County Mediator's Manual

Written by
Sharon Press
Kimberly Ann Kosch

March 2008

Florida Dispute Resolution Center

County Mediator's Manual

ACKNOWLEDGMENTS

This manual could not have been produced without the proofreading skills and creative assistance of Dawn Burlison who took our words and made them beautiful… as always.

We also gratefully acknowledge the contributions of Josh Stulberg who designed the original county court mediator training program on which this manual is based.

Finally, to all the county court mediators who participated in training programs which we conducted and provided us with your insight and critique of the training materials, we are deeply appreciative.

Sharon and Kimberly

TABLE OF CONTENTS

Introduction....1

Mediation in Florida....6

County Court Mediation in Florida....7

Mediation and the Role of the County Court Mediator....9

Characteristics of a Mediator....10

Functions of a Mediator....13

The Steps in the Mediation Process....16

Beginning the Mediation....19

Introductions....25

Opening Statement....26

Accumulating Information....39

Agenda Development....53

Generating Movement....60

Escape to Caucus: The Separate Session....70

Concluding the Mediation....81

Ethics....89

Conclusion....100

INTRODUCTION

Congratulations on being selected to participate in a Supreme Court of Florida certified mediation training program in order to serve as a county court mediator. Conflict is an inevitable part of our lives, and mediation can play a vital role in the peaceful resolution of such conflicts. Mediating court disputes is an important undertaking, and your desire to become involved in this field is admirable.

Conflict is an inevitable part of our lives, and mediation can play a vital role in the peaceful resolution of such conflicts.

The Dispute Resolution Center's (DRC) county mediation training program is certified by the Supreme Court of Florida. The training must be a minimum of 20 hours. It will introduce you to mediation of civil matters under the jurisdiction of the county courts of Florida (including small claims) and assist you in developing the skills necessary to become an effective mediator. Successful completion of the training program is the first step toward certification as a Supreme Court of Florida certified county court mediator.

Each trainee brings to this program a variety of skills and information which have been acquired and developed through other life experiences. This training program will help develop your sensitivity and understanding of others through a focus on the substantive skills and strategies of dispute settlement which shape the distinctive role of the mediator. We will identify possible contributions and

constraints of taking an impartial role in dispute resolution, point out deliberate strategies which the mediator may adopt in attempting to build a settlement and indicate the activities which the mediator must avoid.

Beyond the skills required for effective mediation, however, development of certain artistic characteristics is also important because mediation is mostly an art, not a science. Each of you will have a distinctive mediation style. Your tone of voice, your physical appearance, and your normal way of conducting your personal affairs will serve to define your mediation style. A wide range of styles enriches the mediation process and constitutes one of its compelling strengths for resolving citizens' disputes.

This formal mediation training program certified by the Supreme Court of Florida consists of lectures, discussions, short problems, and role plays. Each component is designed to highlight the principles underlying the mediator's role and the practical ways in which those principles apply in the actual disputes that you will be called to mediate.

The program will demand 20 hours of your time and energy. It begins with an introduction to conflict resolution and the means by which society confronts and handles conflict. A video demonstration of a typical county court mediation will be shown to highlight the role and characteristics of the mediator and the components of the mediation process. Each component of the mediation process will be discussed individually and the training will conclude with your participation in mock mediations that will be observed and critiqued by experienced mediators who have been approved as assistant trainers.

The training is highly interactive, and a successful program depends on everyone's active participation.

As adopted by the Supreme Court of Florida, the Mediation Training Standards require that each certified county mediation training program:[1]

- be a minimum of 20 hours of instruction (based upon a 60 minute hour) which spans at least three days
- will cover all learning objectives pursuant to section 3.01, Mediation Training Standards and Procedures
- will provide you with a written set of materials including Chapter 44, Florida Statutes, Rules 1.700-1.750, Florida Rules of Civil Procedure, the Florida Rules for Certified and Court-Appointed Mediators and an approved bibliography of outside readings
- will present a role play simulation (either live or by video) prior to your role play experience as a mediator

[1] If you have any questions regarding the training standards or this program, please call the Dispute Resolution Center at (850) 921-2910.

- will provide you the opportunity to develop your mediation skills by participating in two 45 minute role plays; one as the sole mediator and one as a disputant

- will provide one qualified mediator to observe and critique your role play as the mediator which will include written feedback on an approved critique form and a minimum of 15 minutes of oral feedback at the conclusion of the role play

- will provide you with an activity for reducing an agreement to writing

- will provide a continuous 90 minute lecture on ethics including Rules 10.200-10.690, Florida Rules for Certified and Court-Appointed Mediators

- will provide you with an evaluation form listing as an opportunity for you to evaluate the program

- will provide your name and social security number to the DRC upon successful completion of the program

- will provide a specific course of action for participants who do not successfully complete the program.

This manual tracks the training program, and contains a wealth of information regarding program procedures and mediator strategies. Feel free to take notes directly in the book. Each evening you may wish to review portions of the training which were covered that day – especially, if you would like to clarify a particular aspect or concept. The most helpful use of this manual however, may be to treat it as a resource and to return to it after you have been mediating for a period of time.

Welcome to the training.

We hope you find the program

to be both educational and enjoyable!

MEDIATION IN FLORIDA

Florida is recognized as a national leader in promoting and institutionalizing court-connected mediation. Beginning in the mid 1970's, the Florida Courts System has demonstrated a strong commitment to alternative dispute resolution (ADR). The first Citizen Dispute Settlement Program (CDS) was created in Dade County in 1975, followed shortly by the creation of the first county court mediation program in Broward County. In 1985, a Legislative Study Commission on Alternative Dispute Resolution was formed to study the use of ADR. As a result, the Florida Statutes were broadened in 1987 to grant trial judges the authority to refer any contested civil matter to mediation or arbitration subject to Supreme Court rules. [Chapter 44, Florida Statutes].

In 1986, the Dispute Resolution Center was created as a joint effort of the Supreme Court of Florida and the Florida State University's College of Law. The purpose was to provide education and research in the field of ADR and to provide technical assistance to local courts in developing court-connected mediation programs. The DRC continues to offer a myriad of services to local courts, mediators, arbitrators and other professionals involved in dispute resolution.

In 1992, Florida was the first state to adopt an ethical code for mediators that contained a grievance procedure [the Florida Rules for Certified and Court-Appointed Mediators]. In 1994, the Mediator Qualifications Advisory Panel[2] was created to provide written ethics opinions to mediators concerning interpretations of the mediator standards of conduct found in the rules.

[2] Renamed the Mediator Ethics Advisory Committee in April 2000.

COUNTY COURT MEDIATION IN FLORIDA

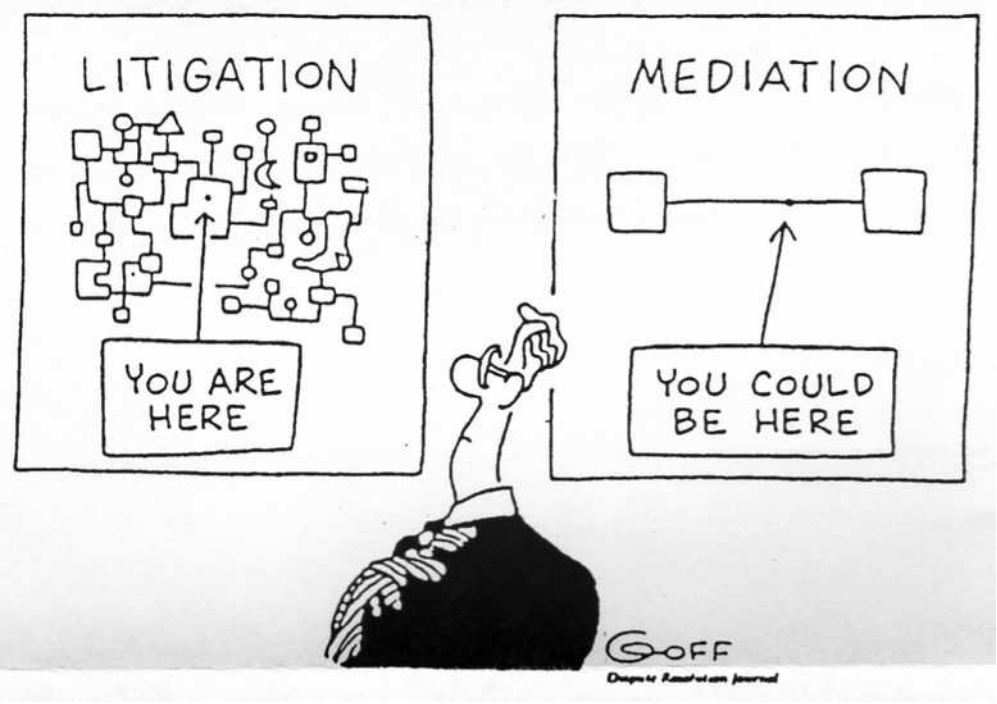
County courts handle civil cases with monetary jurisdiction up to $15,000. Cases up to $5,000 are considered "small claims" within the jurisdiction of the county courts and have special rules for efficiency and expeditiousness. There are general rules of procedure for county court mediation and some specific rules particular to small claims mediation. Generally, the parties mediate without attorneys, but the rules allow for attorneys to appear without their clients in small claims mediation. (See rule 1.750, Florida Rules of Civil Procedure). Small claims mediation is generally free to the disputants, while mediators for county court cases above small claims often charge a fee. Mediation of county cases average 45-60 minutes in length.

