

MEDIATION HANDOUT*

MEDIATION

Mediation is a voluntary and private process in which a neutral third party (the mediator) facilitates the discussion and identification of issues between the disputants, the development of alternate solutions, and the non-directed negotiation of a mutually satisfying outcome to the dispute. Mediation seeks to prevent conflicts from escalating and the focus in mediation is on mutual acceptability.

- **Mediation is a voluntary process.**

Although all mediation programs function differently, the mediation process is most effective when the disputants are participating of their own free will. This sense of choice allows them to become personally invested in the mediation process, rather than just being invested in the dispute. Although duress of some degree sometimes may be needed to initiate the mediation process, is it recommended that no one be required to participate in the mediation process. Some choice on the part of the participants is essential.

- **Mediation is a private process.**

One reason that mediation is a successful process is that it promotes trust and cooperation between disputants and discourages adversarial behavior. If the disputants are concerned that every word said during the mediation may be shared with others later or possibly be used against them, they may be unwilling to provide information and to invest themselves in the process. There will always be limits to what can be kept private, and it is important that these limits be explained to the parties before the beginning of the mediation process.

- **The mediator is neutral and nondirective.**

For disputants to fully invest themselves in the mediation process, they must feel as though the mediator is acting in a neutral manner, with no interests or agenda of his or her own outside of assisting the parties in resolving their dispute. Additionally, disputants are more likely to invest themselves in any agreement that is reached when they are responsible for developing the agreement and were not directed to take specific actions by the mediator.

*Information taken from Olshak, Rick, ed. "Mastering Mediation: A Guide for Training Mediators in a College and University Setting." Horsham, PA: LRP Publications, 2001.

A SUCCESSFUL MEDIATOR:

- **Trusts the parties.**

An effective mediator must trust in the ability of the disputants to resolve their own disputes. The mediator rarely, if ever, should make suggestions to the disputants. Instead, he should recognize that his responsibility is to establish and control the process in order to resolve the issue from within, and not to control the content of the dispute. An effective mediator recognizes that her or his role is to assist the disputants in opening channels of communication and to promote effective listening.

Mediators sometimes are called on by disputing parties to offer suggestions or solutions. An effective mediator resists this temptation, finding a way to turn the request into a question directed back at the disputants. When mediators provide advice or answers, even with good intentions, they provide an excuse for the parties not to be invested in an agreement once they leave the room.

- **Is neutral.**

Disputants in a mediation session must perceive the mediator as being a neutral party, with no vested interest in any outcome. As a general rule, mediators should not be acquainted with either party involved in the dispute and must not take sides during the mediation, even when one person clearly might be wrong. Effective mediators must be able to put their own feelings aside in any situation in order to assist the disputing parties. Because complete neutrality is hard to find in anyone, mediators must be aware of their own limits and values, and they must be aware of "triggering issues" that might impact their ability to serve as a neutral party. Neutrality is a critical component of the mediation process because parties will not invest themselves in the mediation process if they perceive the mediator as having a bias. Since, in the eyes of a biased mediator the disputants would no longer be on an even playing field.

- **Has excellent listening skills.**

Remember that in many instances disputants have entered the mediation process because they have not been able to communicate effectively with the other party. It is the responsibility of the mediator to get the disputants to communicate with one another by first getting each party to communicate with him or her. The mediator must be invested in listening to what is being said by both disputants and to convince the parties of that. The effective mediator remembers that listening is the only part of a conversation in which we learn something. It also is critical that the mediator remembers that this might be the first time in which the disputing parties are being addressed with acknowledgment rather than argument.

- **Creates a trusting environment.**

In many cases, the disputants have sought the assistance of a mediator because they do not trust one another to negotiate in good faith, based on their previous experiences, their perceptions and/or assumptions. An effective mediator is someone who recognizes that he or she must create as level a playing field as possible in order to establish mutual investment in the process. Additionally, an effective mediator never puts a party in a position where he or she may "lose face" by giving a "wrong" answer. By creating a trusting environment, the mediator assists the parties in working collaboratively with him until they are able to work collaboratively with one another.

- **Is professional.**

An effective mediator is the consummate professional in all instances, no matter what is being discussed or how emotional any person may become. The mediator is prepared prior to the start of a session and begins on time. The effective mediator always uses appropriate language, is respectful to all parties, and treats each person consistently. The mediator does not act emotionally and deals with setbacks in a calm, disarming, and non-defensive manner.

