Mediation Skills and Process

Presented by

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Mediation Skills and Process

Participant Guide/ Resource Manual

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Northern Virginia Mediation Service (NVMS)

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The conflict resolution field is comprised of many knowledgeable and generous people. NVMS is fortunate to be able to collaborate with many of these practitioners. Their dedication to the field and to helping others attain a level of expertise is special and unique.

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The Designers and Authors of Mediation Skills and Process Program

Designers and Authors (first edition)

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Susan Shearouse has twenty years of experience as a consultant, trainer, mediator and facilitator, helping people resolve their differences, improve their organizations, enhance their conversations, and lead more effectively. Her areas of expertise include improving the productivity of offices and work groups from line staff operations to upper levels of management.

Susan earned a Master of Science in Conflict Resolution from George Mason University in 1988. Since that time, she has served as Executive Director of the National Conference on Peacemaking and Conflict Resolution (NCPCR), as Alternative Dispute Resolution (ADR) Specialist for the Federal Mediation and Conciliation Service (FMCS), and as adjunct faculty at Georgetown University's MBA program and American University's School for International Service. She served for ten years on the Advisory Board of the Institute for Conflict Analysis and Resolution (ICAR) at George Mason University and is a Board member of the Institute for Multi-track Diplomacy. Based on her experience, she recently authored *Conflict 101: A Manager's Guide to Resolving Problems So Everyone Can Get Back to Work,* AMACOM (a division of the American Management Association) 2011.

Ervin Mast, MSW, LCSW

Ervin Mast, is a Virginia Certified Mediator and has been a practicing mediator since 1982. His mediation certifications include General District, Juvenile and Domestic Relations, Circuit Court Civil and Circuit Court Family. He has experience in divorce, family, neighborhood and work place mediation.

He was one of the founding members of the Harrisonburg Community Mediation Center where he served as mediator, trainer, and board president. Over the past decade, hundreds of federal employees from all the major federal departments, have attended his trainings and workshops. His work in mediation and training has taken him to Ukraine where he has served as a consultant and provided training for mediators and mediation trainers. Ervin Mast is currently an associate of Commonwealth Mediation Group, Inc. in Richmond, Virginia where he provides mediation, mediation training, and consultation services.

He holds a Bachelor of Arts degree from Eastern Mennonite University, Masters in Social Work degree from Tulane University, and has completed substantial post-graduate level education in family studies at

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Designers and Authors (second edition)

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Tracey Pilkerton Cairnie is a court certified mediator/mentor, ICF certified coach, facilitator, and trainer. She holds an advanced degree in conflict analysis and resolution and an undergraduate degree in public administration. She specializes in relationship and group dynamics, and management and leadership optimization. She mediates resolutions and provides coaching to individuals and teams.

As a conflict specialist, Tracey works with families, communities, businesses and organizations. She assists her clients in identifying the appropriate stakeholders, decision-making models, and best modes of facilitating effective communication. She works closely with her clients in clearly articulating the issues, interests, and desired outcomes. She facilitates discussions around action planning, implementation, and evaluation. Tracey is familiar with identifying and helping to reconcile competing interests. Dispute resolution services include workplace (EEO, interpersonal relations, inter and intra- agency dynamics), community (land use, tenant/landlord, public policies, home owner associations), families (property distribution, parenting plans, custody, visitation, adoptions), business (management/labor, contracts, generational planning, change management, strategic planning), and other services as required.

As a trainer and coach, Tracey provides an extensive menu of self-help workshops and training seminars specifically tailored to the clients' needs. Her training tools are suitable for small groups and large audiences and have proven highly effective for individuals and organizations working or operating within the private, public, and non-profit environments. She offers unique, one-on-one coaching for individuals to help them better understand their own management and leadership style and enhance their capacity for achieving more effective communications with staff, peers and senior executives. She also provides team coaching to help people engage more effectively in order to achieve organizational goals.

Tracey is an adjunct-professor at George Mason University. She teaches collaborative communication, mediation, and negotiation skills as well as conflict theory and alternative dispute resolution.

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Jim Pope is an attorney, Supreme Court of Virginia certified mentor mediator, and consultant in conflict management and other subjects related to workplace conflict, employee relations, civil disputes, child support and divorce, and special education. Pope is currently an Adjunct Professor of Mediation and Arbitration at the Catholic University Columbus School of Law and an Adjunct Professor of Mediation at George Mason University School of Law, and has been a guest lecturer at George Washington University School of Law, Georgetown University School of Law, and Howard University School of Law.

Pope conducted US Department of State sponsored mediation trainings for the governments of Israel and Palestine and mediated and conducted conflict management, mediation, and negotiation trainings for numerous public and private agencies and organizations, including the U.S. Postal Service, the USDA., the Department of the Navy, NOAA, NASA, NEA, FAA, US Air Force, US Forest Service, the World Bank, the Equal Employment Opportunity Commission, Arkansas Supreme Court, IRS, United States Postal Service, DEA, National Archives, Virginia Supreme Court, Virginia Mediation Network, and Northern Virginia Mediation Service. Pope currently serves as an administrative hearing officer for the Virginia Supreme Court, in which capacity Pope reviews and rules upon state employee grievances related to terminations and disciplinary actions. Pope is a former member of the Executive Board of the District of Columbia chapter of the Association for Conflict Resolution (formerly the Society of Professionals in Dispute Resolution - DC SPIDR). Pope holds a Doctorate of Jurisprudence (JD) from

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Editor

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Chapter 1

Introduction: Mediation in Context

Dissatisfaction with the Legal System

Because of the exponential growth of litigation and the use of the legal system to resolve disputes and social issues, a great deal of dissatisfaction with the legal system has arisen in the last few decades. The sources of this dissatisfaction include the high cost of lawyers and the legal system, the lengthy delays which can occur, the uncertainty of the outcome due to the vagaries of judges and juries, the loss of privacy which can occur with public trials and the extensive discovery process, the time consumed preparing a case, and the arcane and frustrating procedural requirements inherent in the legal system. When the dispute is between people with a continuing relationship, such as neighbors, divorcing parents and co-workers, the stresses of litigation are compounded that much more. All of these elements have fueled the dissatisfaction with the legal system and the search for alternatives.

Alternative Dispute Resolution

Mediation is one of a number of forms of ***Alternative Dispute Resolution*** (ADR). Other forms include arbitration, mini-trials, early neutral evaluation, private judging and screening-panels. With the exception of mediation, all of these forms of ADR are similar to the litigation model. That is, they all use a system of advocates (lawyers) who represent their respective clients' cases to a third-party decision maker similar to a judge. Arbitration is often a binding decision-making process in which the arbitrator hears evidence and renders a decision. In neutral expert evaluation, the attorneys represent their cases to a third attorney who has many years of experience who renders an informal opinion emphasizing the strengths and weaknesses of their cases – with the purpose of giving a more realistic basis for out-or-court settlement. Private judging is identical to standard litigation but uses former judges to hear cases in private courtrooms. Screening panels are used like neutral experts to evaluate cases at an early stage and encourage settlement or dismissal of cases unlikely to be successful.

Mediation is a Unique Form of ADR

Unlike other forms of ADR, mediation is not just a tool for attorneys to settle their cases before trial. Mediation is unique in that it encourages the principals to deal directly with each other, to treat the dispute as a mutual problem to be solved, to explore multiple options for resolution, to treat each other and their separate issues with respect and to focus on what they will do in the future rather than what has happened in the past. Unlike all the other forms of ADR, the third-party neutral (the mediator) is not a decision-maker or an expert adviser who will render an opinion. Instead the mediator facilitates the negotiations between the parties, enabling them to find their own, mutually acceptable solutions.

Mediation: A Different Role for a Different Question

Litigation usually asks the question: "Who is most at fault and how much should he or she lose?" Mediation asks questions, such as: "We're getting a divorce, how shall we continue to parent our children?" Or, "the car that was sold was defective, what will we do about this transportation problem?" Or, "What needs to be done to improve our working relationship or correct the work environment (e.g. When impaired by sexual or racial comments or actions)?" In short, legal problem-solving involves looking at rights and the remedies inferred from those rights, whereas mediation problem-solving involves looking at needs, interests, values and goals and the solutions, which will meet them.

Because different types of questions are asked by mediation as opposed to other forms of dispute resolution, the role of the neutral is different as well. In litigation and non-mediation ADR, the role of the neutral is to facilitate the analysis of facts, which can be compared to a standard (i.e. a law or set of laws or regulations). The role of the neutral is to facilitate problem-solving between the parties. This difference in role highlights the principle that ***most forms of ADR have a great deal in common with litigation while mediation is a fundamentally different approach.***

Mediator Training

Mediation is a fundamentally different process from litigation and other forms of ADR and the role of the mediator contrasts sharply with the roles of lawyers, judges and arbitrators. These differences require mediators to get special training in the skills and processes used in mediation.

This manual accompanies a twenty-hour training program in professional mediation skills and process. The training curriculum focuses on the following three general areas:

Values: People who choose to engage in mediation training, generally hold certain values about what they believe is best for people, about what is the best way to resolve conflicts and the appropriateness of people in conflict resolving their own problems. These values undergird the principles and skills taught in this class and include the value of self-determination and that the best problem-solving takes place when people resolve their own problems and make their own decisions.

Knowledge: This class identifies and teaches the areas of knowledge that are crucial for successful mediation. Participants need to demonstrate mastery of the substantive knowledge areas before moving forward with the next steps in their preparation as mediators.

Skills: In addition to holding foundational values and understanding what they need to know, participants will also need to develop and demonstrate mastery of specific skills as mediators. This can only be accomplished through practice and experience. For this reason, a major part of this course involves experiential activities that provide the context for skill development. The following skill areas are the focus of this training:

- **Conflict Resolution –** Understanding conflict, conflict styles and the application of conflict resolution methods.

- **Negotiation –** Mediation is the facilitation of negotiations between two parties in conflict. Understanding the negotiation process enhances the skills of the mediator.

- **Problem solving** – Problem-solving is an essential skill for the mediator. Participants practice identifying he issues in the problem, generating possible solutions, evaluating the options, and selecting and testing the best solution.

- **Communications** – Mediation training requires learning and practicing effective listening and communications skills.

- **Practice Skills** – Additional skills needed for effective mediation include balancing power, option generation, consensus building, working with co-mediators, dealing with strong emotions, and others.

Chapter 2

Understanding Conflict

A logical place to begin the study of mediation skills and process is to examine the nature of conflict and typical strategies for dealing with conflict. In this chapter, several aspects of the origins of conflict and conflict resolution approaches will be explored.

The Sources of Conflict

Given the many ways of human interaction, there are also many ways in which conflict arises between them. This section explores several typical sources of human conflict and associated implications for mediation. The idea that most conflicts are problems with communication and the solution is to improve communications is a myth. There are multiple sources of conflict, many of which interact with each other in a given conflict.

Strategies for Dealing with Conflict

For each source of conflict between people, there are different strategies for conflict resolution.

Conflict Styles

This section examines five typical responses to conflict. These responses find their expression in the work place, at home, by neighbors, and wherever people interact with each other over a period of time.

Causes of Conflict and Possible Interventions

DATA CONFLICTS

- Lack of information
- Misinformation
- Differing views of which information is relevant
- Different interpretation on the meaning of information
- Different procedures or approaches to assessment of information

Possible Interventions

- Reach agreement on information that is needed
- Develop agreement on how the information will be obtained
- Develop agreement on criteria to assess information
- Use outside, neutral experts to gain additional opinion

INTEREST OR GOAL CONFLICTS

- Perceived or actual differences in hoped for outcomes
- Substantive interests (What substantive issues need settlement?)
- Procedural interests (How will the decisions be made?)
- Psychological interests (Respect, good faith, etc.)

Possible Interventions

- Focus on interests and preferences, not on positions
- Help parties develop objective criteria for evaluation
- Expand available options and resources
- Develop solutions that meet the needs of all parties
- Develop tradeoffs among interests of varying strengths

STRUCTURAL CONFLICTS

- Unequal control, ownership, or distribution of resources
- Unequal power and authority
- Geographical, physical or environmental factors
- Time constraints
- Destructive patterns of behavior or interaction

Possible Interventions

- Assist parties to define and change roles
- Help parties to shift ownership or control of resources
- Focus on interest based negotiation

- Help parties to move from coercive tactics to persuasion
- Change physical and environmental relationships of parties
- Modify time constraints by negotiating more or less time

VALUE CONFLICTS

- Different criteria for evaluating ideas and goals
- How to achieve valuable and intrinsically good goals
- Different life styles
- Ideological and religious differences

Possible Interventions

- Avoid the values laden issues and focus on behavioral issues
- Allow parties to agree and disagree
- Identify commonalities in goals and means for achieving them
- Acknowledge and respect each person's values and beliefs

RELATIONSHIP CONFLICTS

- Strong emotional reactions to each other
- Misperceptions or stereotypes about the other party
- Poor communication
- Miscommunication
- Repetitive negative behavior
- Patterned cycle of nonproductive, escalating interaction

Possible Interventions

- Use ground rules, caucus and reframing
- Model appropriate, productive interaction
- Support expression of emotion via non-judgmental acceptance
- Coach communication and interactions of parties
- Clarify perceptions and build positive perceptions

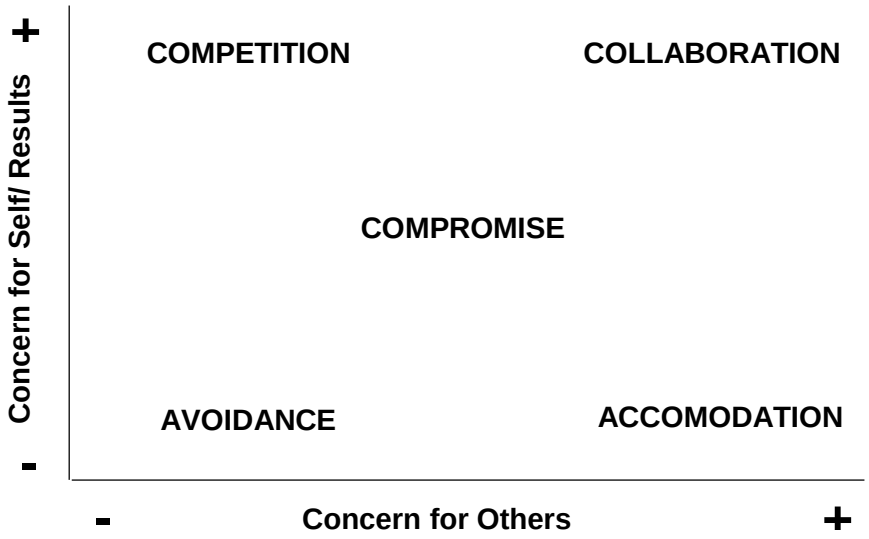
Strategies for Responding to Conflict

Other strategies for dealing with conflict in the workplace, in addition to aggression and collaboration, are quite common. When we find ourselves faced with conflict, we typically resort to one or more of the following:

Avoidance **Competition** **Collaboration**

Accommodation **Compromise**

The following chart, based on the research conducted by Thomas and Killmann, shows the relationship between the five identified strategies. The chart differentiates the strategies that are employed based upon our concern for people versus our concern for self or results.



The horizontal axis represents the degree of concern for others that may be exhibited as one is involved in a conflict. The vertical axis exhibits, in a similar manner, the degree of concern for self or results. For example, a person taking an aggressive strategy is exhibiting a high degree of concern for self or results and a low degree of concern for others. A person employing an accommodating strategy is exhibiting just the opposite, a high concern for others and a low concern for self.

Each of these approaches is appropriate in some circumstances, and inappropriate in others. Difficulties arise when an individual uses one or two approaches exclusively.

"*When the only tool you have is a hammer, every problem looks like a nail*."

Effectively dealing with difficult behaviors begins with:

- Being aware of the differences in these approaches and the thinking behind these differences,
- Being able to shift approaches based on the situation, and
- Developing skills to respond effectively to other people's patterns when their approaches are working against reaching a positive solution.

AVOIDANCE *"Conflict? What Conflict?"*

- Strategies: flee, deny, ignore, withdraw
- Often **Appropriate** when: the issue is relatively unimportant, the risks of harm are too high, time is short or a decision is not necessary
- Often **Inappropriate** when: negative feelings may linger, resentment may build, problems which need to be addressed are not resolved
- Often the choice when people fear the consequences of raising issues.
- **To respond:** create a safe environment for solving problems

ACCOMMODATION *"Whatever you want is OK with me."*

- Strategies: agree, appease
- Often **Appropriate** when: issue is more important to the other person, tasks involved are part of your work responsibility, favors and requests are traded over time
- Often **Inappropriate** when: others could benefit from your wisdom and experience; habitual use builds resentment
- Often the choice when people are concerned about the relationship.
- **To respond:** Raise issues without confrontation; assure others that the relationship is NOT the issue.

COMPETITION *"My way or the highway."*

- Strategies: confront, control, contest, coerce
- Often **Appropriate** when: differing ideas and opinions need to be expressed, when an immediate decision is needed, or when energy is generated for accomplishing tasks
- Often **Inappropriate** when: cooperation from others is important to implementation and buy-in, win-lose dynamics are created, or others are treated with disrespect.
- Often the choice when a person wants respect or control of the situation.
- **To respond:** respect the person's knowledge and experience, help them identify how it is in their best interest to cooperate or collaborate.

COMPROMISE ***"Let's split the difference."***

- Strategies: bargain, reduce expectations, split the difference
- Often **Appropriate** when: finding some solution is better than a stalemate, cooperation is important but time & resources are limited
- Often **Inappropriate** when: you can't live with the consequences, finding solutions which better meet the needs of those involved may be possible
- Often the choice when people are bargaining over positions, or want to find a quick solution. **To respond:** Slow down. Clarify the issues and interests before considering possible solutions.

COLLABORATION ***"How can we solve this problem?"***

- Strategies: gather information, look for alternatives, dialogue, welcome differing views
- Often **Appropriate** when: the issues & relationship are both significant to those involved, cooperation and buy-in are essential to implementation, there is reasonable expectation of addressing concerns of everyone
- Often **Inappropriate** when: time is short, the issues are unimportant, finite resources make it impossible to create a solution that meets everyone's needs
- Often the choice when a person or group wants joint ownership of decisions.
- **To respond:** set realistic, definite deadlines for decision making. Allow individual to take responsibility for decisions without unreasonable fear.

Chapter 3

Interest Based Negotiation and Mediation in Context

Continuum of Conflict Management and Resolution Approaches

Private decision making by parties				Private third-party decision making			Legal (public) authoritative third-party decision making		Extra-legal coerced decision making	
Conflict Avoidance	Informed discussion and problem solving	Negotiation	Mediation	Early neutral evaluation	Arbitration	Administrative decision making	Judicial decision making	Legislative decision making	Nonviolent	Violent

Increased coercion and likelihood of win-lose outcome

Low — High

Adversarial vs Interest-Based Approaches to Conflict Resolution

Negotiation is the most frequently used method for resolving disputes. Successful negotiation generally is a positive experience in which each party has successfully achieved his/her interests and is satisfied with the process and the outcome. Negotiation based upon achievement of interests is a non-adversarial approach to resolution of conflict.

Generally, the mediator is called upon to intervene in disputes in which the parties have taken an adversarial approach to dealing with their conflict and have clearly identified positions on the issues and their desired outcomes. The role of the mediator is to help the parties move from their adversarial positions to an interest based, problem-solving strategy. What follows is an attempt to contrast the two approaches.