There are a variety of case types referred to county mediation, including, but not limited to, landlord/tenant, contract, recovery of money and/or property, auto repair, consumer, worthless checks and employer/employee disputes. During fiscal year 2006-2007, certified county mediators mediated over 42,000 small claims cases and over 3,700 cases above small claims for the 54 county mediation programs statewide.

To become certified as a county court mediator and receive court referrals, an individual must be at least 21 years of age, have a minimum of a high school diploma, complete a minimum of 20 hours in a training program certified by the Supreme Court of Florida, complete a mentorship program, and be of good moral character. Your local mediation program may assist you in completing the mentorship requirements.

As of March 2008, there were 5, 464 Florida certified mediators, of which 3,247 are certified in county mediation. A total of 1,398 mediators are certified only in county mediation. The typical county mediator (according to the DRC's mediator database) mediated approximately 14 cases last year, is a white male over the age of 65 who was in business, worked for the government or the military, and has been certified since 1992 or 1993.

From the statistics gathered by the DRC (and published annually in our compendium of mediation programs), there are more county mediations done through the courts than any other type of mediation.



MEDIATION AND THE ROLE OF THE COUNTY COURT MEDIATOR

Chapter 44, Florida Statutes, defines mediation as "a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives." Section 44.1011(2), Florida Statutes.

The role of the mediator includes, but is not limited to, assisting parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.

The true role of a mediator, however, is far more detailed than a single definition. A definition cannot capture the wide range of dynamics, strategies and techniques a mediator employs when attempting to assist parties in negotiating a dispute. Your role in the mediation extends beyond assisting the parties, it also includes being responsible to the mediation process and the court.

In discussing the role of a mediator, it is fitting to examine the characteristics of an effective mediator. Not everyone is suited to be a mediator. While the following is not an exhaustive list, these characteristics will enable you to assume your role as mediator effectively.

CHARACTERISTICS OF A MEDIATOR

A good mediator exhibits many diverse characteristics. Below is a list of some of the more important ones. Each of you possesses these characteristics to some degree, some may come very natural to you and others you may need to work on.

Effective Listener

A mediator must focus on the communication of the parties and listen to interests and issues presented, both verbally and non-verbally. A mediator that continually talks or questions will not have an opportunity to learn the dynamics of the dispute as perceived by the parties.

Empathetic

While always maintaining impartiality, a mediator should strive to appreciate the thoughts, fears, history and perceptions of each party.

Flexible

The mediator should model for the parties' flexibility in order to enhance their negotiations.

Honest

A mediator is entrusted with confidential information and must prove to be trustworthy. If parties do not sense that you are a person of your word, they will resist sharing information which may be helpful to resolve the dispute.

Imaginative/Resourceful

A mediator will often bring the parties to a fresh approach or a new perspective on an old problem.

Impartial

A mediator must assist each party equally and remain free from favoritism or bias in word, action or appearance.

Intelligent

Parties often look to a mediator to guide them through the process. While a mediator need not be educated in every topic discussed, a mediator must be quick on his/her feet in order to instill confidence in the process.

Non-defensive

A mediator should not become personally upset by comments with which they do not agree. Mediators often bear the brunt of tense emotions and should develop a thick skin.

Non-judgmental

A mediator should help parties reach an agreement whose terms are acceptable to them, even if the mediator disagrees with the wisdom or fairness of their resolution.

Objective

A mediator assists the parties and does not add fuel to the fire of an existing dispute. You must not become entangled in the emotional aspects of the dispute or judge the parties.

Optimistic

A mediator often is able to help the parties find a win-win resolution to their dispute. Staying optimistic and focusing on the future will help the parties do the same.

Patient and Persevering

Mediation is hard work and parties may move slowly toward agreement. A mediator must be willing to listen to and assist the parties at their own pace.

Respected

Your character must be an example to others in order to represent the court mediation program and instill confidence in the mediation process.

Respectful

You should treat each party with respect and dignity. Remember, this is their day to discuss an issue that is important to them.

Sense of Humor

Humor can often ease tensions and move discussions forward. A mediator must be willing to and able to laugh at him/herself or with the group. Keep in mind that humor must never be at the expense of one of the parties.

FUNCTIONS OF A MEDIATOR

The duties of a mediator begin before the commencement of the actual mediation conference. Your role as mediator will include all of the items below and more.

Setting the Stage

It is the mediator's responsibility to arrive before the mediation to set the room in a conducive manner and make sure all necessary forms, papers, pencils and chairs are available.[3]

Opening Statement

At the commencement of mediation, a mediator has an ethical duty to describe the mediation process and the role of the mediator. The mediator should specifically state that mediation is a consensual process, that the mediator is an impartial facilitator without authority to impose a resolution, and that communications made during the process are confidential, except where disclosure is required or permitted by law, or is agreed to by all parties. Additionally, a mediator will outline the mechanics of the process and set ground rules for discussions.

[3] In small claims mediation conducted at pre-trial, the mediation coordinator often will inspect the rooms before assigning them. In any case, each mediator should ensure that they have writing implements, a calendar and calculator.

Establishing Trust and Building Rapport

Parties will not confide in the mediator and share details of their lives unless trust has been established. Mediators accomplish this by word and action.

Questioning

A mediator asks questions to gather information needed to identify issues and interests to move the discussion forward. Questioning is also used to brainstorm possible outcomes and help the parties assess the practical implications of any given course of action.

Listening

A good mediator listens to the parties and acknowledges that they have heard the information shared by clarifying and summarizing. However, a mediator who is always talking is not giving the parties an opportunity to share their thoughts and feelings.

Identifying Issues

During each parties' "opening statement," the mediator identifies the matters that each party would like to discuss. By identifying issues, the mediator is able to assist the parties in creating an agenda for discussions.

Translating

Discussions in mediation between the parties can become heated. A mediator, through the use of neutral language, translates terms used by the parties into words that do not cause the emotional level to escalate.

Remaining Impartial

It is an ethical responsibility that a mediator remains impartial and willing to assist all parties in an equal manner. If a mediator is unable to remain impartial, the mediator should withdraw from the mediation.

Empowering Parties

The right to decide on any proposed outcome or participation within mediation rests with the parties. An effective mediator should convey to the parties that they are in control of all decision-making throughout the mediation.

Reality Testing

A mediator will help the parties to determine whether alternative courses of action are attainable and if they realistically meet their interests.

Writing the Agreement

If an agreement is reached, the mediator generally writes the agreement at the end of the mediation (particularly in small claims mediation). The agreement needs to be clear and concise as it will become part of the official court record. If one or more parties do not live up to the terms of the agreement, the court will need to enforce the terms without the benefit of having been at the mediation. This is the one part of the mediation which is not confidential.

THE STEPS IN THE MEDIATION PROCESS

There are many different theories and definitions on the steps of the mediation process with some scholars identifying three or four stages and others asserting twelve or more. At a minimum, it is helpful to consider the following parts of the mediation.

The Beginning

Includes the pre-mediation set-up, any review the mediator makes of the court file, and the mediator's opening statement.

Accumulating Information

Includes the parties recounting what happened to bring them to mediation. Note that this part of the mediation may continue throughout the process.

Developing an Initial Agenda

Based on the initial identification by the parties of their needs, interests and concerns, the mediator will assist the parties in organizing their conversation. Providing structure will often assist the parties to keep focused. The agenda is always subject to revision as the mediation proceeds.

Generating Movement

Often parties in a dispute are stuck in the way they are thinking about their dispute. One of the benefits a mediator brings to the process is the ability to help the parties see the dispute in a new way, focus on the future, and consider creative alternatives. In addition, the parties may find it useful

during the mediation to meet with the mediator individually in a separate session (caucus). This too can happen at varying times during the mediation and may occur more than once.

Ending the Mediation

This includes any of the following possible endings (or some combination): a full resolution with a written agreement signed by all of the parties; a full resolution of the dispute with a dismissal of the underlying case; a partial resolution which is written and signed by the parties and a return court date scheduled with the clerk; a cessation of the mediation session with an agreement to return to mediation and continue the discussion at a scheduled[4] future date; or no agreement and the assignment of a future court date with the clerk.

[4] Typically, the court will schedule both a mediation return (continuation) date and a court date past that time to ensure that in the event that one or more party fails to return for mediation, the case will not slip through the cracks.