- **Is patient and flexible.**

An effective mediator is a patient person, willing to help the parties no matter how long it takes or how mundane the situation might seem. The mediator treats each disputant with respect and each issue with absolute seriousness. He or she is willing and able to adjust the process "on the fly" to allow parties the flexibility that sometimes is required in order to establish trust and agreement. The effective mediator is a creative helper who provides guidance and support throughout the mediation process.

SOME BENEFITS OF MEDIATION

- Mediation is a voluntary process. Parties elect to participate in mediation because of the potential for better settlement than those available through other procedures involving third-party decision makers. Creative brainstorming of new options is not something that people can be forced to do effectively. No one is coerced into using this alternative dispute procedure. If the parties do not reach an agreement in mediation, other options are still available to the parties.
- Mediation is private and confidential. Mediation provides for a safe environment for the participants to explore options and modify their positions without fear of losing face in front of colleagues and coworkers. In mediation, parties come together in a private and neutral location with an impartial third-party to talk about their conflict and negotiate a resolution to it that addresses the needs and interests of both parties. Whatever is discussed during the session is treated as confidential and will not be disclosed to anyone unless it is expressly requested and agreed by both parties or ethically violates the pre-set parameters of confidentiality.
- Mediation is both timely and convenient. Mediation can be scheduled and held in a matter of days, not weeks or months. This can be critical to intervening in the escalation of conflict and prevent unnecessary delays in finding mutually agreeable resolutions.
- Mediation has a high rate of compliance. Parties who have reached their own "customized" agreement are generally more likely to follow through and abide and comply with its terms than those whose agreement has been imposed by a third-party decision-maker. Parties that negotiate their own settlements have more control over the outcome of their dispute and gains and losses are more predictable when they maintain the decision-making power than when decisions about the outcome of disputes are turned over to outside third parties. Mediation involves mutually satisfactory agreements in which all parties have at least some of their interests met to the degree that they are willing to support the overall agreement.
- Mediation helps preserve ongoing relationships. Mediation agreements, which result in negotiated solutions that address each of the parties' needs (win/win), are much better able to preserve present and future working relationships than win/lose procedures. If a future working relationship is important, a negotiated settlement may be the best resolution possible whereby all-gain solutions are created. Mediation is often a helpful healing process and encourages direct communication between parties. The mutual resolution will also help give the parties a place to start for future interactions.

***The following information was taken from Schrumpf, Fred. "Talk Peace: Resolving Conflicts Through Mediation."**

Mediator Opening Statement

The Opening Statement

The mediator sets the tone and locus of control for the entire mediation with the mediator opening statement. The statement offers a time for disputants to collect themselves and for the mediator to paint the picture of what everyone can expect in mediation. The opening statement sets an "affirming" tone for disputants because of the thoroughness of detail, the sense of fairness, the belief in client capabilities, and the professionalism contained in its message.

The stage needs to be set before the mediator begins speaking. For instance, if there is co-mediation, mediators should arrive one-half hour ahead of time to discuss strategy, mediator style, use of caucus, and division of responsibilities. Set up of the room is also done at this time.

To maintain neutrality, mediators should avoid talking with either party prior to the session. If one party walks in while the mediator is having an informal chat with the other, neutrality may be lost or compromised at the outset. It is imperative to maintain the appearance and the substance of neutrality. As the parties arrive, seat them at the mediation table and go to another room until everyone has arrived.

An opening statement checklist is included with this chapter. It is acceptable to have this at the mediation as a reminder list. This is probably the only part of mediation that can be rehearsed, although it should be

presented as a casual conversation that is not memorized.

- The ideas can be expressed in language that is personally comfortable, yet covers all of the points.
- Use language that disputants can readily understand--not jargon.
- Establish credibility for mediation and the mediators; be professional; it's easier to start out a little formal, and loosen up if appropriate, than to regain control mid-stream.
- Be brief--disputants are generally nervous about the situation and bursting to tell their side of the story; ask them to relax a few minutes while the mediator covers some necessary business prior to discussing the dispute that brought them to mediation.
- Project natural authority and control--the confidence that the mediator will manage the process and ensure a safe environment; insist throughout on courteous behavior; the mediator can take charge of the process through the opening statement.
- Emphasize team work and collaboration; the dispute is not one-sided and they will work together on the problems.
- Give equal attention to both disputants; monitor your body language and eye contact for impartiality.