Communication Styles

ADVERSARIAL	INTEREST-BASED
Information flow is CLOSED	**Information flow is OPEN**
Information is withheld Parties employ deception and misinformation Secrecy is valued as an effective tactic	Information is shared Communications are more open and honest Accurate communications ensures that interests can be met
COMMUNICATIONS ARE ONE-WAY	**COMMUNICATIONS ARE TWO-WAY**
Parties “Point fingers” Communications involve blaming and fault finding Communications are indirect; Parties talk at or past each other Parties think about how they will respond while the other person is talking	Parties identify their needs Parties look for ways to cooperated and move forward Communications are direct; Parties talk to each other Parties listen carefully for clues to an acceptable solution

Negotiating Climate

ADVERSARIAL	INTEREST-BASED
The climate is TENSE and FORMAL	**The climate is RELAXED and INFORMAL**
The parties may be hostile and personal The parties are suspicious and lack trust in the other party Selfishness prevails Parties are focused on conflicting views of the past Parties aggressively pursue their own interests Parties maintain a defensive posture	Parties pretend to be polite and business like An environment of trust is created Mutuality prevails Planning for the future becomes the focus Parties assertively make their own preferences known Parties are more accepting of each other and take mutual responsibility

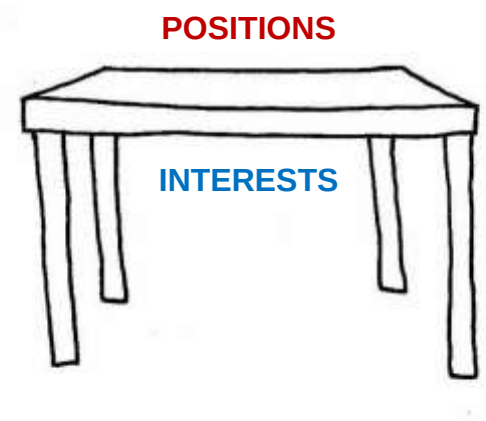
Tactics and Techniques

ADVERSARIAL	INTEREST-BASED
Bargaining is based on declared positions Parties try to attack and discredit each other and their positions Unilaterally selected standards are used to support decisions Concessions are used to advance positions Power, threats and coercion are used to gain concessions Trade-offs and compromises are the primary ways to get agreements	Bargaining is based upon identifying and working with interests Each party tries to identify and solve the problem Mutually agreed upon standards are used to identify solutions Brainstorming is used to create satisfactory options Persuasion is used to gain one's preferences Consensus-building is used to reach agreement

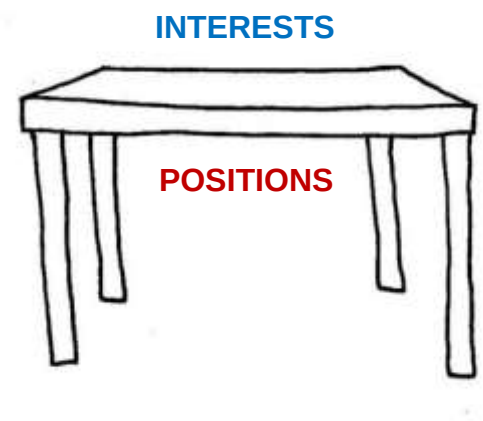
Outcomes and Consequences

ADVERSARIAL	INTEREST-BASED
Outcomes are likely to be win/lose or lose/lose	Mutually acceptable solutions are possible
Parties are left with scars	Parties retain their dignity and gain mutual respect
Parties may feel alienated from each other and their constituent groups	Parties' relationships remain intact and/or are enhanced
Outcomes may be the result of exchanging concessions while maintaining positions	Mutual needs and interests are met
Feelings of having been overpowered or having overpowered the other may be the result	Mutual ownership of the outcome and the process creates satisfaction and respect

ADVERSARIAL APPROACH



PRROBLEM-SOLVING/ INTEREST-BASED APPROACH



ISSUES

An issue is what the dispute is about

- To identify, ask open-ended questions
- List issues in neutral terms
- Negotiation seeks solutions to issues

POSITIONS

A position is what is insisted on

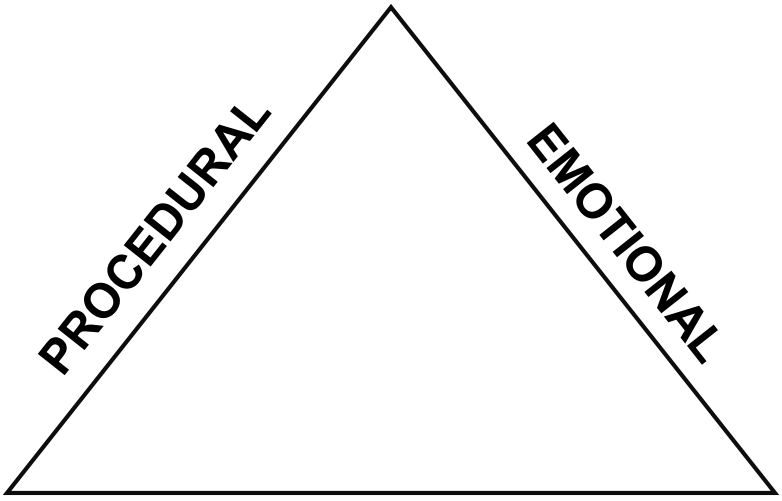
- Usually the positions are articulated first
- Positions cannot be negotiated
- Create doubts about the positions

INTERESTS

Interests often under gird/support positions

- Basic human needs may underlie interests
- What are the parties' concerns, desires, underlying needs, motivations, or explanations?
- Identifying interests opens the door to negotiation

THE SATISFACTION TRIANGLE



Conflict resolution by whatever method has to meet the needs and interests of the parties involved. That is to say that the means to resolution of the conflict is often as important as the solution. There are three important aspects of satisfaction that need to be met.

SUBSTANTIVE – This refers to the actual outcomes or solutions created in mediation. People seek out mediation or other forms of conflict resolution as a way of getting something they want.

TO SATISFY

- Move beyond positions. Why is the position important? What kind of need are they trying to meet by holding to the position?
- Manage expectations. Help parties become clear about their expectations and help them examine how realistic or unrealistic they are.
- Establish goals and guidelines for the parties so that they have a basis for establishing the adequacy and/or fairness of the proposed solutions.

PROCEDURAL – This has to do with how the decisions are made. When people are aware of how decisions are being made and feel satisfied with the fairness of it all, they often find it easy to settle for less than what they wanted. A main concern that people have is that they are involved in making the decisions that will affect their lives.

TO SATISFY

- Be clear with the parties about how decisions will be made and how they will be involved.
- Describe the role of the mediator and explain in some detail how the mediation process works.
- Help all parties to be involved in identifying issues, exploring possible options, and choosing the option that will work the best.

EMOTIONAL – Parties will need to feel that they were heard and respected. Parties will need to feel safe within the context of the mediation session. When they feel threatened or discounted when they make their desires and preferences known, they are less likely to feel satisfied with the decisions that are made.

TO SATISFY

- Create ground rules at the beginning of the session. Helpful ground rules are that they may not attack each other, to listen while the other party is talking, and not to engage in calling each other names.
- Be clear about confidentiality. Outline exceptions to confidentiality.
- Provide safe ways for people to express their emotions.

Chapter 4

Introduction to Mediation: An Overview

In Chapter 3, we learned and practiced the concepts and skills involved in the negotiation process. In this chapter we will examine the overall mediation process before learning in detail and practicing each step.

This chapter will focus on:

- ***A Definition Of Mediation***

  A useful definition of mediation that provides information about the mediation process, the role of the mediator and the task and responsibility of the disputants will be provided.

- ***Mediator Styles***

  In this section we will focus on three mediator styles that are currently a part of the dialogue that is going on and is being utilized in mediator circles.

- ***The Mediation Process***

  This section identifies each stage of the mediation process and examines what functions each serves and identifies the mediator's activities during each stage.

- ***Understanding Mediation based upon the Virginia Statutes***

  The Virginia Code will be reviewed to discover how mediation is viewed by lawmakers in the State of Virginia.

- ***Ethical Considerations in Initiating the Mediation Process***

  The ethical and practical questions that emerge during early stages of the mediation process will be identified and discussed.

Mediation: A Definition

Mediation is a ***PROCESS*** in which an ***IMPARTIAL*** third party ***ASSISTS*** disputants in finding a ***MUTUALLY ACCEPTABLE SOLUTION*** to their conflict. It is both ***VOLUNTARY*** and ***CONFIDENTIAL.***

Process – Steps taken to move from one point to another. In this class we will explore a four-stage process. Other mediation training may include eight or twelve steps, breaking the same tasks into different components. This is an American/Western European model for resolving conflicts. Other cultures have different approaches that are effective and valid. When using this process, it is important to remember and respect these differences, and to adjust the process accordingly. In addition, for training purposes, these stages are taught in a straight-line sequence. In dealing with people in live discussions, this may be more of a spiral moving forward than the simple structure of four stages.

Impartial – having no stake in the outcome. Mediators are human beings. We have biases and points of view. The challenge for us is to be aware of those judgments, and to keep our task focus on being available to meet the parties' needs and values, rather than our own.

Assists – The mediator assists people in negotiation. It is not doing the problem-solving for them, nor imposing processes or decisions on the parties.

Mutually Acceptable – Solutions derived through mediation must be acceptable to the parties involved. Whether or not they are acceptable to the mediator is irrelevant.

Voluntary – No one in mediation is compelled to reach agreement or accept decisions. If either of the parties decides that they do not want to reach solutions through this process, they may withdraw. (The mediator can expect this withdrawal to be based on a discussion with the mediator, not simply accomplished by walking out or not coming to a scheduled meeting.) Keeping the terms of a signed agreement is not voluntary but should be considered a contractual relationship between the parties.

Confidential – The mediator will not disclose information about any discussion or behaviors that took place in mediation. This includes court testimony as well as any reports to agencies or offices not represented in the mediation. There are some exceptions to confidentiality as outlined later in this chapter. The ability to maintain confidentiality in mediation is essential to the effectiveness of the process.

Mediator Styles

While there is some overall consensus in the mediation community as to what mediation is and what it is not, several stylistic differences have been developed in mediator approaches to the mediation process. The most common style differences are represented in the transformative, facilitative, and evaluative styles. The Virginia Code of Professional Conduct for mediators states that mediators have an ethical and professional obligation to inform the parties of their individual mediation style prior to continuing with mediation.

Transformative Mediation – The central goal of transformative mediation is the development of empowerment and recognition (development of self-efficacy and relational skills). In transformative mediation the process emphasizes the parties' understanding of their relationship, the history of their behaviors and some of the reasons for those behaviors. The focus in on fully understanding each other and their situation which will enable the parties to move toward an agreement or they may find that an agreement is not necessary. The goal of developing an agreement is secondary to the relational agenda of the process.

For Example: *A couple is involved in a dispute with their former landlord who requests compensation for their having left the premises without cleaning up, breaking the front door, etc. Their attempt at dealing with this by phone only led to anger, misunderstanding and recriminations. The parties met with a mediator who helped them explore their past relationship, exchange assurances and apologies and to voice their desire to restore their former good relationship. The parties discovered that they could talk with each other and create understandings. The couple agreed to spend a day cleaning up and fixing things and the landlord agreed to return all their deposit. The important point is that once the relationship was restored, they were able to come up with a solution on their own.*

Facilitative Mediation – The facilitative approach incorporates elements of the transformative approach. The mediator recognizes that the likelihood of an agreement working out for the parties in the long run is enhanced if their history, dysfunctional interactions, and hurts of the past are understood and if they can develop new ways of relating to each other. At the same time, the mediator provides a structure and procedures so they can move systematically toward solutions to their conflicts.

For Example: *The mediator is always very clear with the parties that they, not the mediator, are responsible for identifying issues, developing options, and selecting the solutions that work the best for them. The mediator does not suggest the best solution or provide evaluations or judgments of their merits.*

Evaluative Mediation – The evaluative mediator may provide an advisory opinion as to the relative legal merits of the parties' case. The mediator who evaluates the merits of the respective parties' cases departs from two important tenets of the mediation process, client self-determination and mediator impartiality. As long as the parties do not expect an impartial mediator, an evaluative approach can be effective in some cases. If the parties are aware that the mediator will provide evaluation of the merits of their case, they may find themselves focusing on making a strong case rather than focusing on solutions that define their relational future.

THE MEDIATION PROCESS: A BRIEF SUMMARY

STAGE I: ORIENTATION: (SETTING THE STAGE)

THE ORIENTATION STAGE INVOLVES THE FOLLOWING TASKS:

PRIMARY GOAL: DEVELOPING TRUST IN THE MEDIATOR AND THE PROCESS

1. Welcoming, introductions, making initial connections.
2. Outlining how the process works along with procedures.
3. Describing the role of the mediator.
4. Cover ground rules, confidentiality, etc.
5. Go over Agreement to Mediate.

STAGE II: IDENTIFYING ISSUES & UNDERSTANDING PARTIES

THIS STAGE INVOLVES THE FOLLOWING TASKS:

PRIMARY GOAL: GETTING THE ISSUES AND PERSPECTIVES ON THE TABLE

1. Hearing the perspective of each party without interruptions from the other party.
2. Paraphrasing by the mediators.
3. Summarizing by the mediators.
4. Accepting and responding to intense emotions and feelings.
5. Open ended questions.
6. Listing the issues.

STAGE III: PROBLEM-SOLVING

THE PROBLEM-SOLVING STAGE INVOLVES THE FOLLOWING TASKS:

PRIMARY GOAL: GENERATING AGREED UPON SOLUTIONS

1. Assist parties in clarifying and prioritizing issues to be resolved.
2. Assist parties in generation of possible options for each issue.
3. Help parties in evaluating options and selecting the one that will work the best.
4. Assist parties in moving from positions to interests.
5. Help parties identify short and long-term issues and associated solutions.
6. Mediators will reframe, launder language, paraphrase, summarize.

STAGE IV: WRITING THE AGREEMENT

THE AGREEMENT WRITING STAGE INVOLVES THE FOLLOWING TASKS:

PRIMARY GOAL: RECORD THE SELECTED SOLUTIONS INTO A WRITTEN DOCUMENT

1. Serving as scribe in composing an organized, professional looking document.
2. Assisting parties to include the important specifics they may need.
3. Assisting parties in planning next steps after the memo of agreement is completed.
4. Preparing parties for explaining the document to others who may be affected.

Mediation Statues

Chapter 20.2

Court-Referred Dispute Resolution Proceedings

§ 8.01-576.4. Scope and definitions.

The provisions of this chapter apply only to court-referred dispute resolution services.

As used in this chapter:

"***Conciliation"*** means a process in which a neutral facilitates settlement by clarifying issues and serving as an intermediary for negotiations in a manner which is generally more informal and less structured than mediation.

"Court" means any juvenile and domestic relations district court, general district court, circuit court, or appellate court, and includes the judges and any intake specialist to whom the judge has delegated specific authority under this chapter.

"Dispute resolution proceeding" means any structured process in which a neutral assists disputants in reaching a voluntary settlement by means of dispute resolution techniques such as mediation, conciliation, early neutral evaluation, non-judicial settlement conferences or any other proceeding leading to a voluntary settlement conducted consistent with the requirements of this chapter. The term includes the orientation session.

"Dispute resolution program" means a program that offers dispute resolution services to the public, which is run by the Commonwealth or any private for-profit or not-for-profit organization, political subdivision, or public corporation, or a combination of these.

"Dispute resolution services" includes screening and intake of disputants, conducting dispute resolution proceedings, drafting agreements and providing information or referral services.

"Intake specialist" means an individual who is trained in analyzing and screening cases to assist in determining whether a case is appropriate for referral to a dispute resolution proceeding.

"Mediation" means a process in which a neutral facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute.

"Neutral" means an individual who is trained or experienced in conducting dispute resolution proceedings and in providing dispute resolution services.

"Orientation session" means a preliminary meeting during which the dispute resolution proceeding is explained to the parties and the parties and the neutral assess the case and decide whether to continue with a dispute resolution proceeding or adjudication.

§ 8.01-576.5. Referral of disputes to dispute resolution proceedings.

While protecting the right to trial by jury, a court, on its own motion or on motion of one of the parties, may refer any contested civil matter, or selected issues in a civil matter, to an orientation session in order to encourage the early resolution of disputes through the use of procedures that facilitate (i) open communication between the parties about the issues in the dispute, (ii) full exploration of the range of options to resolve the dispute, (iii) improvement in the relationship between the parties, and (iv) control by the parties over the outcome of the dispute. The neutral or intake specialist conducting the orientation session shall provide information regarding dispute resolution options available to the parties, screen for factors that would make the case inappropriate for a dispute resolution proceeding, and assist the parties in determining whether their case is suitable for a dispute resolution process such as mediation. The court shall set a date for the parties to return to court in accordance with its regular docket and procedure, irrespective of the referral to an orientation session. The parties shall notify the court, in writing, if the dispute is resolved prior to the return date.

Upon such referral, the parties shall attend one orientation session unless excused pursuant to § 8.01-576.6. Further participation in a dispute resolution proceeding shall be by consent of all parties. Attorneys for any party may participate in a dispute resolution proceeding.

§ 8.01-576.6. Notice and opportunity to object.

When a court has determined that referral to an orientation session is appropriate, an order of referral to a neutral or to a dispute resolution program shall be entered and the parties shall be so notified as expeditiously as possible. The court shall excuse the parties from participation in an orientation session if, within fourteen days after entry of the order, a written statement signed by any party is filed with the court, stating that the dispute resolution process has been explained to the party and he objects to the referral.

§ 8.01-576.7. Costs.

The orientation session shall be conducted at no cost to the parties. Unless otherwise provided by law, the cost of any subsequent dispute resolution proceeding shall be as agreed to by the parties and the neutral.

§ 8.01-576.8. Qualifications of neutrals; referral.

A neutral who provides dispute resolution services other than mediation pursuant to this chapter shall provide the court with a written statement of qualifications, describing the neutral's background and relevant training and experience in the field. A dispute resolution program may satisfy the requirements of this section on behalf of its neutrals by providing the court with a written statement of the background, training, experience, and certification, as appropriate, of any neutral who participates in its program. A neutral who desires to provide mediation and receive referrals from the court shall be certified pursuant to guidelines promulgated by the Judicial Council of Virginia. The court shall maintain a list of mediators certified pursuant to guidelines promulgated by the Judicial Council and may maintain a list of neutrals and dispute resolution programs which have met the requirements of this section. The list may be divided among the areas of specialization or expertise of the neutrals.

At the conclusion of the orientation session, or no later than ten days thereafter, parties electing to continue with the dispute resolution proceeding may: (i) continue with the neutral who conducted the orientation session, (ii) select any neutral or dispute resolution program from the list maintained by the court to conduct such proceedings, or (iii) pursue any other alternative for voluntarily resolving the dispute to which the parties agree. If the parties choose to proceed with the dispute resolution proceeding but are unable to agree on a neutral or dispute resolution program during that period, the court shall refer the case to a neutral or dispute resolution program who accepts such referrals, on the list maintained by the court on the basis of a fair and equitable rotation, taking into account the subject matter of the dispute and the expertise of the neutral, as appropriate. If one or more of the parties is indigent or no agreement as to payment is reached between the parties and a neutral, the court shall set a reasonable fee for the service of any neutral who accepts such referral pursuant to this paragraph.

§ 8.01-576.9. Standards and duties of neutrals; confidentiality; liability.

A neutral selected to conduct a dispute resolution proceeding under this chapter may encourage and assist the parties in reaching a resolution of their dispute, but may not compel or coerce the parties into entering into a settlement agreement. A neutral has an obligation to remain impartial and free from conflict of interests in each case, and to decline to participate further in a case should such partiality or conflict arise. Unless expressly authorized by the disclosing party, the neutral may not disclose to either party information relating to the subject matter of the dispute resolution proceeding provided to him in confidence by the other. In reporting on the outcome of the dispute resolution proceeding to the referring court, the neutral shall indicate whether an agreement was reached, the terms of the agreement if authorized by the parties, the fact that no agreement was reached, or the fact that the orientation session or mediation did not occur. The neutral shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the dispute resolution proceeding, unless the parties otherwise agree.

However, where the dispute involves the support of minor children of the parties, the parties shall disclose to each other and to the neutral the information to be used in completing the child support guidelines worksheet required by § 20-108.2. The guidelines computations and any reasons for deviation shall be incorporated in any written agreement between the parties.

With respect to liability, when mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia, then the mediator, mediation program for which the certified mediator is providing services, and a mediator co-mediating with a certified mediator shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in efforts to assist or conduct a mediation, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another. This language is not intended to abrogate any other immunity that may be applicable to a mediator.

§ 8.01-576.10. Confidentiality of dispute resolution proceeding.

All memoranda, work products and other materials contained in the case files of a neutral or dispute resolution program are confidential. Any communication made in or in connection with the dispute resolution proceeding which relates to the controversy, including screening, intake and scheduling a dispute resolution proceeding, whether made to the neutral or dispute resolution program staff or to a party, or to any other person, is confidential. However, a written settlement agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.

Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the dispute resolution proceeding agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the neutral or dispute resolution program and a party to the dispute resolution proceeding for damages arising out of the dispute resolution proceeding, (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the dispute resolution proceeding, (iv) where a threat to inflict bodily injury is made, (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime, (vi) where an ethics complaint is made against the neutral by a party to the dispute resolution proceeding to the extent necessary for the complainant to prove misconduct and the neutral to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-576.12 in a proceeding to vacate a mediated agreement, or (ix) as provided by law or rule. The use of attorney work product in a dispute resolution proceeding shall not result in a waiver of the attorney work product privilege.

Notwithstanding the provisions of this section, in any case where the dispute involves support of the minor children of the parties, financial information, including information contained in the

child support guidelines worksheet, and written reasons for any deviation from the guidelines shall be disclosed to each party and the court for the purpose of computing a basic child support amount pursuant to § 20-108.2.

§ 8.01-576.12. Vacating orders and agreements.

Upon the filing of an independent action by a party, the court shall vacate a mediated agreement reached in a dispute resolution proceeding pursuant to this chapter, or vacate an order incorporating or resulting from such agreement, where:

1. The agreement was procured by fraud or duress, or is unconscionable;

2. If property or financial matters in domestic relations cases involving divorce, property, support or the welfare of a child are in dispute, the parties failed to provide substantial full disclosure of all relevant property and financial information; or

3. There was evident partiality or misconduct by the neutral, prejudicing the rights of any party.

For purposes of this section, "misconduct" includes failure of the neutral to inform the parties in writing at the commencement of the mediation process that: (i) the neutral does not provide legal advice, (ii) any mediated agreement may affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.

The fact that any provisions of a mediated agreement were such that they could not or would not be granted by a court of law or equity is not, in and of itself, grounds for vacating an agreement.

A motion to vacate under this section shall be made within two years after the mediated agreement is entered into, except that, if predicated upon fraud, it shall be made within two years after these grounds are discovered or reasonably should have been discovered.

§ 8.01-581.21. Definitions.

As used in this chapter:

"***Mediation"*** means a process in which a mediator facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute.

"Mediation program" means a program through which mediators or mediation is made available and includes the director, agents and employees of the program.

"Mediator" means an impartial third party selected by agreement of the parties to a controversy to assist them in mediation.

§ 8.01-581.22. Confidentiality; exceptions.

All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.

Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the mediation agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the mediator or mediation program and a party to the mediation for damages arising out of the mediation, (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation, (iv) where a threat to inflict bodily injury is made, (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime, (vi) where an ethics complaint is made against the mediator by a party to the mediation to the extent necessary for the complainant to prove misconduct and the mediator to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or (ix) as provided by law or rule. The use of attorney work product in a mediation shall not result in a waiver of the attorney work product privilege.

Notwithstanding the provisions of this section, in any case where the dispute involves support of the minor children of the parties, financial information, including information contained in the child support guidelines worksheet, and written reasons for any deviation from the guidelines shall be disclosed to each party and the court for the purpose of computing a basic child support amount pursuant to § 20-10§ 8.01-581.23. Civil immunity.

When a mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia, or who is trained and serves as a mediator through the statewide mediation program established pursuant to § 2.2-1001(2), then that mediator, mediation programs for which that mediator is providing services, and a mediator co-mediating with that mediator shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in efforts to assist or conduct a mediation, unless the act or

omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another. This language is not intended to abrogate any other immunity that may be applicable to a mediator.

§ 8.01-581.24. Standards and duties of mediators; confidentiality; liability.

A mediator selected to conduct a mediation under this chapter may encourage and assist the parties in reaching a resolution of their dispute, but may not compel or coerce the parties into entering into a settlement agreement. A mediator has an obligation to remain impartial and free from conflicts of interest in each case, and to decline to participate further in a case should such partiality or conflict arise. Unless expressly authorized by the disclosing party, the mediator may not disclose to either party information relating to the subject matter of the mediation provided to him in confidence by the other. A mediator shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the mediation, unless the parties otherwise agree.

However, where the dispute involves the support of minor children of the parties, the parties shall disclose to each other and to the mediator the information to be used in completing the child support guidelines worksheet required by § 20-108.2. The guidelines computations and any reasons for deviation shall be incorporated in any written agreement by the parties.

§ 8.01-581.25. Effect of written settlement agreement.

If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract. If the mediation involves a case that is filed in court, upon request of all parties and consistent with law and public policy, the court shall incorporate the written agreement into the terms of its final decree disposing of a case. In cases in which the dispute involves support for the minor children of the parties, an order incorporating a written agreement shall also include the child support guidelines worksheet and, if applicable, the written reasons for any deviation from the guidelines. The child support guidelines worksheet shall be attached to the order.

§ 8.01-581.26. Vacating orders and agreements.

Upon the filing of an independent action by a party, the court shall vacate a mediated agreement reached in a mediation pursuant to this chapter, or vacate an order incorporating or resulting from such agreement, where:

1. The agreement was procured by fraud or duress, or is unconscionable;

2. If property or financial matters in domestic relations cases involving divorce, property, support or the welfare of a child are in dispute, the parties failed to provide substantial full disclosure of all relevant property and financial information; or

3. There was evident partiality or misconduct by the mediator, prejudicing the rights of any party.

For purposes of this section, "misconduct" includes failure of the mediator to inform the parties at the commencement of the mediation process that: (i) the mediator does not provide legal advice, (ii) any mediated agreement may affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.

Ethics in Mediation

Mediation is not always appropriate. Mediators must assess the proper use of this process before mediation begins and throughout the process. During the mediation, if additional concerns arise, the mediator will consider suspending or terminating the process.

QUESTIONS TO CONSIDER

- Are the parties willing to participate in good faith, making and keeping agreements that are made?
- Are you, as a mediator, sufficiently experienced in the substantive area of this dispute to function effectively?
- Can you, as mediator, remain impartial concerning the parties or the issues in dispute?
- Do you have any conflict of interest, such as previous or ongoing relationships with either of the parties?
- Do the parties fully understand their legal rights and the full meaning of confidentiality in mediation?

BEFORE THE PARTIES SIGN AN AGREEMENT

- Have they considered all that the agreement involves, including any possible ramifications?
- Have the interests of other persons not present at the mediation but affected by the agreement been adequately considered?
- Have each of the parties entered into the agreement voluntarily? Does intimidation or threat of harm prevent either of the participants from considering possible solutions?

WHAT TO DO WHEN MEDIATION IS NOT APPROPRIATE

If you determine that mediation is NOT appropriate, tell the parties of your decision without revealing confidences or breaking trust in the mediation process: “I have determined that mediation is not appropriate at this time.” Consider discussing other sources of assistance with the parties (perhaps in separate sessions) for resolving their dispute.

Chapter 5

The Mediation Process:

STAGE I

Setting the Stage for Mediation

Overview

Setting the stage for mediation is a critical part of the mediation process. As with many tasks, advance preparation and a step-by-step approach are keys to a successful outcome. Many parties to mediation want to "just get down to business" by skipping ahead to problem-solving. Parties will often say something like "I don't want to waste time with formalities. I just want to sit down with the other party and get right to the point. I don't think this whole thing will take longer than an hour or so." The mediator must resist the temptation to give in to this approach. ***Unlike other forms of dispute resolution, successful mediation outcomes depend to a great extent on following the process.***

During this phase of the process, the mediator has an opportunity to lay a solid foundation for a successful mediation. Each action that the mediator takes in this initial phase of the mediation, and in subsequent phases, is part of a carefully integrated approach. As you work through the elements of the introductory phase of mediation, keep in mind the three levels of satisfaction. Successful mediation depends on meeting the parties' needs for procedural, emotional and substantive satisfaction with the process.

In this chapter we will focus on the introductory elements of setting the stage for mediation in pre-session contacts with the parties and in the first joint session. These elements include:

- Using the first contact effectively to help define roles, relationships and the process;
- Establishing an appropriate meeting space which enhances the dynamics of the communications process;
- Dealing appropriately with advance information;
- Using the welcome and introductions to begin establishing structure, trust, rapport, and defining roles;
- Explaining and reinforcing the role of the mediator, expectations for the parties and the process of mediation;
- Explaining confidentiality and its limits;
- Establishing any ground rules; and,
- Obtaining commitments from the parties to continue in mediation and follow the process through a written agreement to mediate.

Setting the Stage for Mediation

Goals

- To develop trust and rapport
- To educate the parties
- To obtain a commitment to mediate

Prior to the First Mediation Session

Contacting the Participants

The mediator or intake coordinator speaks with each party to answer any questions and to set up the first meeting. Remember, the task at this point is to develop initial rapport and get them into mediation. You will also want to assess the appropriateness of mediation in their situation and whether you are the right mediator for them. Generally, one party will initiate the contact but it is important that all relevant parties are contacted to go over the following:

- a description of the mediation process
- the role of the mediator
- how the parties will participate
- who will be present at the mediation session (establish before the mediation session)
- avoid going into a lot of detail at this point
- agree on a time to get together
- check whether they have any unanswered questions

Preparing the Meeting Space

- **The place for the mediation** should be located in a safe, neutral place that provides for adequate confidentiality.
- **The space should be uncluttered**, orderly and provide for an informal atmosphere.
- **Supply the room** with appropriate literature, paper, pencils, forms, etc.
- **Consider the seating arrangement**. Be aware of the dynamics created by having parties face to face across the table, or sitting on one side of the table facing you, or using no table at all. Whatever arrangement you use, be sure that you do not appear aligned with one or the other of the parties.

Background Information

- **How extensive should the background information be?** You will need enough information to assess the appropriateness of mediation and whether you are qualified to serve as their mediator. You will want to refrain from becoming very detailed at this point since that is more appropriate in the mediation session. It is important that all parties are present to hear the details.

- **How is the information obtained?** How the information is obtained will depend upon the nature of the dispute. If it is a fairly simple, two-party dispute the information can be obtained verbally directly from the parties. If it is a complex, multi-party dispute it may be necessary to assess to whom you go as a representative sample of the group. In multi-party disputes it may be helpful to have parties to the dispute prepare something in writing that will help the mediator assess the nature of the dispute and procedures for getting started.

- **How is the information used?** In this stage of the process information is used to assess the appropriateness of mediation and whether the mediator is the appropriate one to conduct the mediation. This is also where, in a preliminary way, the mediator or the intake person begins to assess for the possibility of domestic violence and other factors that would suggest inappropriateness of mediation.

Preparing Yourself for the Mediation Session

- **Interruptions:** It is important to plan in such a way that you will not be interrupted during the mediation process. Find ways to assure that you get no phone calls, knocks at the door or any other means of distraction.

- **Preparing yourself:** Some people find it helpful to take some time to get focused and centered. Meditation, concentration, quiet time, and focusing in an anticipatory way upon the upcoming mediation have all been used as means for getting centered and prepared.

- **Confer with your co-mediator:** When co-mediating, it will be necessary to spend some time with your co-mediator to plan how you will get started, who will play what role, and just to get to know each other in a preliminary way.

The First Session: Introduction and Orientation

It is important during this stage to establish the kind of relationship that serves as a foundation for the rest of the mediation. Much of the information will be difficult and painful to talk about. If the mediator has gained sufficient trust and rapport, the participants will find it easier to bring out and discuss these very personal issues.

Welcome the Parties

- **Be careful about placing the parties in the same room** without the mediator's presence. They may feel very awkward and uncomfortable because of the level of

animosity and sense of alienation.

- **Introduce yourself to the parties**, learn their names and establish whether you will be using first or last names or formal titles. To establish this as an informal process, it may be helpful to agree to use first names.

- **Escort the parties into the room and to their respective seats.** You will be in control of the seating arrangement and the process. This level of control helps create a safe environment when their level of distrust may be high.

- **Talk about issues of time, breaks, location of bathrooms, etc.** Make sure that the mediators and disputants are clear about the length of the session, anyone can call for a break, and the location of bathrooms.

Explain Your Style and Role as a Mediator

While you are describing your style and role as a mediator, you will also be talking about what is the role and responsibility of the disputants throughout the mediation sessions. Help the parties to distinguish between mediator, judge, and the role of attorneys. You may want to talk about what you will be doing as well as what you will not be doing.

- **Describe your mediator style.** Your role is to assist the parties to come up with their own solutions. Spend some time talking about how they are in a position to make the best decisions about their situation and that you are there to help them to do it.

- **You will not decide who is wrong and who is right.** You will be helping to move away from those considerations to looking at possible solutions to their problems.

- **You will not be making decisions** about what should be done to resolve their problems. That is their responsibility.

- **You will help create and preserve a safe, predictable and productive environment.** To accomplish this they will need assurance and trust that you will be in control of the process and that you have the ability to keep things from getting out of hand.

Describe the Mediation Process

Talk about the purpose of mediation. It is to assist them, the parties, to find mutually acceptable solutions to the issues or problems they are having. It is important that they understand that there are specific steps you will be helping them to take toward finding resolution. Briefly describe the steps of the process.

- **Each person will be given an uninterrupted time to talk.** Each participant will be given an opportunity to provide the mediator and the other parties their own perception of the nature of the problems, the issues to be resolved and something of what they want as an outcome of the mediation session.

- **The participants will work together to develop solutions.** After each participant has placed all their issues on the table and have agreed that they have said what needs to be said, they will be given an opportunity to work together in developing possible solutions for each issue.

- **A final written agreement or memorandum of understanding will be prepared.** It is helpful to talk about the written agreement that they will be creating. Help them to think about it as a contract that they are creating between themselves and that it can be changed at any time in the future as long as all parties to the agreement agree to any changes.

- **Mention the possibility of separate sessions (caucus).** The mediators may want to meet separately with each party during the mediation process. Let them know that they may wish to call for separate meetings as well. Be sure to let them know that the mediators will always meet separately with each party to the dispute. At no point will there be a separate meeting for just one of the parties.

- **Talk about the possibility of additional sessions.** Explain that if additional sessions are required that they can be arranged at the conclusion of the first session. As many sessions as needed to complete the mediation can be planned for.

Explain Confidentiality and its Limits

Prior to the commencement of mediation the mediator must inform the parties of the following and have some assurance that they understand each item having to do with confidentiality.

- All memoranda, work products and other **materials contained in the case files** of a mediator or mediation program are confidential.

- **Any communication made in or in connection with the mediation** which relates to the controversy being mediated, including screening, intake and scheduling a dispute resolution proceeding, whether made to a mediator or dispute resolution program staff or a party, or to any other person is confidential.

- **A mediated agreement signed by the parties shall not be confidential**, unless the parties otherwise agree in writing.

- **Allegations of child abuse are not confidential** as mediators are mandatory reporters of such information.

- I**n reporting on the outcome of the dispute resolution proceeding** to the referring court, the mediator shall indicate whether an agreement was reached, the terms of the agreement if authorized by the parties, the fact that no agreement was reached, or the fact that the orientation session or mediation did not occur. The mediator shall not disclose information exchanged or observations about the conduct and demeanor of the parties and their counsel during the dispute resolution proceeding, unless the parties agree otherwise.

The mediator has the responsibility to explain that confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except:

- **where all parties agree**, in writing, to waive the confidentiality;

- in a subsequent **action between the mediator and a party for damages** arising out of

the mediation;

- statements, memoranda, materials and other tangible **evidence, otherwise subject to discovery**, which were not prepared specifically for use in and actually used in the mediation;
- where a **threat to inflict bodily injury** to self or others is made;
- where **communications are intentionally used to plan, attempt to commit, or commit a crime** or conceal an ongoing crime;
- where an **ethics complaint is made against the mediator** by a party to the extent necessary for the complainant to prove misconduct and the mediator to defend against such complaint;
- where communications are sought or offered to **prove or disprove a claim or complaint of misconduct or malpractice** filed against a party's legal representative based on conduct occurring during a mediation;
- where communications are sought or offered to prove or disprove any of the grounds listed in Virginia Code § 8.01-576.12 **in a proceeding to vacate a mediated agreement**; or
- **as provided by law or rule**.

If a mediator has established specific exceptions to the general rule of confidentiality they must be disclosed to the parties at the start of the mediation. Consistent with the elements of confidentiality listed above, the parties must agree, in writing, to waive confidentiality with respect to those issues.

- **Disputant confidentiality** can be negotiated between the parties with the assistance of the mediator. There may be some issues that they may not want to talk about outside the mediation. Or, they may be concerned that they not talk to certain people. Point out that they may need to talk to others such as, experts, attorneys and consultants and other people that will be impacted by their agreements.

Establish Ground Rules

The mediator may need to establish some very specific ground rules so that the mediation can proceed in an orderly fashion. The ground rules serve to guard against participants getting into their old non-productive patterns of interaction. When they do, the mediation cannot continue in an orderly way or it may not continue at all. Potential ground rules include the following:

- **Only one person may speak at a time.** When introducing this ground rule, make sure that each participant makes a firm commitment to give the other party uninterrupted time. To reinforce this ground rule provide each party with paper and pen to take notes so they will remember what they want to say.
- **Use respectful language and refrain from name-calling.** When it has become clear that parties are pushing each other's "hot buttons" through labeling and name

calling it becomes necessary to point out that in order for the mediation to continue in an orderly fashion, they need to refrain from such activities. If you do not establish this ground rule at the outset, you may wish to introduce it later when it becomes necessary.

- **Anyone in the mediation session may ask for a break at any time.** This holds for both the mediators and disputants.
- **Check with the participants whether there are other ground rules they may need.**

Review the Mediation Consent Form (Agreement to Mediate Form)

Although Mediation Consent Forms differ widely, they serve three important purposes. First, by signing the form, they have entered into their first agreement with each other. Second, by going through the ritual of signing the form, each party is making a tangible commitment to continue in mediation. Third, the parties acknowledge understanding and acceptance of the particular terms of the Consent Form. Consent Forms typically include the following points:

- An agreement on the fees to be paid
- Parties agree that they will participate in good faith.
- An acknowledgment that mediation is voluntary and that either party, or the mediator, may terminate it at any time.
- A description of the style and role of the mediator.
- Delineate aspects of confidentiality and its exceptions.
- Mediators do not provide legal advice.
- Any mediated agreement may affect the parties= legal rights.
- Parties have the right and are encouraged to consult with independent legal counsel during mediation.
- Any draft agreement should be reviewed by independent legal counsel prior to signing or the parties should waive their right to do so.
- Check whether participants have any questions on the Mediation Consent Form or having to do with the mediation session generally.

Obtain the Parties' Commitment to Mediate

Ask the parties to sign the Mediation Consent Form before starting discussion of the issues that brought them to mediation. Explain that by signing the form they are proclaiming that they understand what it is saying and that they want to continue with mediation. It is probably not wise to continue with mediation if the parties are unwilling to sign the form.

Orientation: Some Useful Questions

How did you learn about mediation?

Is this your first experience with mediation?

Are you ready to proceed with mediation?

Do you have any other questions before we begin?

ORIENTATION CHECKLIST

Greet the Parties	Introduce yourself, establish how parties wish to be addressed, escort parties to their seats.
Voluntary	Participants may leave mediation at any time and do not lose other rights as a result.
Mediator Role	Mediators are impartial, do not make decisions or give advice. Mediators facilitate the process and communication between the parties. They do not provide legal advice.
Confidentiality	Anything told in mediation is held confidential by the mediators with some exceptions. Notes are destroyed when mediation ends. Exceptions are child abuse. Disputant confidentiality may be negotiated by the parties.
Explain Mediation Stages	Uninterrupted time for each; Identify issues, needs, interests, and values; Generate possible solutions to bring resolution to the issues and needs, etc.
Outcome	The goal is to create a written agreement signed by both parties addressing the issues between them.
Mediation Sessions	Discuss joint and separate session, breaks can be requested by anyone, additional sessions may be planned as needed.
Attorneys	Disputants are urged to consult with legal counsel during mediation and prior to signing final agreement since legal rights may be affected. Attorneys may be present in mediation sessions.
Ground Rules	For mediation to work, participants need to show respect, courteousness, and not interrupt each other. Do parties have ground rules to suggest?
Med Consent Form	Review the Mediation Consent Form, obtain the Parties' commitment to mediate and obtain signatures.

RAPPORT BUILDING

Rapport is the bridge across which all helping must travel.

To build rapport means to connect with or join another person(s) in relationship so the communication process and trust level are enhanced. Without rapport between mediators and between mediators and disputants, the mediation process can be greatly hindered or may not take place at all.

Critical Rapport-Building Opportunities

- At intake when the disputant(s) are exploring mediation and a mediator to conduct the process, rapport must be established immediately or they will look elsewhere or decide mediation is not what they need. The person conducting the intake needs to provide information, answer all questions, talk about the mediator role and mediation process rather than give the impression that he/she does not have time to meet the potential clients' needs.

- The location of the mediator's office can be critical. It needs to be in a location easy to reach, it needs to be located in a safe neighborhood, should have an aesthetically pleasing appearance and provide for confidentiality.

- The mediator's interaction with the parties must lead to trust, comfort and confidence. The mediator(s) need to be prepared, attentive and available to the disputants.

- A final locus for rapport building is with respect to the mediation process itself. The parties need to understand and feel comfortable with the process. It is up to the intake person and the mediator(s) to get the parties into the mediation boat and to help them stay there until the mediation is complete.

Mediators can facilitate rapport building through:

- Relaxing as you interact with the disputants. As you relax others tend toward more relaxed states themselves.

- Maintaining eye contact. Eye contact conveys attentiveness and is a nonverbal message of "I am listening and interested". Be sensitive to any discomfort parties may have with eye contact.

- Approximating the other person's posture. Be careful you don't mimic.

- Matching the tone, tempo and pitch of the other person's voice.

- Matching predicates. People want to be heard and to feel like they are being understood by others. As individuals we can facilitate understanding by communicating in the language of the other person. Others will typically use visual

words (I see, I imagine, I can't focus, etc.), auditory words (I hear, I tuned out, that rang a bell, etc.) or kinesthetic words (I feel, get in touch, I can't grasp it, etc.). Rapport will be enhanced by using the types of words used most by the person speaking with you.

- Using appropriate gestures. When paraphrasing, summarizing or providing feedback use the same hand, face and other body gestures used by the other person in his/her communications. Avoid doing so in a fashion that gives the impression you are mimicking.

- Through the use of paraphrasing you can convey, "I am with you"; "I understand." Effective use of paraphrasing gets you on the same "wave length" as the person who is speaking to you.

- Dress so you are not completely out of step. Use discretion. Perhaps dress up at first and down later when you know the disputants better.

MEDIATORS ARE MANDATORY REPORTERS OF CHILD ABUSE

If mediators in their official capacity have reason to suspect child abuse or neglect they are required to report the matter immediately to the local department of child protective services of the county or city where the child resides or where the abuse or neglect has taken place. They may also report to the Department's child abuse and neglect hotline (Toll free: 1-800-552-7096; Virginia: 1-804-786-8536).

Any mediator who fails to file a report within 72 hours of his or her first suspicion of child abuse or neglect is subject to being fined not more than $500 for the first failure to do so and in subsequent failures not less than $100 nor more than $1,000.

Any mediator who makes a report of child abuse or neglect or participates in a judicial proceeding resulting from such reporting shall be immune from any civil or criminal liability unless it is proven that he or she acted in bad faith or with malicious intent.

The Child Abuse Statutes that follow provide additional detail on the rights and responsibilities of mediators and others who are mandatory reporters of child abuse or neglect:

CHILD ABUSE STATUTES

§ 63.2-1509. Physicians, nurses, teachers, etc., to report certain injuries to children; penalty for failure to report.