As a new mediator…

it probably would be most comfortable to think about the steps of mediation in a linear format, e.g., you start at the beginning, gather information, develop the agenda, generate movement and finally reach a conclusion. In actuality, the middle stages of mediation are often cyclical rather than linear. The mediation will always have a beginning and an ending, but in the middle, it may loop back and forth between the various stages.

For purposes of learning the process, we will discuss each phase as a separate and distinct part of the mediation. Keep in mind, however, that when mediating a real case, the phases will often blend together and loop back upon each other.

BEGINNING THE MEDIATION

Most small claims county court mediation programs in Florida conduct mediation at the time the pre-trial conference is conducted at the county courthouse. Depending on the caseload in your county, pre-trial conferences may be every day, once a week, or once a month. It is your responsibility to know when your mediation program director has scheduled you for mediation. County cases above small claims follow the general rules for mediation and may be scheduled by agreement of the parties at their convenience.

You should plan to arrive 15-20 minutes prior to the time scheduled for mediation, or in the case of small claims, prior to the time the pre-trial docket begins. For small claims cases, let the mediation program director know that you have arrived. Often mediation programs will use that time to pass along important information to the mediators and discuss the business of the day. It is also an opportunity for mediators to meet others involved in the program. New mediator trainees may also be introduced at this time.

At pre-trial, when court is called into session, the judge will typically make some general opening remarks to the parties indicating that they will be referred to mediation and explaining the importance of trying to work out a resolution for themselves. Depending on the county, the judge may automatically refer all parties to mediation (and turn over the administration of the referral to the clerk of the court and the mediation coordinators), may refer only those who are unrepresented by legal counsel, or may remain on the bench and make a case by case referral.

Typically, the parties are called to the front of the courtroom and asked a few preliminary questions by the judge, the clerk of the court, or other court personnel. It is beneficial for mediators to pay attention during this brief questioning session, as it will often provide useful information to the mediator. For example, the respondent may be asked if he believes he owes the money the complainant is seeking. If the defendant replies, "not all, but some," that is useful information.

If the person who files the claim does not appear at court, generally, the case will be dismissed. If the person who is being sued does not appear, the complainant will generally obtain a default judgment. If both parties are present, the mediation program coordinator or other designated person will assign a mediator and a room to each case. Once you have been assigned a case, you will be handed the court file and will escort the parties to the mediation conference room. In many courthouses, the mediation room may be a distance from the courtroom. It's a good idea to verify that you have all of the ***correct*** people with you before you leave the courtroom.

Since there is not a lot of time, most mediators of small claims cases do not read the court file prior to commencing the mediation. An advantage of proceeding in this fashion is that the mediator preserves neutrality by not developing a preconceived notion of the case from the written complaint. For very complex cases, mediators often like to have some sense of the types of issues which may be raised. It is important to note that if you do read the court file, remember that in small claims cases the respondent is not required to file an answer to the charges, so frequently the file will only contain "one side of the story."

Whenever possible, you (or the program coordinator) should have checked the room to make sure that the physical arrangements are in order. When you invite the parties into the room, tell them where to sit (either verbally or by motioning to a particular grouping of chairs on one side of the table). Do not let the parties simply amble in and sit anywhere. You are trying to structure a clear process of communication; if one party sits at the table but the other sits in the corner, the process is skewed. Make certain that your chair and materials are so situated that, from the parties' perspective, you are "in the middle." Sometimes, parties bring other people with them to mediation. If other people are in the mediation room, they should sit with the person who they are accompanying. But how do you decide whether they are in the room or not?

In county mediation, the following persons are entitled to be in the mediation:

- **the mediator**
- **the named parties**
- **the parties' attorneys (if applicable)**
- **a sign language interpreter or other Americans with Disabilities Act representative (if necessary)**
- **representative of the insurance company (when insurance is involved) who has full authority to settle up to plaintiff's last demand or policy limits, whichever is less.**

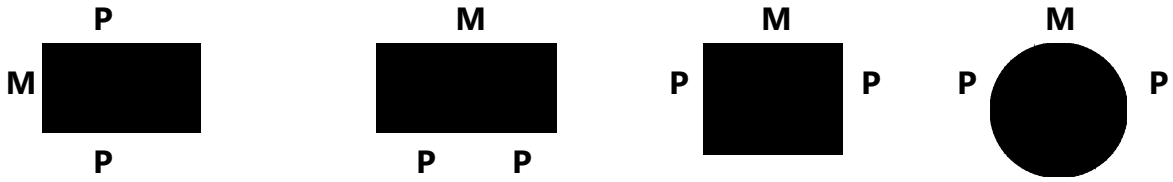
Other individuals who "show up" at mediation are only admitted into the mediation upon agreement of the parties. Others include: family members, bailiffs, members of the media, friends, moral supporters, observers, and witnesses.

If one of the parties objects to the inclusion of someone else at the mediation, it is their right to do so. As mediator, you may wish to discuss with the parties the ramifications of this disagreement. Since the parties need only "appear" at mediation, they will have fulfilled their obligation by attending and listening to the opening statement of the mediator. If they are then unwilling to proceed with the mediation, the mediation will be concluded. It is appropriate for the mediator to discuss with the parties the pros and cons of such a decision and the parties are then free to decide if they want to reconsider their objections to proceeding without the inclusion of someone whom they have brought or their objection to allowing the inclusion of someone who the other party has brought to mediation. Remember, the level of participation of others who are permitted in the room remains the responsibility of the mediator.

One additional note on witnesses, keep in mind that the use of a witness is of primary importance at trial because the parties need to present evidence to convince the judge (the decision-maker) of the correctness of their positions. In mediation, the only person a party needs to convince is the other party. As a result, witnesses tend to be useful only if both parties want to hear from the witness.

Possible Seating Arrangements (mediator and two parties)

P = Party; M = Mediator

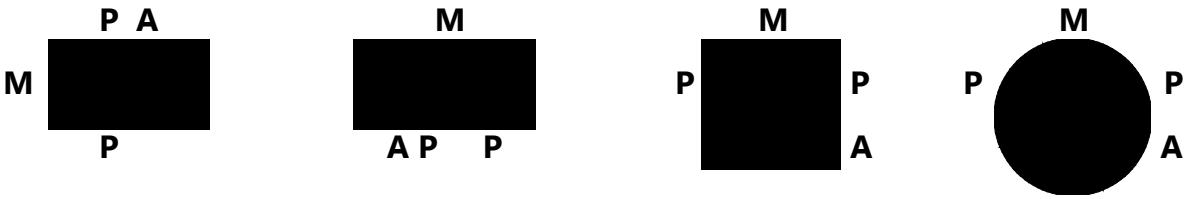


Note that there are many different possibilities and to some extent it will depend on your own personal style and preference, as well as what shape table you have available to you. It is important to keep in mind the following general principles when determining seating:

- the mediator should be equidistant between the parties (and should always be on similar chairs);
- the parties should be able to look at each other and the mediator comfortably;
- the parties should be far enough apart that they are not bumping into each other and able to read each other's notes.

Possible Seating Arrangements (mediator, two parties and an attorney)

P = Party; M = Mediator; A = Attorney



General Principles When Attorneys are Present:

- a party who has retained counsel has a right to be represented at the mediation;

- the attorney should be seated next to his/her client and should not be given the "head of the table;"

- regardless of who is going to speak for the party (the party or the party's attorney), the party should sit closest to the mediator in order for communication to flow through the party.

INTRODUCTIONS

As soon as the parties are seated, introduce yourself as the mediator and once again obtain the names of the parties and the names of any other persons in the room and their relationship to the plaintiff or defendant. The names of the parties should correspond with the names on the court file. If they do not, you may have the wrong parties in the room or someone else may be attending the mediation for the named party.

The Florida Rules of Civil Procedure allow someone else to attend mediation for the named party in certain circumstances. In small claims mediation, an attorney may appear on behalf of a party "provided that the attorney has full authority to settle without further consultation." Rule 1.750(e), Florida Rules of Civil Procedure. In addition, unless otherwise ordered by the court, a non-lawyer representative may appear on behalf of a party, if the representative has the party's signed, written authority to appear (notarization is not required) and has full authority to settle without further consultation. If you do not have the named parties or representatives with full authority to resolve the situation without further consultation, escort them back to the court and ask for the assistance of court personnel or the mediation program coordinator.

Once these preliminary introductions have been made, you are ready to begin your opening statement.

OPENING STATEMENT

Conducting the Opening Statement

There are six basic components to an opening statement:

> *In your own words and style you must find a way to communicate this information.*

- Introductions of yourself and the parties (including verifying the addresses of the parties).
- Establishing credibility and disclaiming bias.
- Explaining the process of mediation and the role of the mediator.
- Explaining the procedures which will govern the process (including the possibility of meeting separately with the parties).
- Explaining the confidentiality of the process.
- Asking the parties if they have any questions.

Conducting an effective opening statement is important for several reasons:

- It establishes the ground rules and your role.