The parties come to the session without experience in the process and ready to begin with their presentations. A brief statement that the mediator will take a few minutes for an opening statement will relax them so they can listen.

Make introductions. Give your name; introduce your co-mediator; ask disputant names. Come to an agreement on the form of address, whether first or last names.

Ask for introduction of any other parties, including witnesses, attorneys, social workers, family members or friends. Their relationship to the case must be defined and all disputants must concur on the role any other party may take. Only disputants, relevant witnesses and attorneys may be present; all others are excused.

Thank the disputants for choosing the mediation process as a means of resolving their dispute. Set a tone of confidence regarding the mediation process; acknowledge the power of each disputant to participate in the process and to come to his/her own settlement of the issues.

The process of mediation is voluntary and any party is free to leave the process at any time.

Ask if there are any court orders in the case. Restraining orders and anti-harassment orders may forbid face-to-face meetings or mediation. If mediation is forbidden, the session must be immediately suspended, and the mediators depart.

The mediator will maintain confidentiality about the case and will destroy any notes taken during the session. Disputants cannot tape record the session. The only paperwork that

will remain is the signed Mediation Agreement and any signed Settlement Agreement; each party departs with a copy. Nothing said in the mediation can be repeated in court; only the written and signed Settlement Agreement can appear in court. Mediators are not subject to subpoena and may not appear as witness for either party. The exceptions to confidentiality are that by law, mediators must report any threat of bodily harm, and any report of abuse to a child, elder or handicapped person.

Explain the role of the mediator and the principles of impartiality/neutrality. The mediator does not act as judge, jury, attorney or therapist. The mediator does not decide the outcome, place blame or determine liability. The mediator is a neutral facilitator to set the tone, facilitate communication, define issues, clarify expectations, explore feelings, help the parties define their interests and develop options for solution.

The principle of acting in good faith is defined and verbal assent is asked from each disputant. Good faith includes:

- willingness to listen to the other party's perception of the dispute;
- maintaining an open mind and willingness to consider any options toward resolution;
- willingness to negotiate without holding to a fixed position;
- willingness to reveal all pertinent information.

Disputants are asked for verbal assent

to abide by basic rules of common courtesy. This includes listening to each other, no interrupting, avoiding inflammatory language, avoiding name-calling and so on.

The mediator briefly outlines the six stages of the mediation process that involve the disputants, taking particular care to describe the caucus option.

The mediator informs the disputants that the average session requires two to three hours and determines whether each disputant has adequate time available. If not, calendars should be checked and another session scheduled. Inform the disputants that some cases require additional sessions but most can be resolved in one session. (Additional sessions are not scheduled unless the mediators agree that progress is being made and that an additional session is likely to be productive.)

Explain that by law the Mediation Agreement is to be read to the parties in its entirety and signed. Give a copy to each disputant. Read the agreement aloud, ask for questions, reassemble the form, and have each party sign the document. Sign the form as mediator and give a copy to each party.

Transition to the mediation itself may be accomplished with a statement that thanks the parties for their patience with this initial business and reminds them that in the next stage each will have uninterrupted time to describe the situation from their perspectives.

Mediator Opening Statement

Mediation Agreement

I agree to enter into this mediation in good faith. I will sincerely attempt to resolve the issues of this dispute, agree to cooperate with the mediation team assigned to this case, and give serious consideration to all suggestions made in regard to developing a realistic solution to the problem(s).

I understand that the mediation team assigned to this case is not serving as an advocate, attorney or judge. Their only function is to act as a neutral facilitator. Any agreements or decisions resulting from this mediation session are entered into voluntarily and by mutual acceptance of the disputants.

I agree that mediation sessions are confidential settlement negotiations and that all offers, promises, conduct and statements, whether written or oral, made in the course of the proceedings are inadmissible in any litigation or arbitration of this dispute, to the extent allowed by law. The parties agree to not subpoena or otherwise require any or all the mediation teams to testify or produce records, notes or work product in any future proceedings and no recording or stenographic record will be made of the mediation session. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation session.

This agreement is entered into by the following persons:

Mediation Client Date

Mediation Client Date

Mediator Date

Overview of the Process

The Eight Stage Model

The model used is based on eight separate stages that help the mediator and disputants sort out issues and interests, keep the group on track towards resolution, and manage the emotional climate.

In mediation, it is important to help disputants invent many options for mutual gain. It is also necessary to circumvent premature judgment, search for more than just a single answer, and steer clients around the assumption of a fixed pie. By clearly identifying eight steps, the mediator helps the group

- deal with needs
- interrupt limited thinking habits
- clarify
- make decisionmaking easier
- present an environment of fairness and neutrality.