A. The following persons who, in their professional or official capacity, have reason to suspect that a child is an abused or neglected child, shall report the matter immediately to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred or to the Department's toll-free child abuse and neglect hotline:

1. Any person licensed to practice medicine or any of the healing arts;

2. Any hospital resident or intern, and any person employed in the nursing profession;

3. Any person employed as a social worker;

4. Any probation officer;

5. Any teacher or other person employed in a public or private school, kindergarten or nursery school;

6. Any person providing full-time or part-time child care for pay on a regularly planned basis;

7. Any mental health professional;

8. Any law-enforcement officer or animal control officer;

9. Any mediator eligible to receive court referrals pursuant to § 8.01-576.8;

10. Any professional staff person, not previously enumerated, employed by a private or state-operated hospital, institution or facility to which children have been committed or where children have been placed for care and treatment;

11. Any person associated with or employed by any private organization responsible for the care, custody or control of children;

12. Any person who is designated a court-appointed special advocate pursuant to Article 5 (§ 9.1-151 et seq.) of Chapter 1 of Title 9.1;

13. Any person, over the age of 18 years, who has received training approved by the Department of Social Services for the purposes of recognizing and reporting child abuse and neglect;

14. Any person employed by a local department as defined in § 63.2-100 who determines eligibility for public assistance; and

15. Any emergency medical services personnel certified by the Board of Health pursuant to § 32.1-111.5, unless such personnel immediately reports the matter directly to the attending physician at the hospital to which the child is transported, who shall make such report forthwith.

This subsection shall not apply to any regular minister, priest, rabbi, imam, or duly accredited practitioner of any religious organization or denomination usually referred to as a church as it relates to (i) information required by the doctrine of the religious organization or denomination to be kept in a confidential manner or (ii) information that would be subject to § 8.01-400 or 19.2-271.3 if offered as evidence in court.

If neither the locality in which the child resides nor where the abuse or neglect is believed to have occurred is known, then such report shall be made to the local department of the county or city where the abuse or neglect was discovered or to the Department's toll-free child abuse and neglect hotline.

If an employee of the local department is suspected of abusing or neglecting a child, the report shall be made to the court of the county or city where the abuse or neglect was discovered. Upon receipt of such a report by the court, the judge shall assign the report to a local department that is not the employer of the suspected employee for investigation or family assessment. The judge may consult with the Department in selecting a local department to respond to the report or the complaint.

If the information is received by a teacher, staff member, resident, intern or nurse in the course of professional services in a hospital, school or similar institution, such person may, in place of said report, immediately notify the person in charge of the institution or department, or his designee, who shall make such report forthwith.

The initial report may be an oral report but such report shall be reduced to writing by the child abuse coordinator of the local department on a form prescribed by the Board. Any person required to make the report pursuant to this subsection shall disclose all information that is the basis for his suspicion of abuse or neglect of the child and, upon request, shall make available to the child-protective services coordinator and the local department, which is the agency of jurisdiction, any information, records, or reports that document the basis for the report. All persons required by this subsection to report suspected abuse or neglect who maintain a record of a child who is the subject of such a report shall cooperate with the investigating agency and shall make related information, records and reports available to the investigating agency unless such disclosure violates the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g). Provision of such information, records, and reports by a health care provider shall not be prohibited by § 8.01-399. Criminal investigative reports received from law-enforcement agencies shall not be further disseminated by the investigating agency nor shall they be subject to public disclosure.

B. For purposes of subsection A, "reason to suspect that a child is abused or neglected" shall include (i) a finding made by an attending physician within seven days of a child's birth that the results of a blood or urine test conducted within 48 hours of the birth of the child indicate the presence of a controlled substance not prescribed for the mother by a physician; (ii) a finding by an attending physician made within 48 hours of a child's birth that the child was born dependent on a controlled substance which was not prescribed by a physician for the mother and has demonstrated withdrawal symptoms; (iii) a diagnosis by an attending physician made within seven days of a child's birth that the child has an illness, disease or condition which, to a reasonable degree of medical certainty, is attributable to in utero exposure to a controlled substance which was not prescribed by a physician for the mother or the child; or (iv) a diagnosis by an attending physician made within seven days of a child's birth that the child has fetal alcohol syndrome attributable to in utero exposure to alcohol. When "reason to suspect" is based upon this subsection, such fact shall be included in the report along with the facts relied upon by the person making the report.

C. Any person who makes a report or provides records or information pursuant to subsection A or who testifies in any judicial proceeding arising from such report, records, or information shall be immune from any civil or criminal liability or administrative penalty or sanction on account of

such report, records, information, or testimony, unless such person acted in bad faith or with malicious purpose.

D. Any person required to file a report pursuant to this section who fails to do so within 72 hours of his first suspicion of child abuse or neglect shall be fined not more than $500 for the first failure and for any subsequent failures not less than $100 nor more than $1,000.

§ 63.2-1510. Complaints by others of certain injuries to children.

Any person who suspects that a child is an abused or neglected child may make a complaint concerning such child, except as hereinafter provided, to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred or to the Department's toll-free child abuse and neglect hotline. If an employee of the local department is suspected of abusing or neglecting a child, the complaint shall be made to the court of the county or city where the abuse or neglect was discovered. Upon receipt of such a report by the court, the judge shall assign the report to a local department that is not the employer of the suspected employee for investigation or family assessment; or, if the judge believes that no local department in a reasonable geographic distance can be impartial in responding to the reported case, the judge shall assign the report to the court service unit of his court for evaluation. The judge may consult with the Department in selecting a local department to respond to the report or complaint. Such a complaint may be oral or in writing and shall disclose all information which is the basis for the suspicion of abuse or neglect of the child.

§ 63.2-1512. Immunity of person making report, etc., from liability.

Any person making a report pursuant to § 63.2-1509, a complaint pursuant to § 63.2-1510, or who takes a child into custody pursuant to § 63.2-1517, or who participates in a judicial proceeding resulting therefrom shall be immune from any civil or criminal liability in connection therewith, unless it is proven that such person acted in bad faith or with malicious intent

§ 63.2-1513. Knowingly making false reports; penalties.

A. Any person fourteen years of age or older who makes or causes to be made a report of child abuse or neglect pursuant to this chapter that he knows to be false shall be guilty of a Class 1 misdemeanor. Any person fourteen years of age or older who has been previously convicted under this subsection and who is subsequently convicted under this subsection shall be guilty of a Class 6 felony.

B. The child-protective services records regarding the person who was alleged to have committed abuse or neglect that result from a report for which a conviction is obtained under this section shall be purged immediately by any custodian of such records upon presentation to the custodian of a certified copy of such conviction. After purging the records, the custodian shall notify the person in writing that such records have been purged.

Agreement to Mediate – Samples

Sample #1

MEDIATION CONSENT FORM
Suggested by the Office of Dispute Resolution
Virginia Supreme Court

We, the undersigned parties agree to voluntarily enter the mediation process and understand and consent to the following:

1. **Definition of Mediation:** Mediation is a process in which a neutral facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties enables them to understand and reach a mutually agreeable resolution to their dispute.

2. **Role of the Mediator:** The mediator acts as a facilitator, not an advocate, judge, jury, counselor, or therapist. The mediator assists the parties in identifying issues, reducing obstacles to communication, maximizing the exploration of alternatives, and helping parties reach voluntary agreements.

3. **Mediator's Style/Approach:** ***for example:*** The mediator uses a more facilitative approach. The mediator guides the parties' conversation and discussion of issues that are important to them, without providing an opinion or judgment regarding the merit of the claims or the likely judicial outcome. The mediator will assist the parties' in assessing the strengths and weaknesses of their case. The mediator will not tell the parties what to do or suggest a particular outcome.

4. **The Mediation Process:** The process will include at a minimum, an opportunity for all parties to be heard, the identification of issues to be resolved, the generation of alternatives for resolution, and if the parties so desire, the development of a Memorandum of Understanding or Agreement.

5. **Other Procedures to be used during the mediation include**: *for example*: caucus

6. **Confidentiality:** All memoranda, work products and other materials contained in the case files of a neutral or dispute resolution program are confidential. Any communication made in or in connection with the dispute resolution proceeding which relates to the controversy, including screening, intake, and scheduling a dispute resolution proceeding, is confidential.

   Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the dispute resolution proceeding agree, in writing, to waive confidentiality, (ii) in a subsequent action between the neutral or dispute resolution program and a party to the dispute resolution proceeding for damages arising out of the dispute resolution proceeding, (iii) statements, memoranda, materials, and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the dispute resolution proceeding, (iv) where a threat to inflict bodily injury is made, (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime, (vi) where an ethics complaint is made against a neutral by a party to the dispute resolution proceeding

to the extent necessary for the complainant to prove misconduct and the neutral to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in section 8.01-576.12 in a proceeding to vacate a mediated agreement or (ix) as provided by law or rule.

7. **Substantial Full Disclosure:** In domestic relations cases involving divorce, property, support or the welfare of a child, each party agrees to provide substantial full disclosure of all relevant property and financial information.

8. **Legal Advice:** the mediator(s) does not provide legal advice. Parties are encouraged to seek the advice of independent counsel at any time. Any mediated agreement may affect the legal rights of the parties. Each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.

9. **Fees:** The fee arrangement is as follows:

_____

Plaintiff/Petitioner	Date
Plaintiff/Petitioner Attorney	Date
Respondent	Date
Respondent Attorney	Date
Mediator	Date
Mediator	Date
Other	Date

Sample #2

Central Mediation Group
4000 West Central Ave
Lisbon, VA 232122

MEDIATION CONSENT FORM

Petitioner: _____

Respondent: _____

Mediation Date: _____

We, the undersigned, understand and consent to the following:

1. Mediation is a process in which one or two impartial mediators facilitate communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve their dispute. The mediators will lead the sessions by assisting parties in reaching decisions that are acceptable to both.

2. Participation in mediation is voluntary and can be terminated at any time by either party or by the mediators.

3. Any mediated agreement may affect the legal rights of the parties. Each party may have an attorney present during mediation, may consult with an attorney at any time during mediation, may have any mediated agreement reviewed prior to signing, and is encouraged to do so. The mediators will not provide legal or financial advice, provide an evaluation, render an opinion, or make decisions for us.

4. Communication with the mediators regarding issues under consideration is generally in the presence of both parties. A caucus (meeting with each party separately) is the only time information is not shared with both parties unless each party agrees that it may be shared.

5. The mediator(s), the parties, their attorneys, and any other participants in the mediation session agree that everything said or done in the mediation session is confidential and may not be used in any subsequent judicial or administrative procedure, except as allowed by statute. Allegations of child abuse and threats of harm to self or others shall not be confidential. Communications regarding involvement in crimes or planned future criminal activity shall not be confidential. Any agreement reached, once signed by all parties, may become part of the Court record and shall not be confidential. Should any complaint against the mediator(s) arise as a result of this mediation, confidentiality is waived with respect to that information necessary to present or defend against such a complaint.

6. All parties agree to provide substantial full disclosure of all property and financial information necessary to reach an informed and just agreement. Failure to do so may result in the agreement or any order incorporating or resulting from the agreement being vacated by the court.

7. Neither party nor anyone representing either party shall call the mediators, any agents of Central Mediation Group or the Chelsea County Juvenile & Domestic Relations Court as witnesses, nor subpoena any records pertaining to this mediation in any subsequent judicial or administrative proceeding.

Petitioner	Date	Respondent	Date

Mediator	Date	Mediator	Date
Attorney	Date	Attorney	Date
Other	Date	Other	Date

Sample #3

CONTRACT FOR MEDIATION

Prior to engaging in the mediation process, it is important that each party understand each of the items identified below. If there are areas of confusion or misunderstanding, it is important to seek clarification with the assistance of the mediator(s) before moving forward.

1. The parties understand that the mediator(s) role is to assist them in identifying all relevant issues, facilitate communication, maximize the exploration of alternatives, help them reach voluntary agreements, and if the parties desire, assist them in development of a Memorandum of Understanding or Agreement. The mediator(s) will not provide evaluation, render an opinion, or make decisions for the parties.

2. As a general rule, the mediator(s) will conduct the mediation session with all parties present in the session. However, there may be times when the mediator(s) will arrange to meet with each party separately.

3. Parties understand that the mediator(s) do not provide either legal advice or representation. It is understood by the parties that any mediated agreement will affect their legal rights. Therefore, each party has the opportunity to consult with independent legal counsel at any time and is encouraged to do so. Each party should have any draft agreement reviewed by independent counsel prior to signing the agreement or should waive his/her opportunity to do so. The parties also understand that they have the right to have legal counsel present in the mediation session(s).

4. Confidentiality: All memoranda, work products and other materials contained in the case files of the mediator or Central Mediation Group, Inc. are confidential. All communications related to the controversy made during mediation, including screening, intake, and scheduling a mediation session, is confidential. Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except:

    - where all parties to the mediation session agree, in writing, to waive confidentiality,
    - statements, memoranda, materials, and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and used in the mediation proceeding,
    - where allegations of child abuse or neglect are made,
    - where a threat to inflict bodily injury to self or another is made,
    - where communications are used to plan, attempt to commit, or commit a crime or conceal an ongoing crime,
    - where an ethics complaint is made against a neutral by a party to the mediation proceeding to the extent necessary for the complainant to prove misconduct and the neutral to defend against such a complaint.

- in a subsequent action between the mediator(s) or Commonwealth Mediation Group and a party for damages arising out of the mediation proceeding,
- where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation,
- where communications are sought or offered to prove or disprove any of the grounds listed in Section 8.01-576.12 in a proceeding to vacate a mediated agreement or,
- as provided by rule of law.

5. In as much as participation in mediation is voluntary, the parties understand that at any time before the mediation is completed they may terminate mediation and choose another alternative for resolving their dispute.

6. The parties agree to disclose fully, all relevant information, including but not limited to property and financial information necessary for making informed, realistic decisions during the mediation process. Failure to do so may result in termination of mediation. Additionally, each party has notified the mediators of any cases or charges pending in any court with the other party in this mediation.

7. It is understood that the mediator(s) may terminate the mediation if it becomes evident that there is failure to participate in good faith on the part of either party. This includes any failure to report necessary information or when undue pressure is placed upon either of the parties.

8. Fees for mediation services, including preparing the Memorandum, are $_____ per hour. Parties shall pay for time spent in mediation at the conclusion of each session. Partial hours of session time shall be charged in fifteen-minute increments at the hourly rate. Telephone sessions or conversations are billed in fifteen-minute increments at the hourly rate plus the cost of the call. Administrative services, preparation and revision of the Memorandum are also billed in fifteen-minute increments at the hourly rate.

   Parties will pay for mediation services according to the following ratio:

   _____ % _____ %

The final Memorandum of Understanding will be released to the parties only after all charges have been paid.

Either or both parties will be charged for sessions missed or not canceled at least 48 hours in advance of the time scheduled. A billing charge of 1.5% per month (18% A.P.R.) is added to any outstanding account balance not paid within 30 days from the date of service. Either or both parties will also be charged for attorney fees and costs associated with collecting delinquent accounts.

By signing below, the parties indicate that they have read and understand the preceding Contract for Mediation and that they intend to engage voluntarily and in good faith in the mediation process.

Party	Date	Party	Date
Mediator	Date	Mediator	Date
Other	Date	Other	Date

Chapter 6

The Mediation Process:

STAGE II

Understanding the Parties and Issues

Goals

- To understand each party's interests
- To identify common ground
- To hear from each party and the parties to hear each other

In this stage the mediator's primary task is to listen. The parties who have come to this session have a lot to say, have strong feelings about the importance of why they are here, and may have very different views of what has happened and why. Often, at this point, there is strong distrust and a demonstrated inability to communicate. People may be focused on assigning blame and determining who is at fault. The mediator, listening to the parties, plays a vital role in redirecting this energy into from *what has happened in the past* to *how to move forward into the future*.

Parties do not come into this session with neatly identified lists of concerns, interests, or issues to be resolved. **Our task as mediators is to help them to translate their views and descriptions into an understanding of issues that can be negotiated.** We do this by listening and by demonstrating understanding and respect for who they are, what they know, and where they have been whether or not we agree with actions they have taken or proposals they may make. We check with each party to confirm that we understand what they are saying. We summarize, sorting through a lot of information to determine the key areas of concern, what their causes are, and what concerns are embedded in what they are saying.

Our job as mediators is not to decide who is right or wrong. Our job is not to get all of the facts and details so that we can make a decision. The parties, given the opportunity, will tell us what is important to them and why.

In addition, as they educate the mediator about the situation from their view, **parties are also educating each other** about their perspectives and the depth of feeling they have about the situation. People may never agree about the past and individual interpretations of what has happened and why. However, to get to a point of willingness to work together to find a mutually acceptable solution, it is important that they develop a level of respect for the other person and their views. The mediator, through paraphrasing, walking as much as possible in each party's

shoes, respecting each of them as they talk while the mediator listens is vital in the process of demonstrating and building this respect.

Preparing To Hear From the Parties

Change the Direction of Information Flow

Until now the parties have been primarily listening to the mediator explain the mediation process and respond to their questions. Now the mediator must reverse that flow by asking the parties to explain their individual perspectives on the problem.

Explain "Uninterrupted Time" to the Parties

Tell the parties that each will have an opportunity to speak, uninterrupted, in turn. Do not let talking times get too long. The mediator will move back and forth between the parties.

Decide Who Will Speak First

Select the party to speak first, either by asking them to agree on who will speak first or by selecting one (usually the complainant, if there is one). Assure each party that, regardless who begins, each will be given the time they need to be heard.

Provide Pen and Paper

Provide the first non-speaking party with paper and pencil and advise he or she to write down any important points that are heard while listening to the other speak and any perspectives and ideas they wish to talk about regarding the subject under discussion. Repeat this procedure with each party as they prepare to speak.

While there are advantages in providing pencil and paper as each party prepares to speak the mediator may provide pencil and paper at the outset to each of the parties at the same time as "Uninterrupted Time" is introduced.

Secure the parties intent and willingness to proceed in this way.

Mediator Activities and Techniques

Employ a Firm Response to Early Interruptions

Be firm about not interrupting each other. You may wish to respond to early interruptions and ignore later ones if they are not especially disruptive. Remind the person interrupting to use the paper you have supplied.

Create a Separation between the Presentations of Each Party

When shifting between the first and second speaker, create a clear separation between what the first has said and what the second will talk about. *Rather than responding or reacting to what the first person has said ask the second person to explain the situation from his or her perspective.* Failure to make this clear break can result in the nature of the disagreement being solely defined by the statements and perspectives of the first person to speak.

Summarize after Each Person Has Spoken

As the mediator moves back and forth between the parties, a summary is always provided before inviting the other party to speak. This provides each party the assurance that he or she has been heard and that their issues are on the table. At the conclusion of both parties' speaking time, summarize what you understand are the issues to be addressed in mediation and any commonalities you heard.

Do Not Lapse Into Cross-Examination

It is easy to begin "cross-examining" disputants in an attempt to find out what the reality is. However, there is no place for this in mediation. What is important is that each party's perspective is heard and understood.

Ask Open Questions

Ask open questions to encourage elaboration and to hear what each party believes to be important and significant. Be careful in the use of closed questions. Closed questions can result in the mediator imposing his or her own agenda upon the party.

Understanding the Parties & Identifying the Issues

Some Useful Questions

Please tell me what has brought you here.

How is this important to you?

How does that affect you?

Tell me what your concerns are.

Please explain…

Tell me more…

Paraphrase Frequently

Restate in a sentence, in your own words, what you have heard the party say. This is a perception check. Don't worry if the party corrects your statement. Rather, view corrections as positive. Paraphrasing gives the parties an opportunity to clarify for everyone what was intended.

Build Rapport

Maintain and enhance rapport with both parties. For example, use emotion labels ("Sounds like you feel frustrated...."), accept statements without agreeing or disagreeing, without judgment, and give equal attention to both parties.

Launder Strong Language (see "Reframing" in Communication Skills)

When paraphrasing or using other reflective listening techniques, clean up harsh, barbed, emotionally loaded language while preserving the speaker's intent. Capture the intention without the negative language.

Allow the Parties Opportunity to Discuss What Has Been Said.

After this "uninterrupted time" continue to listen to the parties as they discuss what they have heard, to add what they need, and what else needs to be considered.

Allow Parties to Vent

Allow the parties time to vent – to express strong feelings about what has happened and why it is important to them. This will provide the mediator with significant information about what is important to them and why it matters.

When people are consumed with strong feelings, they are not able to allow any other views in until they feel that they have been heard in an open and accepting manner. The mediator seeks to normalize strong emotions.

Venting also gives the other party an opportunity to understand the depth of feeling the other is expressing.

During venting, encourage the parties to describe specific events rather than accusations, generalizations, and labeling the other. Personal attacks on each other can alienate them from hearing and they may miss the content of the concern as they begin looking for ways to defend themselves.

Guidelines and Cautions

Be Aware Of Non-Verbal Communication

Maintain awareness of your body language and facial expressions. Both should reflect a non-judgmental, accepting attitude.

Use a Non-Confrontational Tone of Voice

Use of an even tone that invites information and encourages participation will enhance the parties' confidence in your impartiality. Use of accusatory language or tone of voice and closed-ended questions can destroy your credibility.

Demonstrate Respect for Each of the Parties

Be careful that your tone of voice, body language, and the words you choose shows respect for who they are, what they know, and where they have been, regardless of the positions they may be holding in this exchange.

CONCLUDING THIS STAGE OF THE MEDIATION

Conclude this stage of mediation only after you have fully summarized all of the issues, commonalities, and interests identified by the parties to their satisfaction.