- It serves to put people at ease by giving them an opportunity to relax.

- It conveys to the parties a sense that the mediator is competent and skilled, thereby inviting trust and comfort with the process and the mediator.

- It serves to reconcile any conflicting expectations regarding what will happen in mediation.

- It is an ethical requirement. "Upon commencement of mediation, the mediator shall inform all parties that the process is consensual in nature, that the mediator is an impartial facilitator, and that the mediator may not impose or force any settlement on the parties." Rule 10.420(a), Florida Rules for Certified and Court-Appointed Mediators.

Your opening statement should be clear and concise. Never use "jargon" words that the parties are unlikely to understand (e.g., claimant, respondent). Although delivering an opening statement should not consume a lot of time, do not rush through it. Even if there are several repeat parties – never skip your opening statement. Your opening statement is important; make it long enough to cover all of the elements clearly and completely, and short enough not to lose the interest of the parties.

Delivering your opening statement is deceptively difficult. Finding the right words to express the necessary information in an impartial way is very hard. Practice your opening statement in front of the mirror, as you drive in the car, and to anyone who will listen to you. Do not underestimate the importance of starting the mediation in an articulate, informative and calming manner. This is the one part of the mediation which you can practice in advance and you should take full advantage of the opportunity.

Do not underestimate the importance of starting the mediation in an articulate, informative and calming manner.

As you develop your opening statement, keep the following points in mind. Your opening statement need not be structured in any particular order, but it should flow and be comfortable to you – the following are merely suggestions.

Introduce Yourself and the Parties

This seems simple. Before the mediation however, you must decide how you want the parties to address you and then introduce yourself accordingly. For example, do you want them to use your first name? If you do not want them to use your first name, do not give it to them. Do you want them to use a title (e.g., Dr., Colonel)? As a general rule, only tell the parties the information they need to know. Generally, they do not need to know your title or degrees you hold. In fact, sometimes this information can be harmful to the mediation process as the parties may identify you as a lawyer, therapist or business person and look to you for advice rather than as an impartial facilitator.

Hello. My name is Sharon Press (or Ms. Press) and I have been assigned by the County Court Mediation Program to be your mediator today. [Turn to each party] And your name is? [Note: if the named party is present, verify that the address in the court file is correct while protecting that information from the other party. If it is not the named party, a determination needs to be made that the person is an "approved representative" under the Rules of Civil Procedure and that the person in attendance has full settlement authority].

How you introduce yourself will set the tone for the proceeding. Generally, you should address the parties using their last names unless they have given you permission to do otherwise.

Establishing Credibility and Disclaiming Bias

It is important to establish your credibility with the parties in order to give them some confidence that you can be of assistance to them. The focus should be on your mediation experience – not that you are a famous artist, an experienced mechanic, or retired business person. The easiest (and cleanest) way to establish credibility with the parties is to provide them with information about your experience as a mediator. For example, "I am certified as a county mediator by the Florida Supreme Court." That sounds impressive, and it provides the parties with the information they want to know. Remember, the parties are there to resolve their dispute – not to listen to a long dissertation on your previous experience, no matter how impressive it may be.

In order to gain their trust and confidence, you must assure them of your lack of partiality to the dispute. The best way to do so is by letting them draw their own conclusion by providing them with information about your previous experience and knowledge about their dispute. For example, "I have not met either of you before and have no previous knowledge of the events which brought you to mediation today." Most people will conclude that you must be impartial if you do not know either of them and have no preconceived notion about the dispute.

What if you do know one of the parties? The specific requirements can be found in the Florida Rules for Certified and Court-Appointed Mediators. Simply stated, you should conduct a two-part test. First, you should assess how well you know the individual and if you have any concerns regarding your ability to remain impartial. If you have concerns, you should remove yourself from the mediation. Generally, another mediator will be able to substitute for you. You should try to make this assessment as soon as you become aware that the party is someone who you know in order to create the least disturbance for the parties. When in doubt, it's usually a good idea to ask someone else to mediate. If you determine this while cases are still being assigned, merely ask the coordinator to assign a different mediator. Remember, you may remove yourself from the mediation for any reason and you are not required to provide an explanation for doing so.

If you "pass" the first test, that is, you feel comfortable continuing to serve as the mediator, you move to the second part of the test, namely disclosing the contact and checking with the parties. The Florida Rules for Certified and Court-Appointed Mediators require that you disclose "current, past, or possible future

representation or consulting relationship with any party or attorney involved in the mediation" or "any close personal relationship or other circumstance" which might reasonably raise a question as to the mediator's impartiality. Once disclosed, you may serve as mediator if the parties would like you to do so.

I have been certified by the Florida Supreme Court as a county mediator and have been assigned to mediate your case today. I do not believe that I have met either of you before. [Note: you may also check with the parties to see if they recognize you from somewhere which has slipped your mind]. In addition, I have no specific knowledge of the events that brought you to court today.

or

I have been certified by the Florida Supreme Court as a county mediator and have been assigned to mediate your case today. I recognize Ms. Masey as a parent in the same school where my children are enrolled. I believe that I am still able to mediate this case impartially; however, if either of you have any concerns, we can obtain another mediator to work with you today. How would you like to proceed?

Explaining Mediation and the Role of the Mediator

Next you will explain what mediation is and what the parties can expect in this process. In defining mediation, try to use the simplest terms possible. Since the parties are there because they have filed in court and, in county court, have been summoned to a pre-trial conference, you should highlight the difference between mediation and the traditional court process. You might also find it useful to discuss your role and the parties' roles in the process.

Mediation provides you with an opportunity to talk with the person with whom you are having a dispute with the help of another person, a mediator, who is not involved in the dispute. As mediator, my job is to assist you in talking to each other. It is not my job, nor am I permitted, to decide who is right or wrong, or to tell you how to resolve your conflict. While in mediation, you have the ability to figure out a resolution that makes sense to each of you. If you are unable to resolve the dispute here, you will return to the judge who will make a decision for you.

Explain the Procedures Which Will Govern the Process

The following procedural guidelines should be covered in mediation:

Who will speak first

Generally, the party who filed the claim will be asked to speak first. This prevents any controversy over who will be the first to speak. In addition, the person who filed the claim has the obligation to let the other person know why he/she has pursued a court alternative.

Separate sessions

Sometimes it will be useful for you to meet with the parties separately during the mediation. You should alert the parties to this possibility during your opening statement so that they are not alarmed if you decide to do so. Do not spend a lot of time on the mechanics of how it will work since you may decide not to meet separately. Mediators often refer to this session as a caucus. Since most people do not regularly use that term, it is better to refer to it as a separate session instead.

Note-taking

Let the parties know that you will be taking notes to help keep things straight. You should provide pen and paper for the parties and encourage them to listen for new information and

to take notes if necessary while the other is talking. This gives parties the ability to remember issues they wish to discuss so that they do not have to interrupt each other.

Explaining the confidentiality of the process

At the commence of mediation, a mediator has an ethical duty to inform the parties that communications made during the process are confidential, except where disclosure is required or permitted by law or is agreed to by all parties. The current statute states in part:

"Except as provided in this section, all mediation communication shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel."

"A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications."

"All written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of chapter 119."

In simple terms, this means:

- statements which are made or written during mediation are confidential (except where disclosure is required or permitted by law) and are not permitted to be utilized in a later court proceeding unless the parties agree otherwise (in other words, the parties may not tell the judge what a party said in mediation in the event that the case does not resolve in mediation and the parties go to trial);

- each party has the ability to prevent any person present at mediation (including the mediator and anyone else who may be in the room) from disclosing written or oral statements made during mediation;

- Chapter 119, Florida Statutes, (the "Open Government" statute) does not apply to mediation communications;

- a written, signed agreement is not subject to the confidentiality provisions (in other words, it can be disclosed to the court and others unless otherwise agreed to within the mediation);

- the parties may waive their privilege and the confidentiality of the proceeding if they so choose, thereby allowing any information disclosed in mediation to be revealed (the mediator does not have any ability to independently keep the information confidential if all of the parties wish for the information to be disclosed).

Let me explain how this process will work today. When I finish speaking and have answered any questions you may have, I will ask Mr. Green, who brought this case to the attention of the court, to begin by describing his concerns. Ms. Kodly, you will then have an opportunity to share your concerns. At some point, I may find it useful to meet with each of you individually. If such a situation arises, I will explain the process in greater detail.

I have found it best if each of you treats the other with courtesy and respect during this mediation so that when one of you is speaking, I would ask that the other listen carefully. I have provided you with paper and pen to note down any new information you may hear, as well as any issues you wish to discuss. I might also be taking some notes. This is simply to help me keep information straight. At the end of this mediation, I will discard my notes and encourage you to do the same because the discussions here are confidential in that you are not permitted to share them with the judge in the event that your situation is not resolved during mediation.