With the eight step process, we work more quickly towards mutual gain. We are able to help each person rather than being caught in power plays, stronger personalities, emotions, and other distracting factors.

The eight stages overlap in actual mediation. However, it is important to acknowledge their separate purposes. Doing so helps the mediator pull things back on track and to find opportunities and issues that may have gotten overlooked in the confusion. Mediator intuition and ability to risk wisely are essential tools, of course. However, the model presented here is a sound, reliable structure on which to guide the mediation process.

The eight steps are

- Preliminary planning, room set-up, and co-mediator and observer briefing (if they are part of mediation.) This is scheduled 30 minutes before the session.
- Mediator opening statement.
- Client initial statements and mediator feedback.
- Agenda building
- Negotiations.
- Caucus (optional).
- Settlement agreement and closure.
- Co-mediator and observer debriefing.

THE PRELIMINARY PLAN STAGE prepares the site to facilitate disputants' sense of comfort and safety in the negotiation of their dispute.

MEDIATOR'S OPENING

STATEMENT establishes rapport with disputants and instills confidence in the process. The mediator explains roles and the process, gets commitment to negotiate in good faith and comply with the ground rules, and determines if the parties have the ability to reach an agreement.

**INITIAL CLIENT STATEMENT/
MEDIATOR FEEDBACK** step allows

the disputants to present their perspectives and to express their emotions. It allows issues and interests to surface and provides opportunity to bring clarification and validation to disputant feelings and concerns. The mediator summarizes, reflects back. Disputants respond to one another, providing additional information for the mediator. At this time, the mediator asks clarifying questions.

AGENDA BUILDING, the mediator helps disputants label, define, prioritize issues. This step sets parameters of mediation and moves and orders the mediation in manageable pieces. Agenda-building helps the parties "own" the dispute and its resolution and becomes the basis for further agreement.

NEGOTIATIONS is the arena for brainstorming solutions, problem-solving, communicating, clarifying, and exploring options. Here it can be helpful in making interests explicit. Solutions are developed and agreed upon.

A **CAUCUS** is optional. In some disputes, there may be more than one caucus. It allows venting, saving face, exploring sensitive or confidential issues or hidden agendas. This is where development and rehearsal of proposals for open session are discussed and rehearsed, if necessary. Caucus permits discussion of the "bottom line", compromises, "what-ifs", trade-offs, and other testing of reality.

THE SETTLEMENT AND CLOSURE permits solutions to become legally binding. At this time, a permanent record of agreement and "ownership" of dispute and solution are created. This is the final stage of negotiations. It is time for tough

reality testing. The closure statement helps parties leave in an optimistic frame of mind. It provides transition to the future.

DEBRIEF is important and should be viewed as mediator "continuing education" or part of the training and on-going training program of becoming a skilled mediator. It provides transition and closure for observers and mediators. Its most important function is to provide feedback for any observers present and the mediator(s).

Mediation Process Summary

Step I:

AGREE TO MEDIATE

Make introductions and explain the Ground Rules.

Mediators remain neutral.

Everything said is confidential.

Take turns talking and listening - No interruptions.

Cooperate to solve the conflict.

Get a commitment to the Ground Rules.

Step II:

GATHER POINTS OF VIEW

Ask each person to tell what happened.

Listen and Summarize.

Ask each person how s/he feels.

Ask each person if s/he has anything to add.

Find out the history of the problem and the relationship.

Listen and Summarize.

Step III:

IDENTIFY INTERESTS

Ask each person what s/he really wants and why.

Listen and Summarize.

Other questions that help identify underlying interests are:

"Why has the other person not done what you wanted?"

"How would you feel if you were the other person?"

"What might happen if you don't reach an agreement?"

Summarize BASIC NEEDS.

Step IV:

CREATE WIN-WIN OPTIONS

Brainstorm possible solutions to the problem.

Use the Brainstorming Worksheet.

Step V:

EVALUATE OPTIONS - DECIDE ON A SOLUTION

Review options.

Find out which options each person is willing to do.

Evaluate the solution:

Is it FAIR, BALANCED, SPECIFIC, AND REALISTIC?

Will it keep the problem from happening again?

Step VI:

WRITE AGREEMENT AND CLOSE

Review the solution.

Write the agreement and sign it.

Shake hands.