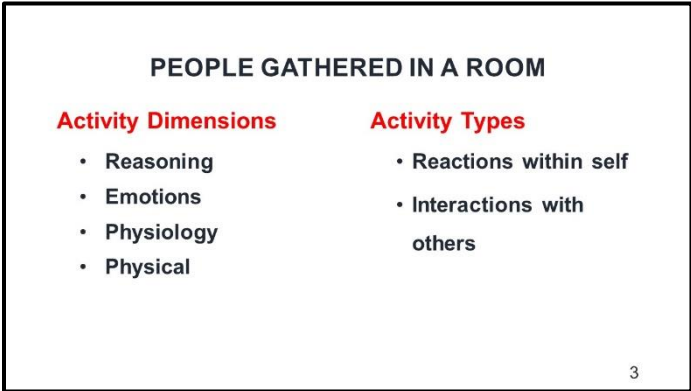
The role of the mediator is both to facilitate the mediation and to participate as a member of the group. On one hand, in the formal mediator role, there are process stages to navigate, such as explaining mediation, obtaining an agreement to mediate, facilitating opening remarks, setting an agenda, and 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**



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## 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 that 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.

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## 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

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*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

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## 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

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To feel safe, each party needs to experience

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- That the mediator can work with the other party
  - Without betraying their connection with the mediator
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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

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*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.*

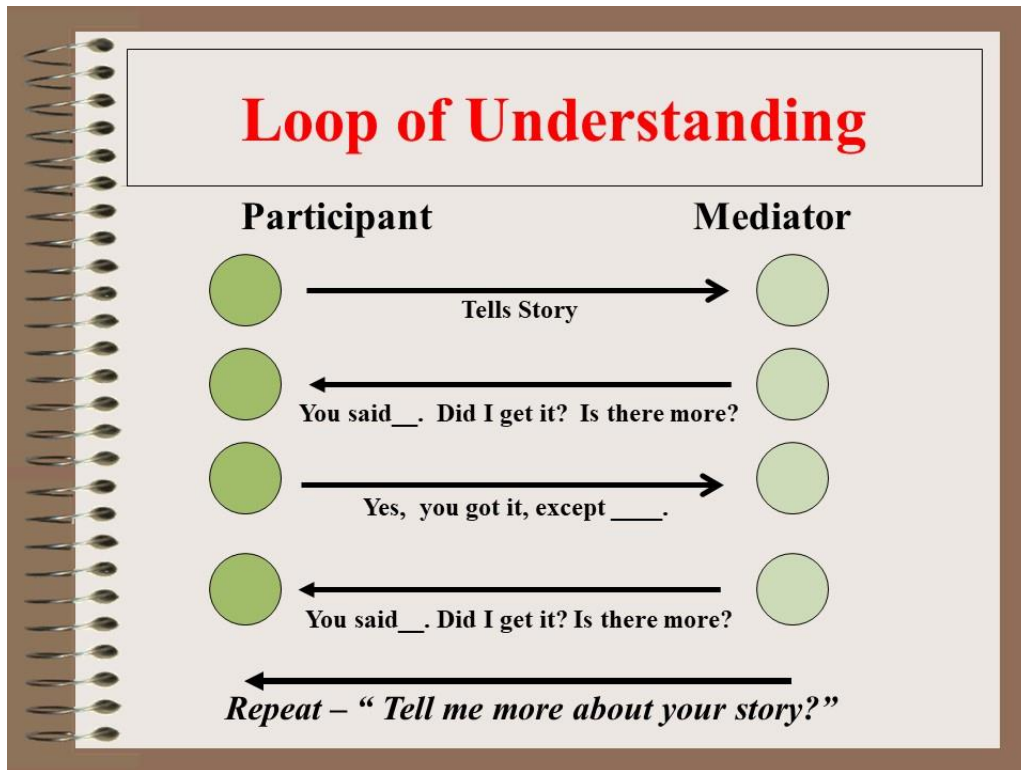
*Slowly, the impulse to advocate and to defend softened. As if the supervisor and the employee were learning the acceptance and support of the mediators was real, unshakeable. Slowly, the discussions shifted. Personal needs, such as a need to be respected, and professional values, such as pride in high 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.*

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## 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 knob 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.*

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**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...