- **Issue**: An issue is a problem to be resolved, a subject or topic that can be negotiated.
- **Commonalities**: When the mediator can point out things that the parties have in common, they can begin to hear each other in a different way, and respect each other despite their differences.
- **Interests**: Interests have to do with the parties' goals, concerns, desires, motivations, and possibly things they are trying to avoid.
- **Why resolve this?** Parties often need to understand – to hear it verbalized – *why* it is in their interest to find a resolution.

Create a Mutual Problem-Solving Statement

The mediator creates a mutual problem-solving statement that summarizes the issues to be resolved in terms that are acceptable to the parties.

Chapter 7

Communication Skills for Mediators

Active Listening

Mediators are facilitators of the communications between disputants as well as good models of effective listening and communication. In order to establish and maintain rapport and to guide the mediation process, careful, accurate listening by the mediator is essential. Active listening involves:

- Listening for the purpose of hearing - not to answer
- Understanding the meaning behind the words
- Understanding the substantive content of what is being communicated
- Attuning to the emotional component of communications
- Providing skilled feedback to convey understanding.

Listening to Non-Verbal Communications

The mediator has to be aware of his/her own non-verbal communications while, at the same time, be able to take into account and understand the non-verbal communications of the disputants. Non-verbal communications tend to be more spontaneous and under less conscious control and therefore can provide a more accurate portrayal of where the disputants are coming from than verbal communication alone. The mediator needs to be aware of the following:

- Of all communications, the higher percent is non-verbal.
- Words can conceal as well as reveal and therefore the added awareness of the non-verbals can be a real asset for the mediator.
- Verbal and non-verbal communication can be either congruent or incongruent. Incongruent communication begs for more exploration from the mediator through the use of open questions and paraphrasing. When there is incongruence between the verbal and non-verbal communication, people tend to believe the non-verbal.
- Non-verbal communications may not have the same meanings for all people. There may be cultural differences in the meanings of non-verbal communications that need to be understood by the mediator.

- Use your body to convey that you are listening. Eye contact, leaning toward the speaker and nodding your head all convey that you are listening.
- Watch the parties' non-verbal communications. The mediator needs to observe what the speaker's body is saying, as well as observing how the listening party is reacting. How do the parties react while the mediator is speaking?

Paraphrasing

One of the primary goals of paraphrasing is to develop and maintain rapport with the disputants. Paraphrasing is a form of active listening in which a sincere attempt is made to understand what the party(s) are saying and to provide feedback which clearly conveys that they have been understood.

Definition

- Paraphrasing means to state, in one's **own words**, in a **brief sentence**, the **facts and feelings** that were heard as a result of listening to the party(s) speaking. Paraphrasing is interactive and takes place throughout the presentation by the parties.

Purpose

- To **convey that you understand** what the party has been saying.
- To **clarify** in your own mind what the disputant is saying. If you have missed or misunderstood something important to the speaker, a paraphrase gives him/her an opportunity to clarify.
- To **get more information**. Often paraphrasing encourages the speaker to say more about a situation and its importance.
- To convey acceptance and **acknowledge** the disputant(s) experience and feelings.
- Paraphrasing can be used to **manage communication** when one person tends to talk a lot. It provides a way to acknowledge the speaker, convey understanding and then to shift to the other party.
- Paraphrasing can be used to **slow things down** when the party(s) are moving faster than the mediator(s) can realistically follow.
- To **help both parties understand each other**. Paraphrasing is as much for the benefit of the party who is listening as the party who is speaking.
- To **reframe or launder trigger words** and hot issues.

Pitfalls to avoid (To maintain impartiality)

- Agreeing with one or both parties
- Including your own opinion of the situation
- Judgments or evaluative statements
- Giving advice
- Inserting, "but . . ." at the end of a paraphrase
- Paraphrasing at inappropriate times. Good times to offer paraphrases are when there is a pause, a shift in the subject matter, or at the conclusion of a statement.

Summarizing

Summarizing involves pulling together, in condensed form, the key points of what another has said. It is distinguished from paraphrasing in that it deals with more information at once.

When to Summarize

- **At the conclusion of one party rendition of his/her perception of the situation.** Always summarize the key points made by the party who has just spoken prior to inviting the next party to speak. Your summary becomes a point for transitioning from one party to the next.
- **At the conclusion of Stage 2** (Understanding the Parties and Identifying the Issues) it is important to pull together in summary form the key points of what both parties have said. At this point the summary can be placed into writing, on an easel page.
- In the Problem-Solving stage, **when the parties are identifying possible options**, it is important to pull together in summary form all the key parts of each option as well as pulling together the range of possible options.
- **When preparing to write the Memorandum of Understanding** or Agreement, the mediator needs to summarize all the solutions the parties have come up with.
- A useful time to summarize is **when the mediator(s) are confused** and have a difficult time to make sense of things. This gives the parties an opportunity to help the mediators put things into perspective.

Some Guidelines

- As in paraphrasing, the mediator needs to **avoid providing advice, evaluation or judgments.**
- **Focus on the issues, solvable problems and proposed solutions** and not on personalities.

- Invite the parties to **confirm whether the summary is accurate and complete.**
- Make sure that all **parties are summarized equally**. Otherwise they could see the mediator as biased toward one party at the expense of the other.

Reframing

Reframing is restatement or paraphrasing words, phrases or ideas into neutral, non-judgmental or even positive terms.

Skillful reframing enables people to hear information and understand problems differently. It can also be a demonstration of the impartiality of the mediator. While the mediator hears what the parties are saying, he/she does not agree or disagree with what is being presented. If the mediator uses the hot button words of one of the disputants, it may appear to the other party that the mediator has bought into what is being said about him or her.

Examples of Reframing

- ***From negative*** ("she is never there when I need her.") ***to positive*** ("You would like to have her help.")
- ***From past*** ("He didn't . . .") ***to future*** ("He's lying." to "You see it differently.")
- ***From a focus on the other person*** ("She never . . .") t***o focus on the speaker*** ("You are interested in . . .")
- ***From a focus on a problem*** ("The problem is the bad performance evaluation she gave me." ***to focus on the issue*** ("The issue is the outcome of the performance evaluation.")
- ***From a position*** ("He has to pay me $5,000.") ***to an interest*** ("You want to be compensated for your efforts.")
- ***From a complaint*** ("He doesn't listen to me.") ***to a request*** ("It sounds like you want to be heard.")

Think of ways to reframe the following:

- "He just wants to get rid of me."
- "He is under the total control of his mother all the time."
- "He has never showed an interest in caring for the children before."
- "She wants to take me for all I'm worth."
- "He (my supervisor) is always looking out for himself."

The Use of Questions

Good mediators learn to ask a lot of questions. Questions are used to help the parties to explore, analyze and become specific. Questions help the mediator understand each party, their interests and aspirations. However, some kinds of questions are useful in mediation and others are not.

Closed Questions

Closed questions are **appropriate when certain specific information is needed**. However, closed questions are needed far less than what many mediators reflect in their practice. The inappropriate use of closed questions can lead to some undesirable consequences.

Closed questions:

- Require a specific answer
- Focus on a particular point in the discussion
- Give the other person a clear idea of what you want to know
- Help eliminate misunderstandings
- Guide discussion toward a specific problem

Closed questions can:

- Be seen as threatening
- Arouse defensiveness
- Result in getting less information.
- Result in the mediator imposing his/her own agenda

Open-ended Questions

Open-ended questions are useful in exploring the disputants= perspectives and understandings. The use of open-ended questions helps guard against the mediator(s) inadvertently imposing their own issues and agendas into the mediation process.

Open-ended questions:

- Ask for an opinion, an explanation, or the reasoning behind a decision
- Allow a wide range of answers
- Can require several sentences or a longer explanation.

Using open-ended questions helps you be seen as:

- A more objective mediator
- Fair and unbiased
- Inclined to listen to all points of view
- Not inclined to evaluate situations prematurely.

Leading Questions

In mediation, leading questions are never appropriate. Leading questions takes the process where the mediator wants to go rather than where the disputants need to go.

Practice: Open, Closed, and Leading Questions

Identify the question type in the examples below. O-Open, C-Closed, L-Leading.

☐ **O**	☐ **C**	☐ **L**	Would you say that you were pleased with the outcome?
☐ **O**	☐ **C**	☐ **L**	Isn' it true that you made the phone call?
☐ **O**	☐ **C**	☐ **L**	Don't you agree that a crime has been committed?
☐ **O**	☐ **C**	☐ **L**	Did you pick up the children last night?
☐ **O**	☐ **C**	☐ **L**	You reacted negatively to her response, did you not?
☐ **O**	☐ **C**	☐ **L**	How did you react when he told you?
☐ **O**	☐ **C**	☐ **L**	Was your supervisor nearby?
☐ **O**	☐ **C**	☐ **L**	Was your supervisor upset with you?
☐ **O**	☐ **C**	☐ **L**	Have you thought about possible options?

☐ **O**	☐ **C**	☐ **L**	How would you describe the incident Friday afternoon?
☐ **O**	☐ **C**	☐ **L**	How do you see things differently from Jane?
☐ **O**	☐ **C**	☐ **L**	How old was your son when you separated?
☐ **O**	☐ **C**	☐ **L**	How much is the house worth?
☐ **O**	☐ **C**	☐ **L**	Can you tell me more about your performance evaluation?

The Use of Questions to Draw Out Parties

The mediator's use of questions helps organize, influence and give shape to the mediation process. Questions can be used to gather information, understand the parties, learn how they perceive their situation, and develop and evaluate options. Particular types of questions are useful at different stages of the mediation process. The following are illustrative of the types of questions that are useful in different stages of the mediation process. Also, think about additional questions you might ask.

Introduction/ Orientation

- What would you like to accomplish here today?
- Can you tell me why you chose to come to mediation?
- Do you have any questions about my role as a mediator?
- Do you have any questions about the mediation process and how it works?
- Do you have any other questions?
- _____
- _____

Understanding the Parties and the Issues

- Is there anything more you would like to say about that?
- What are the concerns you would like to see addressed?
- Is there additional information you would like to have?
- How does that affect you?
- Can you tell me why that is important to you?
- _____
- _____

Problem Solving/ Developing Solutions

- What ideas do you have?
- What do you think of the idea?
- What are the ways you can gain what you need?
- What keeps that from happening?
- How would you like for things to be in the future?
- _____
- _____

Writing the Memorandum of Understanding

- Who will be responsible for making that happen?
- By when do you want this to be accomplished?
- Are there other people who can help you with this?
- Can you tell us what you mean by “soon”?
- How would you like your idea to be stated?
- _____

- _____

Encouraging Reflection and Introspection

Many types of questions are appropriate in any stage of the mediation process. Especially useful are questions that promote reflection and introspection. While paraphrasing is useful in this regard, the use of questions can be equally valuable and productive.

- Have you been hearing anything in a different way?
- Is there anything you would like to clarify?
- How does that affect you?
- Would that make any difference to you?
- What part of that is the most important to you?
- _____
- _____

Chapter 8

The Mediation Process:

STAGE III

Problem-Solving

Goals

- To decide which issues to address first
- To generate possible solutions for each issue
- To evaluate possible solutions and choose the best one

ASSISTING THE PARTIES TO DEVELOP SOLUTIONS

During the previous stage of the mediation process, most of the communication was from the disputants to the mediator. By the time the mediation enters this stage, it is the hope that communication is flowing freely between all participants in the mediation including the mediators and all parties. It is not unusual that parties are able to interact with each other in productive ways. As long as this is the case, the mediator can take on the role of a coach or guide as the parties work out their solutions.

Sometimes the conflict feels overwhelming, confusing and unmanageable during the problem-solving stage. It is important that, as an advocate of the mediation process, the mediator keeps the parties focused and provides the necessary structure and support to keep them on target. The marks of a good problem-solving process include openness, empowerment and participation. Throughout the problem-solving stage, the mediator functions as an advocate of fair standards, elicits full participation, restructures fractured communication, helps the parties identify interests and assists in finding the most workable solutions. What follows are the steps through the problem-solving process.

PRIORITIZING THE AGENDA

During the previous stage, the mediator has assisted the parties in developing a list of their issues and concerns and identified areas where they have agreement. The initial task in problem-solving is to make decisions about where the parties wish to begin. The decision about where to begin is not made by the mediator. Rather, the mediator assists the parties to make the decision. This is accomplished by raising questions for the parties to consider as they think about where to start.

- **Separate the short-term issues from the long-term ones.** The mediator assists the parties to identify and work on those short-term solutions they need during the time interval between sessions. They need to be clear that the short-term solutions do not imply anything about what the long-term solutions will be. However, this is an opportunity for parties to try out some possibilities to determine what will work for them. They can bring their experiences to subsequent sessions for evaluation and possible exclusion or adoption as long-term solutions.

- A second important consideration is whether there are **some issues that need solution first because they provide the groundwork for later decision making.** The mediator assists the parties to sort out what those might be. This is done by helping the parties look at the issues in relation to each other. Sometimes it will be found that several issues are related and therefore will need to be considered together, or at least, in relation to each other. For example, in divorce mediation, the issue of where the children will be living must be decided first because it impacts decisions about parental time with the children as well as child support. Many parents see these issues as one “issues bundle” that need to be considered together.

- **Sometimes it is useful to begin with the easier issues first.** There are several reasons why this may be advantageous. By starting with issues where the parties are not so far apart, they can experience some success in problem solving and gain an understanding of how developing solutions actually works. It is also useful to begin with easier issues when tensions remain relatively high and save the “hot” issues for later on. The mediator, however, is not the one who decides where to begin but rather asks appropriate questions to help the parties make that decision.

- **Parties may wish to begin with those they find to be most important.** Importance may be defined as those issues that are weighing most heavily upon one or both of the parties’ minds, the kinds of issues that keep them awake at night. Or, it may be that some issues need resolution immediately because it becomes difficult for aspects of their lives to go on without some solutions.

GENERATE OPTIONS FOR RESOLUTION

Beginning with the first issue for resolution, assist the parties in generating possible solutions. Working with one issue at a time, it is important that the parties generate as many possible options for each issue as they can. There is an important ground rule, which the mediator needs to introduce at this time. The ground rule is that ideas that are being presented by the parties may not be evaluated or reacted to at this time. All they are doing is generating possibilities. Evaluation of the options will come as a next step. Creativity will be confounded unless this rule is followed. The following are some possible ways to assist the parties in generating options.

- **Begin by identifying options you have heard from the disputants** in the earlier stages of the mediation process to check if they would like to have them identified as possible options now.
- **Ask open-ended questions** to help the parties think about what might work for them. It is helpful to explore what they have thought about or talked about in the past or even what they have tried in the past.
- **Encourage the parties to engage in "brain storming"**, perhaps a form of free-associating. Brainstorming involves inviting the parties to put on the list of options, anything that comes to their mind, even if it may appear to be unrealistic at first.
- **Ask the parties what they would like to offer each other.** This is especially useful for parties who are trying to extract concessions from each other, which often results in the building up resistance and defensiveness. It is not unusual that parties find it easier to take first steps by making offers to each other rather than reacting to what is being asked of them.
- **The mediator may find it useful to offer some sample possibilities.** For example, the mediator might ask questions prefixed by "What if . . .", "Have you thought about . . .", "Some people I know have tried . . ." If the mediator begins to offer possibilities, it is important that a number of possibilities be introduced for the parties to consider. Otherwise the parties may end up selecting the mediator's idea without serious evaluation. This approach can be used only when all the previously mentioned techniques have failed to help the parties think of possible options.

DEVELOP CRITERIA OR GUIDELINES FOR EVALUATION

There are times when the mediator will need to spend some time helping the parties to develop their own criteria for evaluation of options. If they are working from a different set of criteria they will not likely arrive at solutions. The criteria generally address issues of fairness as well as the basis for deciding what a good solution is. Each possible option will then be

examined against the identified criteria. There are several types of questions that will assist the parties in this effort.

- **Assist the parties in identifying the needs of all persons, including themselves, who will be impacted by the decisions they make**. For example, in planning parenting arrangements by parties who are divorcing, they may be asked what their child of a given age needs for healthy development. As the parents identify the needs of the child, each parenting option can be evaluated against those identified needs.
- **Assist the parties in identifying what they would consider fair** based upon individual resources, potential resources, abilities, etc. For example, in distribution of property by divorcing couples they may decide to divide their assets on a 60/40 basis because of the respective income discrepancies or on a 50/50 basis because they have approximately equal earning capacity. Basing a business solution on actual expenses incurred may provide a sense of fairness in determining a settlement.

EVALUATE THE OPTIONS (SELECT THE BEST OPTION)

Once the possible options are identified by the parties and criteria for evaluation have been developed they are ready to take a careful look at each possible option and select the one that appears to be the best solution to the identified issue. The role of the mediator is to assist the parties to evaluate the options for themselves. Evaluation focuses the parties into the future. There are several ways to assist them in this.

- It may be helpful for the mediator to **remind the parties that while they are developing a contract with each other, that it can be changed** at any time in the future with the agreement of all parties to the contract. This can make the decision making process seem less risky for the parties.
- The mediator begins the evaluation by **asking open-ended questions** to help them think about each option. Questions such as “Have you given some thought to how this might or might not work for you?” or, “What has been your experience with this option in the past?” will often be sufficient to get the parties started.
- Help the parties **think about how the option under consideration would work for them in the future**, in six months, twelve months, five years.
- Have the parties **consider whether there are blocks to carrying out the possible solution.** Are there people who would stand in their way? Do the parties lack the skills to carry it out?
- Assist the parties in **identifying what will help them to carry out the possible solution**. Are there people who will assist and support them? Do they have the

necessary resources available? Do the parties have the required skills?

- Do the parties need to consider how the **option under consideration would affect other people** who are not at the mediation table? Are there people whose cooperation they will need to make it work?
- Based upon the evaluation, help the parties to **choose the best option**. This will become part of the final written agreement.

Problem Solving: Some Useful Questions

Where would you like to begin?

What ideas do you have for resolving this?

Which options are most appropriate?

Who will do what, when, how, how long?

Who else do you need to talk to?

HOMEWORK

Throughout the mediation there may be work to be accomplished by the parties as part of the process. This may include anything from getting more information about organizational policies and procedures, seeking the advice of experts, getting appraisals, and talking with other persons who will be impacted by the proposed solutions. At the conclusion of each session, the mediator assists the parties in identifying homework, deciding who will do it, and how much time is needed to get it done.

USE OF EXPERTS

The mediator assists the parties in identifying expert advice and information that is needed. This may include attorneys, appraisers, financial planners, tax experts, psychologists, etc. Many mediators keep a list of "mediation friendly" experts to whom they can refer parties.

DOCUMENTATION

It may be helpful for the parties to provide documents that were used in mediation and include these as attachments to the written agreement. The attachments will be helpful as attorneys and others seek to understand the narrative part of the agreement.

MAINTAINING CONTROL

It is the task of the mediator to keep the parties on target and within the guidelines established for making the negotiation work. Some ways to assist the parties in this are the following:

- **Encourage direct discussion** between the parties, as they are able to do so. Emotions will need to be less intense for this to work.
- Continue to **summarize and paraphrase** each party.
- When interruptions keep the negotiation from moving forward, the mediator may need to **remind the parties about the ground rule not to interrupt each other.**
- Assist the parties to **remain focused on one issue at a time** unless they are inextricably related to each other.
- **Focus on interests, not on positions**. As the mediator highlights interests, useful information about each party's underlying concerns and desires is elicited. The conflict can then be reframed into shared interests and concerns and can create a basis for moving forward.

THE USE OF SEPARATE MEETINGS (CAUCUS)

This is a time when the mediators meet with each of the parties by themselves. When mediators want to meet with one party for a particular reason, they always meet with the other party in separate session as well. Some mediators use separate sessions frequently while others use it only in special circumstances.

When to use separate sessions

- When **mediating complex, multiparty disputes,** the use of separate sessions can be quite essential for expediting negotiation among parties. How to use separate sessions within the context of complex, multiparty disputes is a topic for discussion in advanced training for handling such disputes.

- When **parties are stuck, at an impasse**, and find that they cannot make any movement, the use of separate sessions may be a useful strategy to get them moving again or to examine what their alternatives are if they do not reach agreement.

- When **emotions are getting out of hand** and the mediator has lost control of the process separate meetings can serve to inhibit the nonproductive interactions between the parties.

- When one or both parties are having **difficulty identifying and stating their issues** in the presence of the other party. In separate meetings it is often easier to verbalize concerns because the other party is not there to react. The mediator can also help the party strategize ways for raising difficult topics when they return to the joint session.

- When one or both of the **parties find it difficult to explore and discuss possible solutions** in the presence of each other. It may be easier to think creatively when the other party is not present to react to ideas that are being explored. Having talked about possibilities in separate sessions makes it easier to verbalize them when the joint meeting is reconvened.

- When the **mediator suspects that one or both parties is feeling threatened,** it can be important to explore their fears and anxieties in separate sessions to determine whether to continue mediation or find ways to minimize the sense of threat.

- When one of both parties need some **reality testing** in order to help them move things forward in negotiation. The mediator can help the parties look at what the alternatives are or what will be the outcome should agreement not be reached in mediation.

- When the mediator suspects that there is **an elephant in the room**, **parties are withholding information, or have ulterior motives** for participating.

Procedures for facilitating separate sessions

- The mediator(s) **meet separately with each party**. To maintain the appearance of impartiality, it is important to always meet with both parties separately rather than with only one. This can take place within the context of a single joint mediation session or can take place between two joint sessions, or by telephone. When co-mediating both mediators meet as a team with each party rather than splitting up.

