

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.

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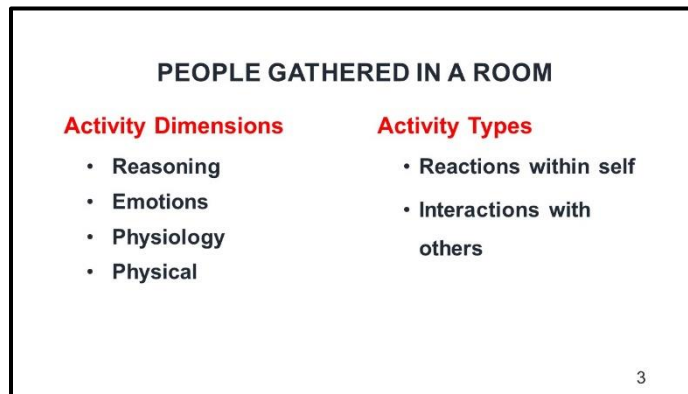
The role of the mediator is both to facilitate the mediation and to participate as a member of the group. On one hand, in the formal mediator role, there are process stages to navigate, such as explaining mediation, obtaining an agreement to mediate, facilitating opening remarks, setting an agenda, and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

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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

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

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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.

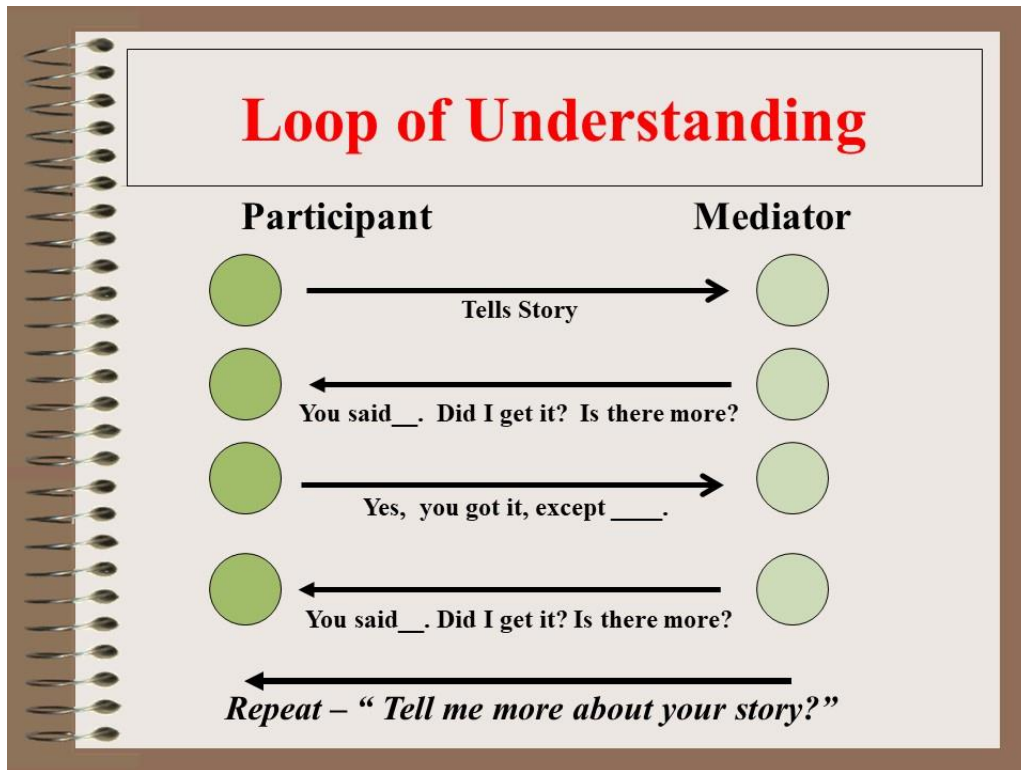
Slowly, the impulse to advocate and to defend softened. As if the supervisor and the employee were learning the acceptance and support of the mediators was real, unshakeable. Slowly, the discussions shifted. Personal needs, such as a need to be respected, and professional values, such as pride in high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

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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. 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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