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## 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.

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## SOURCES OF MEDIATOR POWER

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

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## 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.

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## Core Value of Self-Determination

### SELF-DETERMINATION - STANDARDS

Complete documents available on [www.nmadr.org](http://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...

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## 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.

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## MEDIATION IS

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

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## 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...

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## 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.



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## 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...

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## THRESHOLD CONSIDERATION

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

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# 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*, which is in the materials. 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.

### **A True Example:**

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.

### **What Acknowledgement Is and Is Not:**

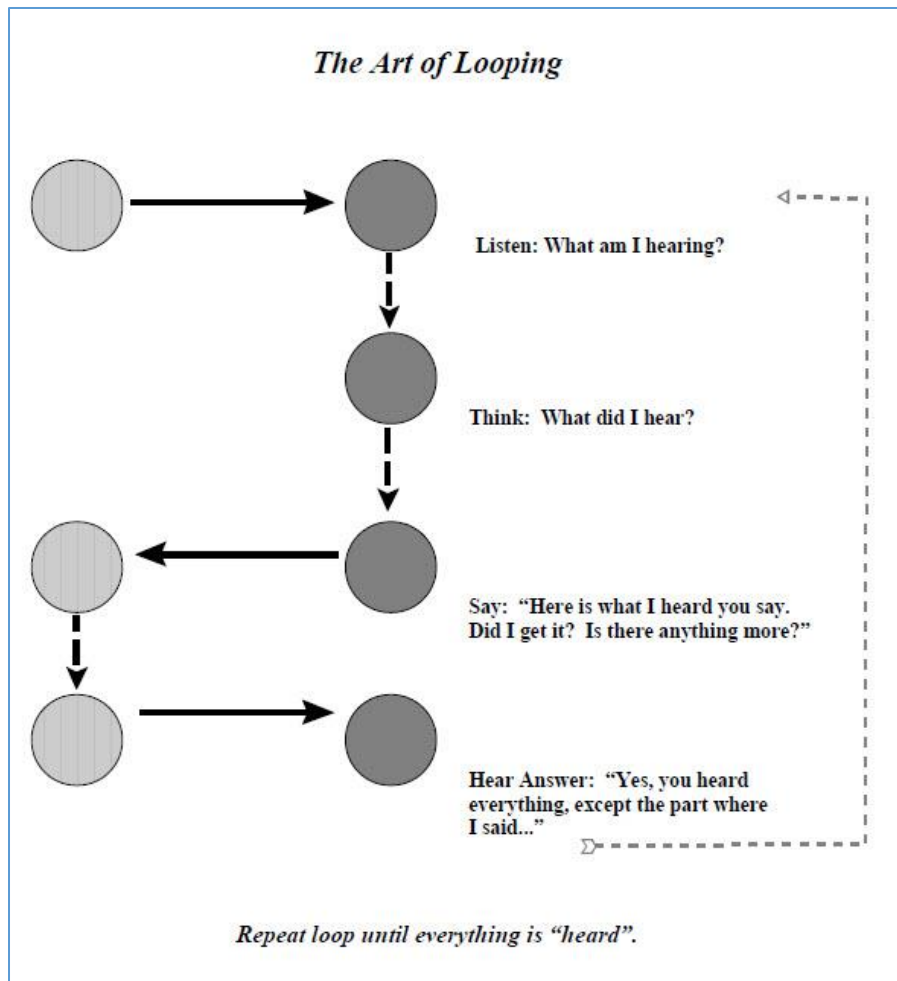
- Acknowledgement is conveying your understanding of emotional and substantive content;
- Acknowledgement is not saying you agree or disagree with what has been said;
- Acknowledgement is demonstrating your interest and respect for what is being said;
- Acknowledgement is allowing the participant feel 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 diagramed.<sup>1</sup>

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<sup>1</sup> 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.



### **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.

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.