- When caucusing within the context of a regular joint session, the separate sessions need to be **relatively short** (15 to 20 minutes). When the separate sessions take place between two consecutive joint sessions, longer meetings are appropriate. In either event, the separate sessions should be about equal in length.

- **Establish confidentiality.** Parties need to understand that what is said in separate sessions is confidential, unless the respective party agrees that it need not be. A useful way to handle this is to check with parties at the conclusion of the separate session, whether anything was said that couldn't be discussed in joint session.

- **Strengthen rapport** with each party. This is an opportunity to provide each party with the mediators' undivided attention. Explore with the parties how the mediation is working for them up to this point. Find out whether there are any concerns or anxieties. Provide positive feedback for the work they have done. Avoid becoming too sympathetic during the caucus in order to minimize the potential for parties becoming more rigid on their positions.

- The mediator can strategically **use the same procedures in separate sessions that are used in joint sessions**. The mediator can explore issues, possible options, facilitate evaluation, and help the parties choose options.

- The use of **paraphrasing and summarizing** is as important in separate as in joint sessions.

Some cautions

- There is always the possibility that one party will share something in separate session that the other party did not want to reveal or talk about. The **mediator may end up bearing secrets** while continuing with the mediation session.

- **Trust issues can come up as a result of using separate sessions**. In discussion following separate sessions, it is possible that one party will introduce content that was shared by the other in separate session. It may appear to the first party that the mediator has talked to the second party about a matter that was shared in confidence.

- Separate sessions are **not meant to be used as an escape for the mediator** when things are becoming difficult in joint session. It is always a discretionary call as to when it can be beneficial for the parties to work separately.

Sample Agreements

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding between , ("Father") and , ("Mother") resulted from a mediation held at the Mediation Center on March 1, 2013 and May 1, 2013 and concerns the parties' parenting arrangements for their son, Albert, age 4 (DOB **6/2009**).

1. Physical residence. Albert will primarily reside with Mother.

2. Visitation. Albert may visit with his Father every weekend from 5 pm Friday until 6 pm Sunday and every Wednesday night from 5 pm until 8:30 pm and at other times to which the Mother and Father agree.

3. Summer scheduling. Mother and Father want to provide Albert with stimulating and enriching activities during the summer. Mother and Father also want Albert to spend time each summer with each parent. Therefore, they agree to try and enroll him in programs in a timely manner so as to assure his admission to those programs and at the same time to preserve time during the summer for Albert to take vacations with each parent.

   (a) As soon as either parent identifies a summer program that he/she is seriously considering for Albert, then he/she will notify the other parent and, on an ongoing and timely basis, provide information about the program (as it becomes available) to the other parent. Then, at least seven (7) days prior to the first date for enrollment for each program, Father and Mother will reach an agreement as to whether Albert should be enrolled or not in the program. If there are not seven days available for them to make a decision, then Mother and Father will decide by the first possible date of enrollment. If the parties cannot agree by the deadline, then Mother may decide whether to enroll Albert, as long as the program(s) in which Albert is enrolled do not take up more than seven (7) weeks of Albert's summer vacation.

   (b) At least two (2) months before either parent intends to take Albert for a scheduled activity involving more than a weekend, that parent will inform the other parent of his/her plans.

   (c) Mother and Father may, if they agree, change any of the summer scheduling procedure.

4. Other decisions concerning Albert.

   (a) Mother and Father agree to exchange information about serious matters concerning Albert relating to his education, health care, religion, location (moving out of town) and upbringing. Each party will then discuss with the other party and seek the other party's opinion concerning these matters. The parties will then make their decisions concerning each such matter no later than seven (7) days prior to the deadline for that decision. If there are not seven (7) days available for the parties to decide, they will make their decisions as soon as possible. If they cannot reach an agreement on a particular matter, then Mother may make the decision, except as described in (b).

   (b) In the case of elective surgery or mental health treatment, Mother and Father will exchange

information and then discuss with each other and seek each other's opinion concerning the proposed surgery or treatment. The parties will then make their decision within two (2) weeks of the initial exchange of information. If they cannot reach an agreement on the proposed mental health treatment, then Mother and Father agree that Albert may undergo up to eight visits with the mental health professional, after which time, Mother and Father will review and discuss the situation to determine whether Albert should continue such treatment.

5. Not binding. This Memorandum of Understanding is not a binding final agreement of the parties, unless it has been reviewed by independent counsel for each of the parties and then signed by the parties.

AGREEMENT

Abbie Smith ("Abbie") and Joe Smith ("Joe") voluntarily entered into mediation at the Mediation Center on May 30, 201 . Abbie and Joe are legal parents of Robert Smith (DOB 1/2/0 ; and Tina Smith (DOB 3/4/10). Both parents have agreed to the following conditions with regard to their children:

CUSTODY Abbie and Joe agree that they will have JOINT LEGAL CUSTODY of Robert Smith and Tina Smith.

The physical residence of the children will be with Abbie.

The parties agree to speak to each other about all important decisions regarding their children and to respect each other's suggestions. They will try to make all decisions about the children jointly. If they are unable to come to an agreement about a matter, then Abbie will have the final authority to make the decision.

VISITATION Joe may visit with children every other weekend from 7 pm on Friday to 5 pm on Sunday, beginning June 1, 201 . If he is unable to visit with the children because of work on any Saturday, he will contact Abbie by the Thursday evening before the visitation is to begin and let her know. If Joe is unable to visit the children on a scheduled weekend, the "every other weekend" schedule remains the same.

Joe may have other visitation with the children if he gives Abbie at least 3 days' notice of his desire to visit with the children.

Joe and Abbie will talk about the children's birthdays and will try to schedule together a party for the children.

For Christmas, 201 , Abbie will have the children Christmas Eve and Christmas morning until noon. Then, Joe may have the children for the rest of Christmas. In 201 Joe will have the children for Christmas Eve and morning and Abbie will have the children for the rest of Christmas. The parties will alternate this holiday schedule each year.

For Easter, 201 , Abbie will have the children. For Thanksgiving, 201 , Joe will have the children. For Easter, 201 , Joe will have the children and for Thanksgiving, 201 , Abbie will have the children. The parties will alternate this holiday schedule each year.

When the children are exchanged between parents for visitation, the parents shall meet at a neutral, public place, unless they agree otherwise.

TRAVEL OUTSIDE OF AREA If either parent wishes to take the children more than 30 miles out of the area in which the children are living, he or she must let the other parent know the

name, address and telephone number of where she/he is visiting and when she/he plans to be back.

NOTIFICATION OF RELOCATION Parties agree to give the other party and the court thirty (30) days advance written notice when they are intending to relocate or change address.

CHILD SUPPORT: Parties have reviewed the Virginia Child Support Guidelines. They have filled out the attached worksheet which indicates a child support amount of $917. Recognizing their present heavy debts, the parties have deviated from this amount by agreement and have agreed to the sum of $800 per month child support.

Joe Smith shall pay Abbie Smith the sum of $800 per month for the support of Robert and Tina Smith. This amount shall be paid monthly and shall begin May 31, 201 and the last day of each month thereafter.

AUTOMATIC WAGE WITHHOLDING Parties agree that they would like these child support payments collected by automatic wage withholding through the department of social services division of child support enforcement. Joe smith understands that he/she is responsible for making these payments directly to Abbie Smith until the division of child support enforcement wage withholding payments begin.

The parties agree that until the withholding begins, Joe will make weekly payments of child support to Abbie.

TAX EXEMPTION Abbie smith may claim both children as exemptions for income tax purposes.

HEALTH INSURANCE Abbie Smith will maintain the children on her health insurance plan, provided, by her employer through the MEDICA Insurance Plan (policy #1234).

LEGAL COUNSEL Each party has either had a draft of this agreement reviewed by independent legal counsel prior to signing it or has waived the opportunity to do so.

Joseph Smith
1234 Highland Street
Any City, VA 22222
SSN 111-11-1111
DOB 7/1/ 0
(h) 703-555-4321

Employed by ABC Contractors
100 Main Street
Any City, VA 22222
(w) 703-555-4433

Abbie Smith
300 Baltic Place
Any city, VA 22222
SSN 000-11-1111
DOB 7/2/ 1
(h) 703-555-1234

Employed by The Group, Associates
12 Ventnor Avenue
Any City, VA 22222
(w) 703-555-6789

SETTLEMENT AGREEMENT
In the matter of M. W.
vs. R.G. , Administrator,
ABCD Administration
Center Docket Number xxx-xxx-xxxx

The Complainant, M.W., and the respondent, R.G., (hereinafter Agency) do hereby enter into this agreement to completely resolve the disputed issues raised in M.W.'s Discrimination Complaint. This agreement is entered into based on the authority provided by Section 717 of the Civil Rights Act of 1964, as amended (42 U.S. Code 2000e-16) [29 Code of Federal Regulations, Section 1614.603].

1. The parties mutually agree:

    a. This agreement constitutes the complete understanding between M.W. and the Agency and is binding upon the parties, their successors, and their representatives. No other terms, promises, or agreements will have any force or effect unless reduced to writing and signed by all parties to this Agreement.

    b. The parties to this agreement will make a good faith effort not to disclose the terms of the Agreement except to the extent necessary to implement this settlement agreement.

    c. The terms will not establish any precedent nor will be used as a basis by the Agency, M.W., or any representative organization to seek or justify similar terms in any subsequent case.

    d. This settlement agreement does not constitute an admission of liability, fault or error by the Agency, its employees or representatives, and/or any violation of Title VII of the Civil Rights Acts of 1964 and 1991, as amended; the Age Discrimination in Employment Act of 1967, as amended; the Rehabilitation Act of 1973, as amended; or any other Federal or State statute or regulation.

2. In exchange for the promises made by M.W. in paragraph 3 of this agreement, the Agency agrees to:

    a. send M.W. to the Leadership Training classes offered by OPM
    b. provide M.W. with a special act award recognizing and acknowledging the scope of her work evaluating and justifying the ST positions for GRC
    c. provide M.W. with a performance appraisal with a rating of not less than "accomplished" specifically for the 2014 performance cycle

3. In exchange for the promises made by the Agency in paragraph 2 of this Agreement, M.W. freely and voluntarily agrees:

    a. That execution of this agreement operates as a withdrawal of the complaint(s) identified in the Preamble above.

b. Not to institute a lawsuit and waives all right to personal recovery, including but not limited to compensatory damages, in any lawsuit brought against the Agency by either M.W. or the Equal Employment Opportunity Commission, or other type of EEO complaint or any other civil and criminal litigation in any court or other administrative forum, for all acts, events and circumstances arising out of or connected with the facts upon which the complaint(s) as listed in the preamble are based, including, but not limited to actions brought under Title VII of the Civil Rights Act of 1964, and 1991, as amended; the Rehabilitation Act of 1973, as amended; or any other federal or state statute or regulation. M.W. specifically and voluntarily affirms that she has no other claims made under the Age Discrimination in Employment Act, as amended.

4. If M.W. believes that for whatever reason, the Agency has not specifically complied with the terms of this Settlement Agreement, M.W. may request that said terms be specifically implemented, or alternatively, that the Complaint be reinstated for further processing at the point processing closed, in accordance with procedures found at 29 C.F.R. 1614.504. Any such request must be made within **30 calendar days** of the date M.W. knows or reasonably should know of the noncompliance. The request must be forwarded to the ASSOCIATE ADMINISTRATOR for THE OFFICE OF DIVERSITY AND EQUAL OPPORTUNITY PROGRAMS, NASA HEADQUARTERS, WASHINGTON, D.C. 20546. The request must include the specific factual grounds supporting M.W.'s belief and should include relevant documents and witness statements, if available.

5. By signing below, M.W. acknowledges reading this Agreement in its entirety, understanding all terms and conditions of this Agreement, and having done so, knowingly, voluntarily, and freely enters into this Agreement without coercion or duress.

6. M.W. is on notice that she has at least 21 calendar days from receipt of this agreement to review the terms and conditions of this agreement, if she so chooses.

7. M.W. is on notice that the terms and conditions of this agreement will become binding and enforceable seven (7) calendar days following the latest signature on this document. M.W. may revoke this agreement in writing at any time prior to the expiration of this seven (7) day period.

8. By executing this agreement, M.W. acknowledges that she is voluntarily and knowingly waives rights or claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621, et seq., in exchange for consideration in addition to anything of value to which she is already entitled.

_____ _____

M.W., Complainant Date

_____ _____

R.G., Settlement Official Date

I do hereby declare and affirm that the signatures contained above are true and accurate.

_____ _____

NOTARY Date

(NOTE: If there are any other rights, particularly ADEA rights conferred upon the Complainant which are being waived pursuant to this agreement, those rights must be specifically set forth in the agreement.)

EEO Settlement Agreement

Agreement made this nineteenth day of November, 2015 between Alex Smartypants (Employee) and the ABC Agency (Agency) to resolve the Employee's discrimination complaints in EEOC Nos. 05-151248.

1. The Agency will issue a lump sum check in the amount of $40,000.00 to the Employee immediately upon notification from the U.S. Office of Personnel Management (OPM) that her application for disability retirement has been approved. The Employee will be responsible for any and all taxes that may be due and owing in connection with the lump sum payment. This payment will be made only in the connection with the Employee's disability retirement.

2. The Agency agrees to support and expedite the Employee's application for disability retirement. Unless otherwise mutually agreed to in writing, the Employee will make every reasonable effort to submit her retirement application by February 1, 2016. The Employee will be allowed to work in her current position pending retirement approval notification from OPM.

3. The Agency will issue a check in the amount of $30,000.00 for attorney's fees. This check will be issued directly to Best Lawyer, PLLC. The Agency will make reasonable efforts to issue this payment check within the 30=60 days following notification of approval of the Employee's OPM retirement application.

4. The Agency agrees that it will expunge any and all documents from the Employee's personnel files relating to the following matters: Request for Fitness of Duty Examination dated July 7, 2015; Letter of Warning dated August 15, 2015; Notice of Seven Day Suspension dated September 29, 2015 and Letter of Demand for audit shortage dated March 2015.

5. The Agency agrees that, following the Employee's retirement, no derogatory information of any kind will be released to any person or entity requesting verification of the Employee's employment status with the Agency. If requested for specific employment information, the Agency will only provide the following information: (a) Employee worked for the Agency from 1989 to 201-; (b) that the Employee was employed as a Court Clerk and (c) the Employee retired for disability reasons.

6. The Employee agrees to withdraw the above-noted discrimination complaints upon execution of this agreement and further agrees to waive any and all claims, grievances, appeals or any other actions arising out of her complaints.

7. The parties agree that the terms of this agreement will be kept confidential and not discussed with anyone except for those persons who have a need to know in order to implement and effect the terms of the agreement.

8. The parties agree that the execution of this agreement shall not constitute an admission of wrongdoing or violation of any law, rule or regulation by either party.

9. The Agency agrees that there will be no reprisal against the Employee for filing the above-noted discrimination complaints or the settlement of said complaints.

10. The Agency agrees that, in the event that the Employee's disability retirement application is not approved by OPM, the above discrimination complaints will be reinstated for processing from the point that processing terminated upon execution of this agreement.

_____

_____

Alex Smarty-pants/ Date
Complainant

Sam Rowdy/ Date
Agency Representative

_____

Attorney for Complainant

Settlement Agreement

1. In exchange for the promises made by the Wizengamot, hereinafter referred to as the "Agency," in paragraph 2 of this Agreement, Ms. Delores Umbridge hereinafter referred to as the "Appellant," agrees:

    a. To forever withdraw the Appellant's Merit Systems Protection Board Appeal, Docket Number XX-XXXX-XXXXX, which is currently pending against the Agency ("MSPB Appeal"). To take no further action against the Agency before the Board or any other forum, administrative or judicial, based in whole or in part on the facts or allegations contained in her MSPB Appeal.

    b. To sign a Standard Form (SF) 52, Request for Personnel Action, documenting that she resigned effective 7 May, 2015.

    c. Not to seek or accept employment with the Agency at any time subsequent to the signing of this Agreement.

    d. Not to file or pursue any inquiries, investigations, appeals, complaints, grievances, or lawsuits against the Agency in any forum relating to or arising out of any aspect of the Appellant's employment with the Agency or her removal therefrom. Not to institute a lawsuit under the Civil Rights Act of 1964, Title VII, as amended, under the Rehabilitation Act, under the United States Constitution or under any other state of Federal employment with the Agency, her removal therefrom, or her MSPB Appeal.

    e. To waive any claim for back pay, front pay, travel pay, severance pay, interest, attorney's fees, costs, or compensatory damages.

    f. To only use the Chief, Employee Management Branch, Personnel Division, as her point of contact at the Agency for purposes of a neutral reference, and if the Appellant fails to do so, the Agency cannot be held liable for any representation made by any other individual (s) at the Agency contacted on behalf of the Appellant.

2. In exchange for the promise of the Appellant in paragraph 1 of this Agreement, the Agency hereby agrees:

    a. To accept an SF-52 documenting the Appellant's resignation from her position of Grand Iquisitor and to prepare an SF-50, Notification of Personnel Action documenting that the Appellant voluntarily resigned from her position and the Federal service effective 7 May, 2015.

    b. To cancel the personnel action removing the Appellant and to purge the Appellant's Official Personnel File (OPF) of all documentation and records relating to her removal.

    c. To, upon receipt of the Appellant's properly executed SF-52 documenting her resignation effective 7 May 2015, issue a check in the amount of fifteen thousand dollars ($15,000.00) payable to the firm of Sirius Black.

3. The Agency and the Appellate further agree:

   a. That this Agreement contains all terms and conditions of the settlement between the parties, and no other conditions, express or implied, are included.

   b. That this Agreement does not constitute admission or acknowledgement of any guilt, fault or wrongdoing and is made solely to compromise and settle all of the issues of the Appellant's MSPB Appeal. That the Appellant is not the prevailing party with respect to her MSPB Appeal.

   c. That the terms of this Agreement will not establish any precedent, nor will this Agreement be used as a basis by the Appellant or any representative to seek or justify similar terms in a subsequent case.

   d. That this Agreement may be used as evidence in a later proceeding in which either of the parties allege a breach of this regarding the terms of this Agreement.

   e. That all parties represent and warrant that they have had adequate opportunity to consult with their own counsel, representatives and attorneys with respect to the terms of this Agreement.

   f. That this Agreement was freely and voluntarily entered into by the Appellant and the Agency.

   g. The parties request that this Agreement be entered into the Board's record for enforcement purposes.

_____ _____

Agency's Representative Date

_____ _____

Appellant's Representative Date

_____ _____

Appellant Date

NORTHERN VIRGINIA MEDIATION SERVICE

IN THE GENERAL DISTRICT COURT

[redacted]
Plaintiff [redacted] }
}
vs. }
[redacted] }
Defendant

The 4 day of Sept, [redacted]
[redacted]
Court Number

MEDIATED AGREEMENT

The Clerk of said Court will note that this case is settled by stipulation as follows:

→ Defendant agrees to pay $1082.00 from escrow regarding current security deposit of $3000.00. Defendant will pay by personal check that will be postmarked no later than September 11th, 2015. Plaintiff agrees defendant will return the remaining balance of escrow account.

→ Defendent agrees to notify Plaintiff by September 30th of estimate repairs for hardwood floor damage on main floor leading to the deck and the powder room. Once plaintiff is notified, parties agree to come back to mediation to discuss these damage charges. If agreement is not reached, a new case will be filed in the courtroom.

This concludes all matters/issues in connection with this warrant in debt.

(Continued from Front)

The Parties further agree (Check ONLY one box):

☒ To a final DISMISSAL of the case WITH PREJUDICE.
This means that as of the date of this agreement the parties have settled their suit according to the terms of the agreement above, neither of the parties has a further obligation to the other in this matter and the suit cannot be refiled or reopened at a later date.

☐ To DISMISS the case WITHOUT PREJUDICE.
This means that if the Defendant fails to comply with the agreement, the Plaintiff may refile the suit and request judgment for $ _____ minus any amounts paid by Defendant.

☐ To CONTINUE the case until _____.
This will allow the parties time to fulfill the obligations described in this agreement. If no party is present in court on this date, the case will be DISMISSED WITH PREJUDICE. If either party fails to comply with the agreement, the other party may appear in court on this date, or earlier with 10 days notice to the other party, and move for judgment under the original suit, less any amounts paid by the Defendant.

☐ To enter the case as a CONSENT JUDGMENT in the amount of $ _____.
This means that if the Defendant fails to pay that amount, the Plaintiff may come back into court to enforce the judgment for the amount stated in this paragraph, less any amounts paid by the Defendant. Upon satisfaction of the payment, the Plaintiff must notify the court.

ACKNOWLEDGED AND AGREED:

[redacted]

Plaintiff's Signature Date

[redacted]

Defendant's Signature Date

Mediated by [redacted]

and [redacted]

of The Northern Virginia Mediation Service.

CONFIRMED:

_____

Judge Date

NORTHERN VIRGINIA MEDIATION SERVICE

IN THE GENERAL DISTRICT COURT

[redacted]
Plaintiff

vs.

[redacted]
Defendant

The 26 day of June [redacted]

[redacted]
Court Number

MEDIATED AGREEMENT

The Clerk of said Court will note that this case is settled by stipulation as follows:

Plaintiffs and Defendant [redacted] agreed to fully and finally settle all of their disputes and all of the issues set forth in the Warrent in Debt as follows:

1. Defendant [redacted] shall pay ONE THOUSAND, FIVE HUNDRED DOLLARS ($1,500.00) in full and final settlement to Plaintiff, [redacted]

2. The $1500.00 shall be paid in monthly payments of $200 per month, to be mailed by certified mail dated no later than the Fifth Day of each month, beginning August 2015.