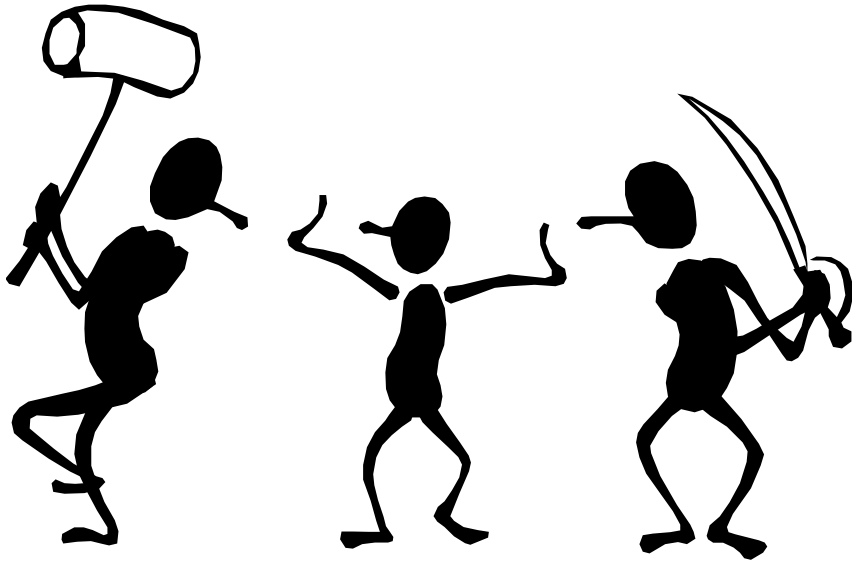
Each of you has what is called a "privilege" to prevent any person, including me, from disclosing any of the communications which take place. The intent of this statute is for you to feel comfortable sharing information with each other without fear that the information will then be told to others, including the judge, in the event that you are unable to work it out here. I do need to let you know, however, that there are some exceptions to confidentiality. For example, if there are disclosures of ongoing criminal activity, those communications may not be confidential. In addition, if there are disclosures relating to child abuse, elder abuse or abuse of the disabled, I am required to report that information to the appropriate authorities.

Asking the Parties if They Have Any Questions

You have just given the parties a lot of information to think about so it is important to pause and let them ask you any questions about the information you provided.

Do either of you have any questions before we get started about mediation in general or the specific way we will be proceeding today?

After you have answered any questions or determined that the parties have none, you are ready to hear from them. Begin by turning to the party who brought the claim and ask them to describe the events that led to the party being at mediation today.



ACCUMULATING INFORMATION

In order to assist parties in mediation, you will need to learn what are the issues which brought the parties to mediation, whether voluntarily (through a Citizen Dispute Settlement or Neighborhood Justice Center program) or by order of the court in which they filed their dispute.

> Keep in mind that communication is translated through more than just the spoken word.

In addition to the actual circumstances surrounding the parties dispute, it is beneficial to observe the behavior of the parties toward one another before, during and after a mediation as a means of accumulating useful information. Keep in mind that communication is translated through more than just the spoken word. Nonverbal cues, posture, and tone of voice all convey a wealth of information.

Courtroom

If your mediation program conducts mediations at the time of pre-trial conference, you will have an opportunity to view the entire courtroom audience prior to conducting your mediation. In addition to giving you an opportunity to identify potential conflicts of interest, often times the parties to a case are called before the judge or clerk and asked a few questions regarding the case. These statements made in open court can assist you as mediator. For example, if one party tells the judge that they admit to owing the Credit Union $200 and would like an opportunity to talk with the union representative regarding a payment

schedule, you may approach this mediation differently than one in which a party tells the judge that they owe nothing and will pay nothing. You may also learn some helpful information to assist you in gauging the level of hostility between the parties by observing their behavior or attitude toward each other.

There is an old saying not to judge a book by its cover. Recommending that you pay attention to the parties prior to the mediation is not meant to imply that you should form judgments about the parties. It is valuable information that you can keep in mind as you approach the mediation. Parties begin with their positions; it is up to you to help them identify their issues and interests.

Case File

Most programs assign mediators when the case is called. As a result, there is little or no time to review the court file prior to beginning the mediation. Some mediators like to take a quick look at the file on the way to the mediation room or immediately upon entering the room. You may find out useful information such as the parties are neighbors. However, keep in mind that the information in the file usually is only from one party's perspective and secondly, it should not replace the parties' opportunity to tell you what has brought them to mediation.[5]

[5] If you are mediating for a CDS program, it is not unusual that there is an in-take form which contains pertinent information on the parties and a description of the situation as written by the parties or mediation coordinator. Again, you may learn helpful information that you can use as a framework for discussions, but remember, this does not replace the parties' opportunity to tell you what has brought them to mediation.

The Parties' Opening Statements

The mediator's opening statement concludes by asking one of the parties to share why they are at mediation. Which party do you start with? Most mediators will begin with the person who has filed the claim, the "complainant." This is a logical selection since the person who files in court typically wants something from the other party that they have been unable to obtain or resolve privately. The person who begins does have an advantage in framing the dispute; therefore, you should be mindful of that dynamic and allow who ever speaks second to have latitude to share not only a response to the first party, but also to describe any other concerns which the party has.

The complainant will articulate his/her concerns. ***Listen carefully***. What the complainant has decided to share with you, the manner in how the information is shared, and the order of presentation are all important pieces of information. Let the complainant take as much time as they need – without interruption from the other party or the mediator.

When the complainant is finished, do not ask the respondent if they would like to respond, instead, ask him/her to explain the issues and concerns. The second person to speak often feels defensive. It is your job to put the parties at ease enough to share what is important to them.

Hold off asking any questions until you have heard from all the parties. While it may be tempting to ask "just a quick question" before the defendant responds, you never know how long the answer may be to even a quick question. Further, if the complainant's opening statement was long, it may be 20-30 minutes

into the mediation before the defendant says a word. By the time the second party gets to speak, they may have given up any hope on this being a fair process. It is also possible that the defendant may clarify the issues, thereby answering questions before the mediator asks them.

After each party has spoken, the parties will look to you to identify the next step in the process. As mediator, you will identify and summarize the issues as the parties have put them forth and your notes will assist you with that task.

Notes

A mediator's notes serve three important purposes:

- identification of the issues which the parties wish to address
- clarification of statements/issues for the mediator;
- record of the parties' "movement" in regard to offers and solutions.

The mediator's notes *should not* be a transcript of the mediation conference. Notes, by definition, are selective. Two practical dangers arising from taking too many notes are:

- if the parties observe the mediator taking voluminous notes, they become more cautious in what they say;

- in taking copious notes, the mediator must look at what is being written rather than devote eye contact, concern and attention to the person who is speaking. This undermines the personal rapport that the mediator wants to establish with the parties.

Most small claim mediations last around an hour. Trust your memory for the larger details. Your notes are an organizational tool and should permit you, at a glance, to recall a particular issue or propose a certain solution. A common technique is to split a piece of paper, one side for the respondent and one for the complainant. The parties' names appear at the top of the page. In addition to being an organizational tool, notes can help mediators assure the parties that they have heard what the party has said. This is particularly useful when one party is repeating him/herself. The mediator can then read the areas of concern which have been noted and ask the party if there is anything other than what the mediator has already captured in the notes which the party wishes to discuss. This approach assures the party you have heard their concerns and allows the party to add anything which has not yet been included.

It is also important in taking notes that you record information in neutral, simple terms. It is probable that the parties will be able to see your notes. One of the problems in recording the exact words of a party is that you are confirming that party's characterization of the issue. One of the reasons mediation is an effective dispute resolution technique is that the mediator can "see" the dispute differently than the parties. For example, one person may describe activities as "noise" while the other may describe it as "music." As mediator, you will need to think of a neutral term which both can accept. For example, "drum playing." In general, your notes should include as few modifiers as possible.

Example of Mediator's Notes

Upon meeting with two parties, the mediator learned from Mr. Watkins that he is a landlord and is suing Mr. Goodwin for back rent of $750; the lease allows tenants to keep only "small" pets; Mr. Goodwin has obtained a large dog; and Mr. Watkins has had frequent complaints from other tenants regarding Mr. Goodwin's late evening/early morning parties on the weekends. Mr. Goodwin has responded that the rent has not been paid because the oven has been broken for two months; Mr. Watkins has not fixed the oven despite requests by Mr. Goodwin to do so; and he objects to Mr. Watkins' unannounced presence in his apartment several times in the past month.

Mr. Watkins	**Mr. Goodwin**
rent ($750)	**oven (2 months)**
dog	**visits**
parties	

Notice how the mediator's notes are simple and serve as a reminder of the issues rather than a transcript of the parties' statements.

Accumulating information from the parties and effective note-taking depends heavily upon your ability to listen to the parties. Practice the mediator slogan: "When I listen, people talk."

Listening

Earlier in the manual, listening was listed as one of the many important functions of a mediator. If the parties are talking, you should be listening. If you are not listening, you are not mediating. Communication studies have offered five levels of listening that people engage in:

> Webster's Dictionary defines listening simply as paying attention or giving heed.