3. Payments are to be mailed to Plaintiff at:
2226 Lofty Heights Place
Reston, VA 20191

4. Full payment may be made at any time prior to the dates specified in this agreement

(Continued from Front)_____

_____

_____

The Parties further agree (Check ONLY one box):

☐ To a final DISMISSAL of the case WITH PREJUDICE.
This means that as of the date of this agreement the parties have settled their suit according to the terms of the agreement above, neither of the parties has a further obligation to the other in this matter and the suit cannot be refiled or reopened at a later date.

☐ To DISMISS the case WITHOUT PREJUDICE.
This means that if the Defendant fails to comply with the agreement, the Plaintiff may refile the suit and request judgment for $ _____ minus any amounts paid by Defendant.

☒ To CONTINUE the case until March 1, 2016
This will allow the parties time to fulfill the obligations described in this agreement. If no party is present in court on this date, the case will be DISMISSED WITH PREJUDICE. If either party fails to comply with the agreement, the other party may appear in court on this date, or earlier with 10 days notice to the other party, and move for judgment under the original suit, less any amounts paid by the Defendant.

☐ To enter the case as a CONSENT JUDGMENT in the amount of $ _____.
This means that if the Defendant fails to pay that amount, the Plaintiff may come back into court to enforce the judgment for the amount stated in this paragraph, less any amounts paid by the Defendant. Upon satisfaction of the payment, the Plaintiff must notify the court.

ACKNOWLEDGED AND AGREED:

[redacted]

Plaintiff's Signature Date

[redacted]

Defendant's Signature Date

Mediated by [redacted]

and _____

of The Northern Virginia Mediation Service.

CONFIRMED:

_____

Judge Date

NORTHERN VIRGINIA MEDIATION SERVICE

IN THE GENERAL DISTRICT COURT

[redacted]

Plaintiff [redacted] } The 31 day of JULY, [redacted]

} [redacted]

vs. } Court Number

[redacted] }

Defendant [redacted]

MEDIATED AGREEMENT

The Clerk of said Court will note that this case is settled by stipulation as follows:

BOTH PLAINTIFF AND DEFENDANT AGREE TO THE TERMS AND CONDITIONS SETFORTH HERE AND HAVE SIGNED THE "AGREEMENT TO MEDIATE"

- PLAINTIFF AGREES TO PAY SAGE PAYMENT SOLUTIONS $4,500.00 IN FULL AND FINAL SETTLEMENT OF THIS ~~ME~~ CLAIM ~~AS WELL AS~~ AND ALL OUTSTANDING AND ALL POTENTIAL FUTURE CLAIMS RELATED TO THE CONTRACTUAL RELATIONS BETWEEN THE PARTIES
- PAYMENTS WILL BE MADE IN FOUR EQUAL INSTALLMENTS OF $1125.00 AS FOLLOWS: • 7 AUG 2015 = $1125 • 7 SEP 2015 = $1125 • 7 OCT 2015 = $1125 AND 6 NOV 2015 = 1125 TOTAL = $4500.00
- PAYMENTS WILL BE MADE BY "MIA GEMMA" BUSINESS CHECKS delivered BY USPS PRIORITY MAIL W/ TRACKING TO 12120 SUNSET HILLS Rd #500 RESTON, VA 20190 ATTN: EITHAN MAXWELL
- ALL PARTIES SHALL BE RELEASED OF ALL CONTRACTUAL RELATIONS WITH EACH OTHER AS OF THIS DATE
- PLAINTIFF AGREES TO REMOVE BETTER BUSINESS BUREAU ~~COMPLAINT AGAINST~~ MERCHANT PROCESSING SOLUTIONS BY 13 AUG 15.

- PLAINTIFF AGREES TO RETURN TO MERCHANT PROCESSING SOLUTIONS THE FOLLOWING EQUIPMENT BY PRIORITY MAIL WITH TRACKING:

(Continued from Front)

- EQUINOX 4220
- PIN PAD P-1300
- PWR SUPPLY
- CONNECTING CABLES

The Parties further agree (Check ONLY one box):

☐ To a final DISMISSAL of the case WITH PREJUDICE.
This means that as of the date of this agreement the parties have settled their suit according to the terms of the agreement above, neither of the parties has a further obligation to the other in this matter and the suit cannot be refiled or reopened at a later date.

☐ To DISMISS the case WITHOUT PREJUDICE.
This means that if the Defendant fails to comply with the agreement, the Plaintiff may refile the suit and request judgment for $ _____ minus any amounts paid by Defendant.

☒ To CONTINUE the case until 20 NOVEMBER 2015
This will allow the parties time to fulfill the obligations described in this agreement. If no party is present in court on this date, the case will be DISMISSED WITH PREJUDICE. If either party fails to comply with the agreement, the other party may appear in court on this date, or earlier with 10 days notice to the other party, and move for judgment under the original suit, less any amounts paid by the Defendant.

☐ To enter the case as a CONSENT JUDGMENT in the amount of $ _____.
This means that if the Defendant fails to pay that amount, the Plaintiff may come back into court to enforce the judgment for the amount stated in this paragraph, less any amounts paid by the Defendant. Upon satisfaction of the payment, the Plaintiff must notify the court.

ACKNOWLEDGED AND AGREED:

[redacted]

Plaintiff's Signature Date

[redacted]

Defendant's Signature 10-5-15 Date

CONFIRMED:

_____

Judge Date

Mediated by [redacted]

and [redacted]

of The Northern Virginia Mediation Service.

NORTHERN VIRGINIA MEDIATION SERVICE

IN THE GENERAL DISTRICT COURT

[redacted]
Plaintiff

vs.

[redacted]
Defendant

The 14th day of August, [redacted]

[redacted]
Court Number

MEDIATED AGREEMENT

The Clerk of said Court will note that this case is settled by stipulation as follows:

The parties agree that Defendant, [redacted] will complete the following work at the Plaintiff's home:

① 2 faucets in the bathrooms will be tightened

② 2 steps in entrance and basement will have borders put on them and the carpet will be replaced with wood.

③ The gaps in the baseboards in the kitchen, basement and 2nd floor will be caulked.

④ Stain on the sidewalk outside will be removed

⑤ Broken tile in bathrooms will be repaired.

⑥ Trim work will be replaced in laundry room and basement

⑦ Door in laundry room will be repaired so that it closes properly

The work will be started on Sept 1st, 2015 and the estimated date of completion is Sept. 3rd, 2015.

(Continued from Front)_____

_____

_____

The Parties further agree (Check ONLY one box):

☐ To a final DISMISSAL of the case WITH PREJUDICE.
This means that as of the date of this agreement the parties have settled their suit according to the terms of the agreement above, neither of the parties has a further obligation to the other in this matter and the suit cannot be refiled or reopened at a later date.

☐ To DISMISS the case WITHOUT PREJUDICE.
This means that if the Defendant fails to comply with the agreement, the Plaintiff may refile the suit and request judgment for $ _____ minus any amounts paid by Defendant.

☒ To CONTINUE the case until 9/11/15.
This will allow the parties time to fulfill the obligations described in this agreement. If no party is present in court on this date, the case will be DISMISSED WITH PREJUDICE. If either party fails to comply with the agreement, the other party may appear in court on this date, or earlier with 10 days notice to the other party, and move for judgment under the original suit, less any amounts paid by the Defendant.

☐ To enter the case as a CONSENT JUDGMENT in the amount of $ _____.
This means that if the Defendant fails to pay that amount, the Plaintiff may come back into court to enforce the judgment for the amount stated in this paragraph, less any amounts paid by the Defendant. Upon satisfaction of the payment, the Plaintiff must notify the court.

ACKNOWLEDGED AND AGREED:

[redacted]

Plaintiff's Signature Date

_____

Defendant's Signature Date

Mediated by [redacted]

and _____

of The Northern Virginia Mediation Service.

CONFIRMED:

[redacted]

Judge Date

NORTHERN VIRGINIA MEDIATION SERVICE

IN THE GENERAL DISTRICT COURT

[redacted]
Plaintiff

vs [redacted]
Defendant

The 1 day of May [redacted]

[redacted]
Court Number

MEDIATED AGREEMENT

The Clerk of said Court will note that this case is settled by stipulation as follows:

Dependant [redacted] agrees to pay outstanding balance of $1,777.00 (One Thousand [redacted] Seven Hundred Seventy Seven and 00/100) to plaintiff, [redacted]

Payment shall be made as follows:
5/10/2015 - $400-
6/10/2015 - $400
7/10/2015 - $400
8/10/2015 - $400
9/10/2015 - $126.00 + $51.00 (Court fee) = $177.00

Payments shall be made VIA PayPal

(Continued from Front)_____

_____

_____

The Parties further agree (Check ONLY one box):

☐ To a final DISMISSAL of the case WITH PREJUDICE.
This means that as of the date of this agreement the parties have settled their suit according to the terms of the agreement above, neither of the parties has a further obligation to the other in this matter and the suit cannot be refiled or reopened at a later date.

☐ To DISMISS the case WITHOUT PREJUDICE.
This means that if the Defendant fails to comply with the agreement, the Plaintiff may refile the suit and request judgment for $ _____ minus any amounts paid by Defendant.

☑ To CONTINUE the case until September 25, 2015
This will allow the parties time to fulfill the obligations described in this agreement. If no party is present in court on this date, the case will be DISMISSED WITH PREJUDICE. If either party fails to comply with the agreement, the other party may appear in court on this date, or earlier with 10 days notice to the other party, and move for judgment under the original suit, less any amounts paid by the Defendant.

☐ To enter the case as a CONSENT JUDGMENT in the amount of $ _____.
This means that if the Defendant fails to pay that amount, the Plaintiff may come back into court to enforce the judgment for the amount stated in this paragraph, less any amounts paid by the Defendant. Upon satisfaction of the payment, the Plaintiff must notify the court.

ACKNOWLEDGED AND AGREED:

[redacted]

Plaintiff's Signature Date

[redacted]

Defendant's Signature Date

CONFIRMED:

_____

Judge Date

Mediated by [redacted]

and _____

of The Northern Virginia Mediation Service.

NORTHERN VIRGINIA MEDIATION SERVICE

IN THE GENERAL DISTRICT COURT

[redacted]
Plaintiff

vs. [redacted]
Defendant

The 14 day of AUG [redacted]

[redacted]
Court Number

MEDIATED AGREEMENT

The Clerk of said Court will note that this case is settled by stipulation as follows: The parties agree that Ms. [redacted] will vacate the property at 4523 [redacted], Alex[redacted], by Sept 15 Prior to that date, both parties will meet for a walkthrough so the landlord can assess any changes to the property. Within 30 days, [redacted] will notify [redacted] of any money should be deducted from past due rent + damages from security deposit. [redacted] agrees that the amount of $4170 represents past due rent + she will begin paying by ~~money~~ order $200 a month for the 1st to 26th days of the month, starting Sept. 26, until the debt is paid in full.

At the walkthrough, [redacted] will turn over the keys to [redacted]

Should at any point, [redacted] default on the promised payments on time, [redacted] reserves the right to return to Court to seek remaining monies owed plus any penalties.

Once [redacted] has paid monies owed, [redacted] will notify the Courts in writing that the debt has been paid & to dismiss the case.

all payments must be postmarked by the 26th of the month.

(Continued from Front) Payment plan includes $100 in Sept 2015, then 20 months of $200 a month + then final payment of $70 on June 11, 2017

The Parties further agree (Check ONLY one box):

☐ To a final DISMISSAL of the case WITH PREJUDICE.
This means that as of the date of this agreement the parties have settled their suit according to the terms of the agreement above, neither of the parties has a further obligation to the other in this matter and the suit cannot be refiled or reopened at a later date.

☐ To DISMISS the case WITHOUT PREJUDICE.
This means that if the Defendant fails to comply with the agreement, the Plaintiff may refile the suit and request judgment for $ _____ minus any amounts paid by Defendant.

☑ To CONTINUE the case until June 29, 2017.
This will allow the parties time to fulfill the obligations described in this agreement. If no party is present in court on this date, the case will be DISMISSED WITH PREJUDICE. If either party fails to comply with the agreement, the other party may appear in court on this date, or earlier with 10 days notice to the other party, and move for judgment under the original suit, less any amounts paid by the Defendant.

☐ To enter the case as a CONSENT JUDGMENT in the amount of $ _____.
This means that if the Defendant fails to pay that amount, the Plaintiff may come back into court to enforce the judgment for the amount stated in this paragraph, less any amounts paid by the Defendant. Upon satisfaction of the payment, the Plaintiff must notify the court.

ACKNOWLEDGED AND AGREED:

[redacted]
Plaintiff's Signature Date

[redacted]
Defendant's Signature Date

Mediated by [redacted]

and _____

of The Northern Virginia Mediation Service.

CONFIRMED:

_____
Judge Date

Chapter 9

The Mediation Process:

STAGE IV

Writing the Agreement

Goals

- To bring closure to the problem-solving stage of mediation
- To assist the parties in committing their resolution into writing
- To assist parties in considering all the ramifications of the agreement

The final phase of the mediation process brings closure to the problem-solving process by putting into writing the solutions that the parties have created. Agreements in principle are a good first step, but until the agreement is reduced to language agreed upon by all parties, there is no certainty that they have indeed reached consensus on the details. Good agreements pay attention to the details of what the parties want. Reducing the solutions into writing enhances the probability that implementation will be successful.

The Mediator as Scribe

- As a general rule, the **mediator will be the writer** of the written agreement. In the role of an impartial third party, the mediator is more likely seen as one who can draft an agreement that does not favor one party over another.
- **Consider preparing a Memorandum of Agreement** rather than a final agreement under the following circumstances:
    - One or both parties are represented by counsel.
    - Parties expect legal counsel to prepare the final agreement.
    - The mediator desires the parties to have the document reviewed by legal counsel.

  - A subsequent final agreement must be drafted in order to preserve a tax benefit or satisfy other formal legal requirements.

- **The mediator may prepare a final Agreement when**:
  - The parties do not wish to consult legal counsel.
  - The mediator is comfortable in preparing the document and believes the parties reached agreement with adequate information and informed consent.

Elements of the Agreement

1. **Title of Agreement**
   Memorandum, Memorandum of Understanding, Memorandum of Agreement, Mediated Agreement, etc.

2. **Date of Mediation**

3. **Demographic Information**
   Names, Dates of Birth, Social Security Numbers, addresses, phone numbers

4. **Preamble or Opening Paragraph**

5. **Body of Agreement (Terms and Conditions, Solutions)**

6. **Future Evaluation**
   Do parties wish to set a date for evaluation of the Agreement? Such date for future evaluation may be included as a part of the Agreement.

7. **Handling Future Controversies**
   Do parties wish to address how they will handle future controversies? Do they wish to use mediation? Who will pay?

8. **Disclaimers**
   Do the parties agree on including any disclaimers such as “We agree that this draft does not constitute a final agreement until both parties have had it reviewed by their respective legal counsel.” Or “We have been encouraged by the mediator to seek legal counsel prior to signing this agreement and have waived our right to do so.”

9. **Signature Block**
   This may include the parties, mediator, attorneys, and judge depending or just the parties.

Guidelines for the Mediator

- The **role of the mediator is to ask the questions** that will help the parties think of the specifics of the solution. Solutions that spell out specifics stand a better chance of working out over the long haul. State clearly who will do what, when, where, how and how long. Legal language is out, disputant language is in.
- Encourage the parties to **frame their solutions in the positive**. What will each party do versus not do?
- **Be specific.** There is a positive relationship between specificity and an agreement that works. **Who will do what, when, where, how, how long, etc.?**
- **Agreements need to reflect realistic solutions**, those that the disputants have the ability and resources to accomplish. This task will generally be accomplished during the problem-solving stage as the parties evaluate the various options before them. Is the fulfillment of the agreement within the control of the parties? Will it require the cooperation of an expected third party? Has the agreement included their approval
- **Agreements need to reflect some balance**. It is important for each party to have gained something that can be reflected in the final draft of the agreement. Likewise, both will need to have made some compromises in order to arrive at a settlement.
- **Help the disputants with anticipatory preparation**. Help them think about what responses they will get from others and how they will handle it.
- Check with parties whether they would find it helpful to **plan a date for future evaluation**. Plans for evaluation at some future date can be written into the agreement.
- Explore whether the parties wish to **address how they will handle any future disagreements** or different interpretations of any facet of the agreement. It may be helpful for them to include such a plan in the written agreement as well.
- Encourage the parties to **have the Memorandum of Agreement reviewed by legal counsel** prior to signing. The draft can be refined and changed to include any concerns that may arise during such review.
- Remind the parties that **agreements can be changed** in the future as long as all parties to the agreement agree.

Agreement Writing: Some Useful Questions

Who will do what, when, how, how long?

How will others respond to this Agreement?

Do you have any concerns about the Agreement as written?

Do you need clarity on anything in this Agreement?

Mediators need to be clear about what is considered the unauthorized practice of law. Not only is this a legal issue but it also has to do with an ethical obligation to avoid the unauthorized practice of law. There are several things mediators can do to avoid getting caught up in this problem.

Prior to hearing ***THE ISSUES*** the mediator must provide information to the parties about the mediation process and the role of the mediator. This includes:

- An **explanation of confidentiality** and its limits
- That **a written agreement may affect their legal rights**
- That **the parties are encouraged to seek legal counsel and to have their written agreement reviewed by counsel** prior to signing.

DURING THE MEDIATION, the mediator:

- **May provide legal resource and procedural information** to the disputants. Sometimes it is helpful for the mediator to have sound literature available that can be mailed or handed to the parties.
- **May not predict a specific resolution of legal issues**
- **May not direct the actions of the parties**.
- **May ask clarifying and reality-testing questions** that do not predict specific legal resolutions or recommend a course of action.
- **May take an active role in preparing the written agreement**. The mediator captures parties' words and desires in writing.
- Must **avoid using a legal boiler-plate or legal terminology** when preparing the memorandum of understanding or final written agreement.
- **May provide legal resource and procedural information** to the disputants.

PREPARING MEDIATED AGREEMENTS

Supreme Court of Virginia

SECTION 1. INTRODUCTION

Once parties to a mediation have reached agreement on some or all of the issues in dispute, most desire to memorialize their agreement in the form of a written document.[65] Sometimes this document is entitled a "Memorandum of Understanding;" in other cases, it may be called a "Settlement Agreement" or a "Mediated Agreement." The purpose of this section of the Guidelines is to provide mediators with guidance on how to assist parties in committing their agreement to writing without contravening the Virginia UPL rules, mediator ethics, or in the case of attorney-mediators, the Virginia Rules of Professional Conduct. As with the previous chapter on legal advice, the Department of Dispute Resolution Services does not have the final say on what agreement preparation activities may constitute the practice of law. That determination is left to the Virginia State Bar, the Attorney General's office, or the courts.

SECTION 2. THE LEGAL CONTEXT OF MEDIATED AGREEMENTS

Supreme Court of Virginia Rule Part 6, § I(B)(2) provides that a person is practicing law whenever "one, other than a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business." Unlike Part 6, § I(B)(1) discussed in the previous section on legal advice, the above subsection of the rule does not require that a person prepare the legal instrument for compensation. Thus, even volunteer mediators who are not being compensated for their services are subject to the rule on drafting legal instruments.[66] Furthermore, since most court-connected mediators are contracted by the Office of the Executive Secretary to provide services to the courts on a per case basis, they are not "regular employees" of the disputing parties and so cannot avoid the rule on that basis. Finally, agreements prepared by mediators are probably not the "contracts incident to the regular course of conducting a licensed business" referred to in the rule. This particular provision was adopted by the Supreme Court of Virginia to address the preparation of sales contracts by real estate agents - a practice explicitly approved of by the court in Commonwealth v. Jones & Robins, Inc.[67] Unlike real estate agents, mediators in Virginia (even court-certified mediators) are not licensed. Mediators do not have to pass a licensure exam, nor is licensure mandatory to practice the mediation profession. Moreover, in the real estate profession, sales contracts, which include a provision for the agent's commission, are necessary to insure that the real estate agent receives compensation for his or her

services. In the mediation context, it could be argued that written agreements resulting from the mediation are not required for mediator compensation. However, in Jones & Robins, Inc., the Supreme Court of Virginia was concerned that prohibiting real estate agents from preparing sales contracts would run counter to their long-standing practice of providing this service, would be impractical, and would be detrimental to the real estate business. These same concerns would also be evident if mediators were denied the ability to prepare written agreements for disputing parties. Although it is possible that a court could construe a mediated agreement as a "contract incident to the regular course of conducting a licensed business," mediators would be prudent not to rely on this provision in order to claim an exemption from the UPL rule.

Despite the Supreme Court of Virginia rule prohibiting laypersons from preparing legal instruments, the Virginia mediation statutes refer to the preparation of written agreements by non-attorney mediators. In defining the various terms used in the dispute resolution chapter of the Code of Virginia § 8.01-576.4 states that "'dispute resolution services' includes screening and intake of disputants, conducting dispute resolution proceedings, drafting agreements, and providing information or referral services" (emphasis added). Furthermore, § 8.01-576.11 contemplates that written agreements would emerge from mediation sessions by providing that such agreements are "enforceable in the same manner as any other written contract." Finally, in defining misconduct by neutrals, § 8.01-576.12 states that upon the motion of a party, a court "shall vacate a mediated agreement reached in a dispute resolution proceeding" if the neutral fails to inform the disputants in writing of certain specified information (emphasis added).

Thus, while the Virginia mediation statutes appear to authorize the preparation by mediators of written agreements that may be enforceable as contracts, contracts are legal instruments, and the Unauthorized Practice of Law rules from the Supreme Court of Virginia prohibit non-attorneys from drafting legal instruments. To further complicate matters, the Virginia State Bar has authorized attorney-mediators to act as scriveners in committing mediated agreements to writing.[68] However, the State Bar's Legal Ethics Committee has cautioned attorney-mediators that if they provide agreement-writing services beyond those of a scrivener, then they have engaged in the practice of law.[69] Moreover, a conflict of interest would arise under the Virginia Rule of Professional Responsibility 2.10 (e), which states that "a lawyer who serves or has served as a third party neutral may not serve as a lawyer on behalf of any party to the dispute."

It appears that the Virginia mediation statutes, particularly § 8.01-576.4, authorize non-attorney mediators to prepare written agreements for disputing parties so long as they, like attorney-mediators, limit their drafting services to those of a scrivener. This harmonizing of the UPL rules and the mediation statutes gives mediators the flexibility to assist the parties in committing their mediated agreements to writing but stops short of allowing mediators to draft instruments in which they include legally operative terms not requested or contemplated by the parties during the mediation process. Allowing

mediators to prepare written agreements for the parties facilitates the efficient resolution of disputes and minimizes the costs to the parties, who may not desire or be able to afford their own attorneys.

This approach is consistent with the conclusion of the State Bar's Legal Ethics Committee that "to the extent that the [lawyer]-mediator is engaged by the parties as a scrivener of the agreement reached during the mediation process, such tasks do not constitute the practice of law."[70] Likewise, when non-attorney mediators act as scriveners for the parties in committing their mediated agreements to writing, they have not engaged in the practice of law. However, like the Legal Ethics Committee, the Guidelines on Mediation and UPL Committee also believes that non-attorney mediators have engaged in the practice of law if their agreement preparation activities extend beyond acting as a scrivener for the parties.

A broad reading of § 8.01-576.4 would place no limits on the agreement writing activities of mediators and would essentially allow them to practice law when drafting written agreements. However, such a construction of this statute would render inoperative the entire mechanism for regulating the practice of law in the context of mediated agreement preparation. Although § 8.01-576.4 has not been construed by Virginia's appellate courts, the Committee on Guidelines on Mediation and UPL does not believe that the Virginia legislature intended this broad interpretation of the statute. Therefore, these Guidelines take the approach that both attorney and non-attorney mediators may act only as scriveners of the agreement. The Guidelines that follow help define what is meant by that term of art.

SECTION 3. ROLE OF THE MEDIATOR IN PREPARING WRITTEN AGREEMENTS

* Acting as a scrivener, a mediator may prepare settlement agreements and memoranda of understanding for the parties.

The Code of Virginia states that mediated agreements are legally enforceable as contracts.[71] Whether a contract is formed between disputing parties when they reach an agreement to settle their dispute is matter of state contract law. Generally speaking, however, a contract is formed whenever each party agrees to a settlement and promises that something will or will not be done for the benefit of another.[72] Thus, the particular form that a written agreement takes does not necessarily determine its enforceability as a contract. Documents entitled "Memoranda of Understanding," Settlement Agreements," or merely "Agreements" may all be enforceable if they meet the conditions for the formation of contracts under the laws of the Commonwealth of Virginia.

Regardless of the document's title, mediators in Virginia are permitted to assist the parties in committing their agreement to writing. A mediator may take an active role in preparing the agreement for the parties if they want the mediator to perform this function. The mediator may simply copy the agreement as dictated by the parties or may choose particular words or phrases to include in the agreement so long as the parties indicate that the language chosen by the mediator accurately reflects their desires. A mediator is also free to ask questions of the parties to clarify their agreement and may properly raise issues for their consideration. Likewise, a mediator may assist the parties in organizing their agreement by, for example, creating subsections in the document and placing the subsections in a logical order.

Mediators who prepare written agreements for disputing parties should strive to use the parties' own words whenever possible and in all cases should write agreements in a manner that comports with the wishes of the disputants. Mediators should not use language that one or both of the parties do not understand, and they should always allow the parties to review the written agreement carefully and make any changes that the parties believe are appropriate. As the *Code of Virginia*[73] and the Standards of Ethics and Professional Responsibility for Certified Mediators[74] require, mediators must always inform the parties in writing that mediated agreements should be reviewed by independent counsel before they are signed or that the parties should waive their opportunity for independent review.

* Unless required by law, a mediator should not add provisions to an agreement beyond those specified by the disputants.

Mediators are most likely to run afoul of UPL or ethical rules in drafting agreements when they attempt to include provisions in them that are not contemplated or requested by the parties themselves. In drafting settlement agreements for the parties, mediators should avoid the use of legal "boilerplate" and legal terms of art. These terms have legal consequences resulting from judicial interpretation and may favor one party over the other. The use of such terms may affect the parties in unintended ways and should be avoided.

Below are some examples of phrases or clauses that if included by a mediator in a written agreement may increase the likelihood that the Virginia State Bar, the Attorney General's office, or a court would view the preparation of the mediated agreement as the practice of law. Most of the examples are standard contractual terms used by attorneys for specific purposes and may be inappropriate for mediators to include in written agreements.

Merger Clauses

A and B agree that this Agreement contains the entire understanding between them and that no additional agreements regarding marital property rights have been made. They agree that this Agreement is a full and complete settlement of all property rights between them from the time of their marriage until the date of this Agreement.

A and B agree that any and all previous agreements regarding marital property rights are hereby superseded by this Agreement and that this Agreement contains the entire understanding between them.

Binding Effect Clauses

All provisions of this Agreement shall be binding upon the respective heirs, next of kin, executors, agents, assigns, and administrators of the parties.

Choice of Law Clauses

This agreement is made under and shall be governed in all aspects by the laws of the Commonwealth of Virginia.

Remedies Clauses

In the event that either of the parties to this Agreement commits a material breach of the Agreement, the party in breach agrees to pay the non-breaching party's attorney's fees and other reasonable costs associated with the breach.

Severability Clauses

The parties agree that if any part of this Agreement shall be deemed legally defective, inoperative, or unenforceable, the remaining portions of the agreement shall continue to bind the parties and shall remain in full force and effect.

Although mediators should not ordinarily, on their accord, add the above terms to mediated agreements, they may include the concepts embodied in them if requested by the parties. Section E of the *Standards of Ethics and Professional Responsibility for Certified Mediators* states that consistent with the self-determination of the parties, a mediator may raise issues for the parties to consider. In the agreement context, § J of the *Standards* makes clear that a mediator may suggest options for the parties to consider when reaching an agreement. Thus, a mediator is not precluded from raising issues or

suggesting options to the parties, but the mediator may not add provisions, particularly boilerplate provisions, to a written agreement that the parties themselves have not fully explored and requested. If the parties ask a mediator to include a provision in the written agreement like one of those listed above, the mediator should use plain language and should avoid legal terminology or terms of art with which he or she is not familiar.[75] Not only does legal boilerplate increase the likelihood that the preparation of the agreement will be considered an impermissible activity, but boilerplate may favor one of the parties over the other and thus may constitute a violation of mediator ethics.

In some cases, a statute or a court may require that a certain provision be included in a written agreement. For example, § 8.01-576.11 of the *Code of Virginia* states that a court order which incorporates a written agreement involving the support of a child must include the statutory child support guidelines worksheet and any written reasons for deviating from the guidelines. This particular provision contemplates that mediators may complete child support worksheets and mandates their attachment to a subsequent court order. Thus, mediators who complete these worksheets for the parties have not prepared a legal instrument and have not engaged in the practice of law.[76]

Similarly, § 20-124.5 provides that as a condition for granting any custody or visitation order, a court must require any party to the agreement to give 30 days written notice of an intention to relocate. This code section allows courts to dictate the form that such notice must take, and many courts require that the 30 day relocation notice provision be placed in the custody or visitation order itself. Consequently, in order to have a mediated custody agreement incorporated into a court order, a mediator may be required to include the 30-day relocation notice provision in the written agreement. A mediator who includes a standard relocation notice required by a local court in a mediated agreement has not engaged in the practice of law.

* Mediators may use a court-approved form when preparing a written agreement.

A mediator probably would not be found to have engaged in the practice of law by utilizing a court-sponsored or approved form when preparing a written agreement for the parties. Generally speaking, the preparation of court orders is considered the practice of law.[77] However, it is standard practice for some courts in the Commonwealth to provide agreement forms to court-certified mediators that contain the appropriate language and signature lines to either order the dismissal of the court case pursuant to the agreement or, in some cases, to convert the agreement itself into a court order. Using such forms probably does not constitute the practice of law by mediators. Even if it does, the practice is authorized and supervised by the courts and presumably carries less risk to the public than normally associated with laypersons preparing court orders.[78]

* A mediator may include standard provisions in written agreements relating to the mediation process itself.

If a mediator deems it appropriate, he or she may include provisions in a written agreement that are intended to provide information to the parties about the mediation process. For example, provisions stating that the mediator does not give legal, financial, or tax advice may be included. Provisions that explain confidentiality79 or which state that the agreement may affect legal rights or that encourage the parties to have the agreement reviewed by independent counsel[80] are likewise permissible. In essence, provisions that are designed to inform the parties about the mediation process and which are not part of the substantive agreement between the parties may be included in a written agreement prepared by a mediator.

SECTION 4. CONCLUSION

Mediators are neutrals whose function is to help parties resolve their disputes. If parties to a mediation agree to resolve their dispute, part of a mediator's role may be to help them put their agreement in written form. When parties are willing and able to write their own agreement, self-determination is maximized. However, some disputants may prefer that the mediator memorialize the terms of their agreement and others may view the preparation of a written agreement as a natural extension of the mediator's facilitative role.

The Guidelines in this chapter allow mediators in Virginia to take an active role in preparing written agreements for disputing parties if the parties so desire. Mediators may assist the parties in framing the terms of their agreement, they may help them choose appropriate words or phrases, and they may provide an organizational framework for the agreement. The Guidelines allow mediators flexibility and prohibit only the addition by them of terms that do not make up part of the agreement between the disputants or that may have unanticipated legal consequences. Following these Guidelines should help protect mediators from charges that they engaged in the practice of law or unethical mediation practice in preparing mediated agreements.

Chapter 10

The Mediation Practice Skills

Handling Difficult Emotions

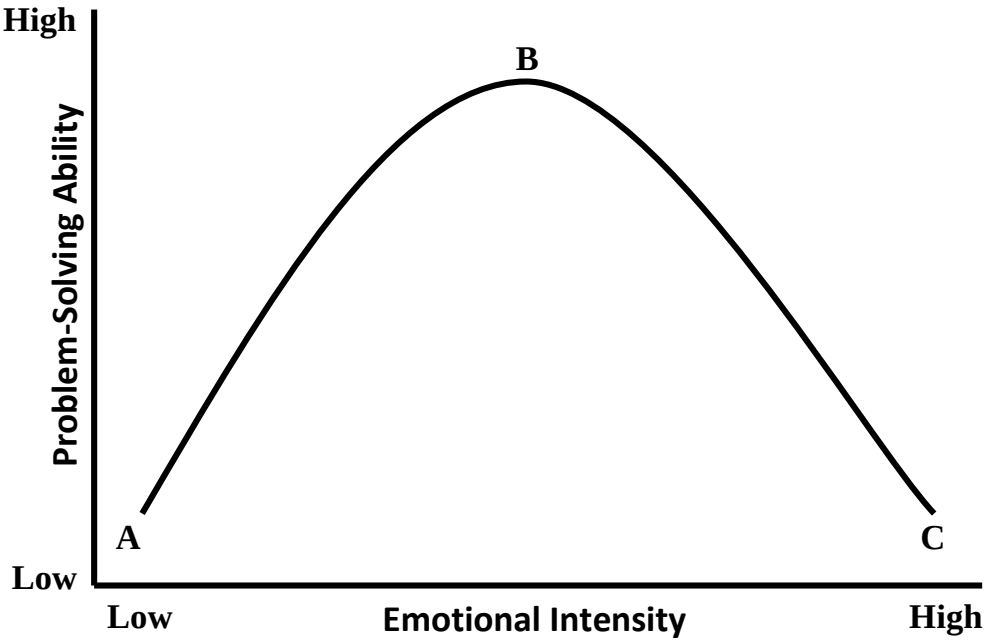
Usually people who come to mediation have strong emotions which have prevented them from solving their problems. In allowing people an opportunity to "vent" in making certain that their concerns have been heard, and in exploring possible solutions, these emotions can surface and seem sometimes to get in the way of moving forward. Thus, the mediator needs to learn to respond effectively to strong emotions.

With reference to the graph below, the following points are illustrated:

- ***When emotional involvement is low (at Point A),*** people may not care enough to work toward finding a solution.
- ***As emotions rise (Point B)*** there is increasing energy to make changes.
- ***When emotions become too strong or uncontrollable (Point C),*** parties cannot solve problems using a reasonable process.
- After a certain point, as emotional intensity goes up, the quality of decision-making goes down.

Emotions and Problem Solving

Some Emotional Intensity	Too Much Emotional Intensity
Provides energy for positive change	Is dysfunctional and creates problems



WHERE DOES ANGER COME FROM?

- Threats to self - including esteem, respect: (*The mediator(s) treat the party with respect, show value, provide ground rules*)
- Fear: (*The mediator(s) provide for a safe environment, maintain control and screen for violence potential*)
- Powerlessness, loss of control: (*The mediator(s) help the parties make AI@ statements, preference statements and assists in obtaining necessary information*)

PURPOSES OF ANGER

How Is Anger Used In Conflict?

- At times **anger is used to establish control**. The exhibition of anger can create fear, anxiety and a desire to see the emotional intensity lowered. The angry person may hope that others will back off, make concessions to him/her or to cooperate.
- The exhibition of anger can be an attempt **to prove that one is right**. There may be a presentation of a sort of righteous indignation because of the stance the other party is taking or because of a feeling that one is being wronged by the other.

- The overt expression of anger can be a way **to punish another** because of the pain and hurt that has been inflicted.
- Acting with anger can be used in an effort **to protect one's rights** or to try to re-establish rights when there is a perception of having been violated.

The ABC's of Anger

People experience anger and situations that lead to anger in different ways. What creates angry responses from one party may not trigger a similar response from another.

A = the event that activates the anger

Interacts with

B = the interpretation and meaning given to the event

Leads to

C = the emotional outcome including resultant behaviors

Handling Anger and Other Strong Emotions

The mediator's ability to manage anger or emotional outbursts calmly and confidently is essential to creating a safe place for a difficult conversation. If the mediator is clearly in control of the process, the parties' anxiety and tension will be reduced.

Before Mediation

Prepare the Space

- **Provide separate space for people** who are waiting, or for parties to use during caucuses.
- As you are setting up the space**, know where you will be sitting, where a telephone is, where others in the building might be**. The instances of an outburst becoming truly threatening are extremely rare, however, the more you know about your surroundings and what you might do *in case*, the more confident you will be about your ability to handle situations that arise.

Center yourself

- **Put aside your own concerns** for the time that you will be in the mediation session.

During Orientation

Build Rapport

- During orientation, **talk *to* the parties, not *at* them**. Establish connection with them early on, so that they trust you as a person and as mediator.

Establish Ground Rules

- **Clarify expectations for behavior during the mediation**. Many times this simple reminder of civility is all that people need in understanding what is expected in the process. In other situations, you may need to bring people back to these ground rules should behaviors begin to get out of control.
- When you or the parties know of particular problem behaviors, you can often **negotiate specific ground rules** to address those challenges. For example, a person may have a pattern of walking out of difficult discussions. A simple ground rule, "we agree to stay in the meeting until it is adjourned by the mediator," can alert participants to a different expectation of participation in this process.

During Mediation

Know and understand your own emotions

- Becoming aware of our own emotional reactions **gives us important information** about what is going on in the room and how it may be affecting the process.
- Understanding your own emotions **helps to develop empathy** for the parties, to understand better how they may be experiencing this exchange.

Allow people to have and express their emotions

- This energy **can give you important information about what is important to the parties**, and why, and about some of the dynamics that may have gotten in the way of their ability to resolve their differences before mediation.
- **People have a right to their feelings**, though they do have a responsibility to others in *how* they express these feelings.
- **Give people an opportunity to vent their emotions**. Often, they cannot hear any other point of view or thought until they feel that their feelings have been heard.

Paraphrase their emotions as well as substantive content

- Effective paraphrasing of feelings **can make a powerful connection with a person,** giving them a sense that they are heard and their feelings acknowledged. This acknowledgement can reduce the level of intensity dramatically in a relatively short time. Sometimes the frustration of not being heard fuels the anger and intense emotion.

Set boundaries (ground rules) and use them

- **Bring people back to the ground rules** that have been established in a non-judgmental tone. For instance: "I really can't hear when two people are talking at once," or "I am concerned that we are not moving forward here."
- **As needed, propose new ground rules**. Again the tone to use is non-judgmental, and addressed to everyone in the room, not focused solely on one party. Example: "I am having difficulty understanding the situation. Can we agree to use respectful language so that we can all understand the situation better?"

Use Separate Sessions

- When emotions are spiraling out of control or you sense that one person's intensity may be alienating the other party, separate sessions can be helpful. They can **allow a person to vent without doing further damage to the process.**
- Separate sessions also **give individuals time to get themselves back to a more productive frame of mind**. When a person experiences emotional hi-jacking, it takes 15 to 20 minutes for these chemicals to dissipate in the brain.

Take a break

- Breaks can give everyone including you, the mediator, and an opportunity to refresh. Often after a break, **people return to the process with new energy** to move forward productively.
- **A break may be fifteen minutes, or over lunch, or even longer** – continuing mediation over to the next day or adjourning the meeting and calling people to reschedule the next meeting are alternatives that are sometimes useful.

Consider the source

- Identify why this person may be angry or upset. **Address the causes, not the behavior.**
- Occasionally, an individual is reacting to factors outside of the mediation. Help them to **focus on the issues that can be resolved through this process**.

Avoid personal attacks

- **Keep your tone positive, non-judgmental and constructive**. Avoid chastising, moralizing, or rebuking either party.
- **Do not become defensive.** Sometimes you, the mediator, become the target of someone's anger. Acknowledge their reaction, ask for more information, and accept responsibility. You may even thank them for bringing their concern to you attention. State your intention to conduct the mediation in a way that addresses concerns fairly. Sometimes you may need to apologize for a statement, or ask their permission to back up and try again.

Chapter 11

The Mediation Practice Skills

Balancing Power in Mediation

Power: The Ability to Accomplish an Outcome

Everyone who comes to mediation is seeking to accomplish something. Their coming to mediation demonstrates the reality that they are powerless in reaching their goals on their own. People who show up in mediation hold many different types of power. Some parties may use their power advantages consciously to gain an advantage. Others may wield power or are affected by another's power without awareness.

Sources of Power and Power Imbalance

- Long standing **patterns of dominance**, **competition and dependence** often get played out in the mediation session. This is especially true in when relationships have existed over a period of time, as in the work place, and especially, in family relationships.
- **Structured relationships** as in supervisor-supervisee, land lord-tenant, professor-student, etc. may present power balancing challenges for the mediator.
- **Child/parent relationships** are difficult to leave behind even when both are adults. When younger children are involved special approaches are necessary to assure that the child is an equal participant in the mediation process.
- **Information** can be a source of power. In mediation all parties need to have the same information related to the dispute in order to have equal opportunity for making informed decisions.
- The **potential to inflict punishment** is a source of power. This can take the form of physical harm or, in the work place, the power to reprimand or fire.
- **Compensatory power** refers to money or other resources that gives a party the ability to offer or withhold rewards in order to get what they want.
- **Psychiatric disorders** may have power implications, especially in cases where competence is required in decision-making. Individuals may be treated as if they are incompetent in an effort to gain power over them.

BALANCING POWER

The mediator should anticipate that parties coming to mediation do not possess equal power. The mediation process, by its very nature, tends to balance power between parties. The following are some ways in which the mediator addresses power differences.

- **Be attentive to early impressions:** Treat parties the same when it comes to greeting, addressing, and seating them.
- **Treat all parties with the same level of respect:** Listening carefully to each party, showing equal interest in what each says and accepting each unconditionally conveys respect and their value as persons.
- **Equal involvement in identifying issues, exploring options, and deciding on the solutions:** Collaboration in mediation will enable disputants to arrive at solutions that transcend those achieved through the sheer use of power.
- **Affirming the parties:** Affirming both parties by assuming that both are competent to resolve their disputes empowers both to move ahead toward solutions.

Some additional ways to facilitate power balancing are:

- **Invite parties to have an advocate present**: Parties may bring others such as attorneys, union reps, mental health advocates, and others who can provide support and advice during the mediation. This can be especially useful in cases where one or all parties are feeling vulnerable and powerless.
- **Consult with experts:** Getting information or advice from experts can promote confidence and reassurance as parties seek to make decisions.
- **Use separate sessions:** Parties may feel less intimidated and vulnerable if they can do some or most of their work apart from each other.

In cases where the power imbalance is too great, the mediator may need to terminate the mediation and assist the parties in identifying other processes to address their differences and resolve their issues. This will be discussed further in the manual section on Mediator Ethics.