- **Ignoring**

  the opposite of listening – it is an active choice not to pay attention to someone or something

- **Pretending**

  tuning someone out

- **Selective listening**

  paying attention to bits and pieces of information, a mixture of hearing and listening

- **Attentive listening**

  paying attention to words and focusing energy on messages

- **Empathic listening**

  done with the intent to understand – empathic listening is done with ears, eyes and the heart.

As a mediator, your level of listening should be in the attentive to empathic stage. Paying attention to what is said and *what is not said* is key to your role as mediator. The parties will know whether you are listening to them. The following are signs that confirm that you are listening:

- Effective and appropriate eye contact.
- Appropriate facial gestures.
- Appropriate affirmative head nods (remember that the nod of the head can be interpreted as agreement or acknowledgment – try to be consistent with both parties).
- Avoidance of actions or gestures that suggest boredom (such as yawning or leaning on your hand).
- Asking clarifying questions.
- Paraphrasing using your own (neutral) words.
- Not interrupting the speaker.
- Not talking too much.
- Acknowledging and validating feelings and thoughts (having empathy).

Questioning

Part of accumulating information from the parties takes place through the mediator's use of questions. The following are examples of types of questions and description of when (if ever) they may be appropriate for use by the mediator:

Clarifying

Commonly used to gather a clearer understanding or to confirm a piece of information. Clarifying questions are typically used at the beginning of mediation when the mediator is gathering information to understand the issues for discussion.

- **Mr. Stockmeyer, can you explain in greater detail the defect in the air conditioner that caused the fire?**

- **Ms. Jones and Mr. Stoon, how would you like for that payment to be made and where?**

Open

This question is designed to get or keep the parties talking and should be used predominantly in the early stages of the mediation when the mediator is gathering information. Asking open questions gives the parties the opportunity to share their experiences with you. Invite them into dialogue by asking them these broad questions which require explanations. As the session progresses, you should ask questions narrower in focus.

- **Can you please elaborate on that statement?**
- **How do you see the situation being resolved?**

Closed

These are questions which can be answered with merely a "yes" or "no" response. While this technique may extract some information, it should be used with discretion because it does not elicit a complete response. The best use of such questioning is with parties who volunteer a lot of information and you are trying to limit their domination of the mediation.

- **I have noted that you are concerned about the rent and the dog. Are there other concerns you would like to raise now?**

- **Does this written agreement completely satisfy your original claim?**

Sometimes a closed question can be reworked as an open question.

Closed: **Did you break Mr. Brown's television?**

Open: **What happened to Mr. Brown's television?**

Both questions have the same intent, to find out what someone else knows about Mr. Brown's broken television.

Justification

This type of question usually begins with "Why" and calls on someone to justify their position (e.g., past behavior, actions, feelings). This type of question tends to make people feel defensive and is often judgmental in nature, mediators should try to avoid using it.

- **Why did you break the lamp?**

Compound

This is typified by multiple questions being asked as one question. The problem with using a compound question is that it is confusing to the person who has been asked the question and thus leads to a confusing answer. As a result, mediators should try to avoid using these questions.

- **Did you go out that night and was the door locked when you left?**

Use of good questioning techniques can help the mediator learn and clarify information. More importantly it can help the parties understand more about the dispute from each other's perspective. A good exchange of information and joint problem solving can be fostered by the mediator's approach with the parties. Use your questions to clarify, explore possibilities and to confirm movement or agreement not to satisfy your curiosity or judge the situation.

Non-Verbal Communication

Non-verbal communication is vital in evaluating the information we receive from other people. Communication experts estimate that 55% of the information we gather is from non-verbal behavior; 38% from the tone and sound of the speaker's voice and only 7% from the actual words that the speaker uses. All of you have seen and responded to non-verbal cues many times in your life. Paying attention to the silent cues you receive and observing the communication between the parties will assist you in mediating their case. These cues may help you identify hot spots, priorities, closely held values, areas that are negotiable, etc.

Non-verbal cues will serve as guide posts and indicators, but be careful not to make assumptions based on a single non-verbal action. For example, traditionally, body language experts identified standing with one's arms crossed in front of him/herself as a "closed" posture indicating an unwillingness to participate or hostility to the person or issue being discussed. Today, we understand that there might be many different reasons for assuming such a posture, e.g., one is cold, one is comfortable like that, one is missing a button and trying to cover it up, and so on. Experts now say that we should look at the total package of behaviors that an individual exhibits and more importantly, changes in behaviors. For example, if during a mediation, two businesswomen are discussing their contract and are making offers of settlement back and forth to each other. All of a sudden, one of the women turns her chair completely around so her back is to the other woman. Something obviously occurred in their conversation that made the woman react in the manner she did. In this situation, the mediator would probably react to the cue and try to draw the woman back into the discussions by exploring the reasons for the rapid change in tone of the discussions.

Most non-verbal communication will not be quite as obvious as the example used above. As in all aspects of the mediation, the mediator must be careful not to assume. If you think you are getting some signals or cues from one of the parties or their demeanor does not match what they are verbalizing, you should explore these issues with the party or parties. It may be appropriate to meet separately with the party to validate the feedback you are receiving in some cases. In addition, as mediator you need to be careful with the non-verbal cues that you are exhibiting. The parties may not know that you are just comfortable with your hands folded; they may think that you are not interested in what they have to say.

Summary

Through your efforts you have established an atmosphere in which the possibility of constructive dialogue is enhanced. This is no small achievement, for frequently the parties have let their concerns simmer, exchanged heated words, and then avoided each other until court. Assisting the parties in communicating with one another constitutes an important first step toward building a solution.

The mediator's role in the information gathering process is one of structure and patience. You will help the parties reorient their perspectives from an adversarial posture to one of collaboration.

Your role is not passive. You are listening for the concerns the parties express and the practical ways in which they can be met. You are trying to help the parties reestablish trust so that practical solutions do not evade them. You can accomplish this by making certain that, by your own example, you do not belittle the intentions or needs of the parties. Your role is not to endorse each person's

perception as "right or wrong," but to acknowledge their concerns as ones which in fact they possess and which constitute the benchmarks of settlement possibilities. Since all parties are different and bring varied perceptions to a situation, the mediator should not assume all parties fit in the same box. The mediator must listen carefully and appreciate the unique strands which individuals will highlight – if given the appropriate forum for doing so. Your task is to engage the parties in a joint effort to resolve the problem. An effective mediator will immerse themselves in the dispute long enough to appreciate its facts and dynamics – while staying impartial – so they can lend a fresh perspective.

"Don't stop the person from telling you everything that they had planned to tell you. A person in distress wants to pour out his heart, even more than he wants to win his case. A good hearing soothes the heart. The means for getting a true and clear explanation is to listen with kindness."

~The teachings of Ptahhotep,
about 2400 B.C.

AGENDA DEVELOPMENT

The parties have told you their respective versions of the events that occurred to bring them to mediation. They probably have shared with you what they think of the other party's version of the events. They may have asked you what they should do or appealed to your judgment that they are acting like anyone else would in the same situation. They may be highly emotional or completely passive. You must now lend a degree of structure to the discussion of the issues.

Characterizing the Issues

An issue is some matter, practice, or action that enhances, frustrates, alters or in some way adversely affects a person's interests, goals or needs.

Mediation focuses on negotiating issues that people are capable of and have the resources for resolving. By definition, not all issues can be negotiated because the parties do not have all the resources necessary to resolve every problem for every person.

An example which is not a negotiating issue is prejudice or bigotry. If one party has a prejudice or hatred against a particular group of people, mediation will not alter that party's deeply held attitudes and beliefs – no matter how long the mediation session lasts or how skilled the mediator is. In contrast, the parties may be able to discuss and reach agreements on particular behaviors that may be causing difficulties between them. The specific incidents are negotiating issues while prejudice and bigotry are not.

As the parties speak, the mediator will listen carefully to what is said (and not said) and how it is said, and note down the issues which the parties have identified as needing to be discussed during the mediation in order for them to resolve the dispute which brought them to mediation.

The parties to a dispute will speak plain English and not in the language commonly referred to as "legalese." They will not tell you, "The issues that I would like to talk about are two-fold: the rent payment and the broken front door." More likely, they will relate a series of events in which the broken door and rent payment play a central role, and it will be up to you to cull through the information to succinctly state what you hear as the issues. It is important to realize the range of flexibility that the mediator possesses when characterizing the dispute.

Example

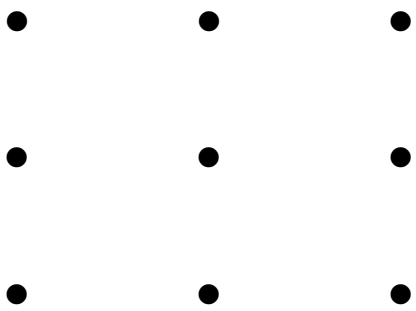
Fred Student housed his German Shepherd at Al's House of Pets for 60 days over the summer and incurred a bill of $360. Fred has not made any payments on the bill and it is past due by six months. Fred has promised to drop off payments twice in the last two months to Al and has not.

What are the issues in this dispute?

A mediator might characterize the issues as "bad debt and broken promises" or the mediator might characterize the issues as "payment due and method of payment." By characterizing the issues in more neutral, future oriented terms the mediator has made a difference in inviting communication and assisting the parties to think creatively.

A mediator shapes both the way in which the parties talk with each other and the range of discussion. It may be tempting in a court-ordered mediation to limit the mediation discussion to the four corners of the complaint, that is, to allow the parties only to discuss the issues which have been filed with the court. To illustrate that this is not a good idea, try the following exercise.

Try to connect all 9 dots using 4 straight lines without lifting your pencil from the paper.



Very often when people are embroiled in conflict, they get stuck. They keep talking about the same issues and ignoring the fact that previous difficulties may have an impact on the current dispute. Just like the only way to solve this puzzle is to use lines that extend beyond the nine dots, sometimes in mediation, the way to assist the parties is to help them expand their discussion.

The common misconception about negotiation and mediation is that the most difficult disputes to resolve are those that involve a lot of money and many issues. In fact, it is more difficult to resolve conflicts in which there is only a single issue in dispute and very little money at stake because there is little room for the parties to maneuver and few concessions they can offer.

Priorities

The parties will talk about many things. Some are more important than others. Assisting the parties in identifying what matters most and what matters least to them establishes an environment that invites negotiation.

Parties will often discuss what is most important to them first and they will often repeat it several times in different ways. Listening to the parties carefully may reveal the attachment a party has to an issue and tactful questioning can confirm the level of interest on a particular topic.

Structuring the Discussion

As human beings, each of us is limited by the fact that we can only talk about one thing at a time. Hence, the order in which issues are discussed can become an important element in helping parties reach agreement. Generally, the guiding principle when setting an agenda is that you want to order the discussion in a way that will assist parties to move toward resolution. There are two schools of practice on which issue(s) to select first when setting an agenda.

Some mediators want to discuss the "easy" issues first. Once the parties have explained their concerns, you can probably make a quick assessment regarding which of those will be resolved most easily. While this judgment is tentative and open to refinement if the parties so indicate, you must start somewhere. By gaining agreement on several of these "small" less important matters, you can begin to develop a habit of agreement among the parties. The momentum of agreement may make the discussion of the difficult issues more productive.

Some mediators will begin with the issue that they view as central to the dispute or the "tough nut to crack." By beginning with the hardest issue, once agreement is made on that issue, small and easier issues will fall into place. Finding a good place to start will come with practice and you may develop your own preferences.

Here are some guides to help you find a starting place and structure discussions.

Categories

One can divide the issues according to various subject matters or principles. Often issues fall into categories such as economic matters (paying for the broken window) and non-economic matters (an agreement as to where the children will play baseball) or financial and behavioral. Appropriate categories will vary according to the nature of the dispute. By dividing the issues, the mediator assists the parties in breaking down the dispute into manageable parts. Notice how closely correlated this process is to that of characterizing the issues.

Nature of Remedies

Some concerns brought up by the parties will invite remedies which are mutual, e.g., they both agree to do something. Other concerns require one party to do something and the other party merely to accept it, e.g., one party pays the other a sum of money. Often, mutual remedy issues are easier for the parties to discuss and agree to than are those which one party has the burden of compliance.

Time

Sometimes the issues will break into categories according to time. For example, the mediator may ask the parties to discuss the issues in chronological order (what happened first) or reverse chronological order (what happened last). In addition, sometimes an issue has a time constraint attached to it. Issues which are constrained by time are often easier for the parties to discuss because they have an outside interest pushing them towards resolution.

Relationship of the Party to the Issues

Some issues will be particularly difficult to resolve if the party or parties have a strong philosophical or personal attachment to the issue. It is best to defer discussion of these matters until other issues are resolved and the parties have built some momentum towards resolution.

Logic

In some instances, issues will come up which are logically related to each other. In using this matter of organization, be careful not to focus unduly on past events instead of future possibilities.

While there are many ways to structure the agenda of discussion, the mediator must be prepared to take responsibility for setting an agenda based on what the parties have said. Generally, the parties will not be prepared to or capable of structuring the discussion. After all, if they were able to do so, they probably would not have ended up at mediation in the first place. One of the greatest assets you bring to the mediation is your ability to create structure and develop a process to assist the parties' communication.

If the mediator neglects to create an agenda, the possibility increases that the discussion will degenerate into impasse not because the parties necessarily disagree on all matters, but rather because no one assisted them in focusing on and separating those items on which they agree from those about which they remain in substantial disagreement.

GENERATING MOVEMENT

After the mediator has developed the agenda for discussion and selected the first issue to discuss, the parties may still be stuck. At this point, the mediator's job is to assist the parties in thinking about their dispute in other ways to help them move forward. It is important to keep in mind that the parties are entitled to maintain a belief that they do not want to resolve their dispute in mediation and would rather pursue the traditional legal process. Your job as mediator is not to make sure that every case is resolved in mediation. Keep in mind that some parties may legitimately want a court resolution. It is your job to help the parties consider their options and make an informed decision as to how to resolve their dispute. In this section, we will discuss the ways in which a mediator may be helpful to the parties in reconsidering their "positions."

The basic definition of mediation is that it is negotiation in the presence of a neutral third person who is not involved in the dispute and who can assist the parties in discussing their concerns. Since mediation is based on negotiation, it is best to start with a brief discussion of the basic principles of negotiation.

In 1983, a small but powerful book, entitled *Getting to Yes: Negotiating Agreement Without Giving In*, was published and went on to become a national best seller.[6] The authors, Roger Fisher and William Ury (later joined by Bruce Patton for the second edition), developed the premise of "principled" rather than

[6] Getting to Yes, Roger Fisher, William Ury and Bruce Patton, Penguin Press, 2nd Edition, 1991. ISBN 0 14 01.5735 2

"positional" negotiation. "The method of principled negotiation developed at the Harvard Negotiation Project is to decide issues on their merits rather than through a haggling process focused on what each side says it will and won't do." (*Getting to Yes*, page xviii)

The basic premises of *Getting to Yes* are as follows:

Separate the People from the Problem

We all know people who we just don't like, that no matter what they say we will find something to disagree with them about. When we are in dispute with these people, we tend to lose sight of what is really important and instead focus on reasons the other person is wrong. *Getting to Yes* cautions us when we are negotiating to keep the focus on the problem – not the people. When we are mediating, our job will be to help the parties separate the "people from the problem."

Focus on Interests not Positions

Generally, when stating a need, we tend to focus on our position, what we want. Often, the position we take will be at odds with someone else's position. *Getting to Yes* encourages us to move beyond positions and move towards stating what our interests are and why we want it. An example used to illustrate this point is a negotiation over an orange. Two people want the orange (that's their positions). If one stays at the level of positions, there is no way to resolve the dispute without one (or both) of the parties "giving in." If one gets to the

interests, however, more options open up. For example, if one party wanted to bake with the orange peel and the other party wanted to eat the orange, both parties could achieve 100% of their interests. If they had focused strictly on their positions, they probably would have agreed to cut the orange in half, thereby obtaining only 50% of their interests. It will not always work out so smoothly and there may be times that the parties' interests are not able to mesh together, but more often than you think, helping parties to identify and discuss their interests will reveal useful information and assist the parties in working towards a resolution.

Generate a Variety of Possibilities Before Deciding What to Do

When we are in dispute or negotiation with another person, we will often identify quickly the way we think it can be resolved and then get stuck there. *Getting to Yes* encourages us to continue to brainstorm a range of ways the dispute may be resolved before choosing what to do. Even the simplest dispute can be resolved in a variety of ways. As a mediator, you should help the parties to think creatively of options, particularly if each one has identified a single option and the options are not the same!

Utilize Objective Criteria

Getting to Yes states this more strongly as "insist that the result be based on objective criteria" which may make sense from a negotiating standpoint, but is less useful from a mediation perspective. Basically, this principle calls upon the parties to a negotiation to ground their

offers and counter-offers to objective criteria, such as the Blue Book value for a used car. The premise is that it is more effective for parties to discuss a situation when it based on objective criteria rather than their own subjective notions. Again, this is a way to make things less personal, and thus, easier to discuss.

Know Your Best (and Worst) Alternative to a Negotiated Agreement (BATNA) and (WATNA)

All too often we will conclude a negotiation or a mediation and leave more money or a better result at the negotiating (mediation) table than we could ever achieve in another forum. We do this because we have not taken the time to think through what is the best we can hope to do outside of the negotiation/mediation and what is the worst that may happen. Your job as mediator is to help the parties to contemplate the alternatives so that they can make an informed decision about what they want to do.

Beyond these negotiation tips, there are some other ways a mediator may be helpful to the parties in generating movement. The following are some options for you to consider to keep the mediation discussions moving:

Procedural Items

- **Alternate discussion of issues**. This is useful so that one party does not perceive him/herself as "winning" everything. A sure way for someone to become recalcitrant and dig in their heels is if they believe that the other person is the only one making concessions.

- **Focus on the Future**. It is helpful to remind parties that they cannot change what happened in the past, but they can decide how they want things to be in the future. Court resolutions focus on the past and determining what happened, a nice aspect of mediation is that what happened in the past is only relevant in helping parties determine how they want to behave in the future.

- **Be positive**. Make the parties feel good about the progress they have made. People like to feel good about themselves. When parties come to a mediation, they are often frustrated with the other party, nervous about being in mediation, and stressed about having a dispute which has not been resolved. As mediator, you may be the only one who remembers that conflict can be positive – that it can offer an opportunity for the parties to learn from each other. By maintaining a positive atmosphere in the mediation and rewarding the parties for their successes, even small ones, the mediator can help the parties view their dispute as a learning endeavor.

- **Use of Silence**. Most people are not comfortable with silence. Silence can be very powerful in helping parties reflect on the effect of a particular proposal or statement. As mediator, do not be afraid to "let silence ring" during your mediation. In particular, use silence when one party has made an offer or counteroffer. The mediator should not be the person who breaks the silence – give the other party time to respond.

- **Use of Humor**. People become more flexible when they are laughing because laughter often reveals some comfort with oneself and the situation. Remember, humor should never be used at the expense of one of the parties.

Informational Items

- **Use of Doubts**. A great question for the mediator to pose to the parties is: "Is it possible…?" If the parties acknowledge that something is possible, even if they say it is unlikely, they already are less rigid in their position and may then be able to consider other options. A corollary to this technique is to challenge assumptions that the parties make. Often we will assume the worst of people with whom we are in conflict. A mediator can be very helpful to the parties, by asking them to consider whether those assumptions may not be accurate.

- **Integrative Solutions**. If you help the parties to identify their interests (not just their positions) and think creatively, they may be able to identify issues in which they both can achieve the "win-win" solution that they want. Think of the orange example.

- **Use the facts**. Often the parties will share information with each other that was not previously known to the other. Encourage the parties to consider this new information as a possible rationale for considering a different "position."

- **Priorities and Trade-Offs**. Not everything which the parties discuss will be of equal importance to them. Helping the parties identify which items are most important will help them see that other items are less important. This may yield greater flexibility and ideas regarding items to "trade-off." We often think that we have disputes when we disagree about what is most important. Interestingly, if one puts high value on an issue (e.g., full payment) and the other puts a high value on a different issue (e.g., payment over time), these parties will likely be able to reach an agreement which results in full payment over time and addresses both of their "high priority" issues.

- **Role Reversal**. Help parties to see the situation from the other party's perspective. This technique sometimes is most useful when meeting separately with the parties and they are able to react with greater honesty.

- **Point Out Possible Inconsistencies**. A mediator should never embarrass or berate a party, but sometimes a mediator can note gently that there may be inconsistencies within what the party has stated. One way to do so is for the mediator to take the confusion on him/herself. For example, "I think I'm confused about what happened. I thought you said that you were not at the building that night and now you say you saw her break the window. Can you help me to understand what I am missing?"

- **Constraints on Others**. Everyone has constraints on them – be they resource, psychological or political. Proposed solutions must fall within these constraints or they will not be accepted by the other party. Pointing out the constraints on others may be useful in helping the parties understand the dynamics at work in arriving at an agreement.

- **Be the Agent of Reality**. The mediator should never force the parties to settle their issues in mediation. The mediator may, however, help the parties to think through what are the consequences of not resolving the dispute in mediation (what is the party's BATNA and WATNA). The parties may want to consider monetary costs, time lost, relationship issues, and the uncertainty of a court outcome when deciding how to resolve their issues.

Relationship Issues

- **Appeal to Past Practices**. Sometimes the parties will have had a prior good relationship. In such cases, it may be useful for the mediator to explore how the parties have resolved similar issues in the past. If the parties have never gotten along or have no prior relationship, this will probably not be a useful technique to utilize.

- **Appeal to Commonly Held Standards and Principles**. Sometimes both parties will express a common theme, for example, to be treated respectfully. While acknowledgment of this notion will not "solve"

their issues, it is often a helpful way for the mediator to demonstrate that the parties can agree on some matters, and thus, can be a good place for the mediator to begin. A corollary to this technique is to utilize "peer pressure" (what would the general public do in a situation) as a way of helping parties identify commonly held standards. For example, it is generally accepted that if we go to pick up our dry cleaning and it is not ready, we do not assault the clerk.

The mediator plays a vital role during mediation in helping parties to reevaluate positions they have taken. Providing a structure for the mediation is a wonderful beginning, but will often not be enough. The parties need the mediator to do more than be a "potted plant" who merely sits in the room. The list above contains some useful techniques for you to try. Some techniques will be very comfortable for you to use, others will be less so. While learning the skills and art of being a mediator, try a variety of approaches.

While learning the skills and art of being a mediator, try a variety of approaches.

We discussed earlier in the manual the mediator's identification of the agenda and the issues which the parties need to discuss. Use of these techniques may be helpful in guiding the mediator through those discussions. Once you choose an issue to start with (e.g., one you think is easy) try several approaches before moving on to a different issue. Three different attempts is generally good – more than that and the parties may feel inappropriately pressured.

If, after several different approaches are tried, the parties are still unwilling to reconsider, you may have chosen a difficult place to start. Move on to another issue and try again.

Sometimes the mediator will want to meet with the parties separately. This can be another effective way of generating movement. Because there are so many more issues to consider in doing so, we will discuss this technique next in its own chapter.

ESCAPE TO CAUCUS: THE SEPARATE SESSION

At some point during the mediation session, you may decide that you would like to meet separately with each of the parties. In addition to the parties, you may wish to meet alone with your co-mediator (if you have one) or mediation trainee (if you are mentoring). You may also need to talk with your mediation program coordinator. For the benefit of this section, we will discuss "caucusing" in terms of the separate meetings you have with the parties.

A separate session should only be called when you have a reason to do so. Some mediators do not declare an impasse unless they have had an opportunity to meet with the parties separately. Some mediators prefer not to disrupt the flow of the joint session between the parties and seldom call a caucus. You will find your preference and style for determining when and if to call a caucus as you become more comfortable with your role as mediator. Remember, regardless of your mediation style, caucus has a reason and a purpose. If you do not have a reason and a purpose for calling a caucus, then do not call one.

Why Meet Separately

The following are some reasons (using the acronym ESCAPE) why you might decide to meet privately with each party.

Explore settlement options

Sometimes you will sense that the parties may be more open to discussing potential options if they could do so without the other party being present. You may want to begin with the party that

appears to be willing to negotiate, but there is no strong preference for who you meet with first if this is your reason for meeting separately.

Signal warning signs

During the session, one party may be exhibiting certain behaviors which threaten any possibility of agreement. If this occurs, the mediator should meet first with the party who is exhibiting the behavior.

Confirm movement

At the start of the session, one party may have indicated that the only acceptable resolution is for the other party to move. As the discussion progresses, the party appears to signal a change in that position, but the mediator is not sure and does not want to risk having the party lock themselves into not reconsidering the previous position. The mediator would meet first with the party who is indicating movement.

Address recalcitrant party

Every so often, one party will take a position early on in the session and not move from it. It may become apparent to the mediator that the session will quickly conclude unless the other party is willing to meet the demand or the recalcitrant party is willing to consider movement. In such instances, the mediator should meet first with the "recalcitrant" party.

Pause

At times, emotions can run hot and you may sense that the parties need a break to collect themselves or calm down. Separate meetings can provide this opportunity. Use your judgment whether to meet first with the person who is upset or to meet first with the other party to give the upset individual an opportunity to collect themselves privately.

Evaluate

Finally, a caucus may be deemed necessary to evaluate the proposals that are currently on the table. A private session affords the parties the opportunity to take a few moments to assess the impact of accepting or rejecting a potential resolution without the pressure of having the other party in the room. It also provides reflection time completely on one's own when the mediator meets with the other party. If there are multiple parties with shared interests or a party is represented, they may request separate sessions so they can consult. The mediator can meet with either party first in this situation.

Why Not Meet Separately

Your mediation should not automatically include a separate session. The following are reasons why you might decide **not** to meet separately with the parties:

It is unnecessary

If the parties are making progress and working together, there may be no need to stop and meet separately. In fact, doing so might disrupt the momentum which has developed and have the effect of interrupting rather than assisting the process.

Low level of trust between the parties

Sometimes the parties have developed a very low level of trust between them. The dispute will not be over unless they see and hear from the other exactly why the other party is willing to concede. Breakthroughs that happen while one party is out of the room will be viewed with suspicion and not accepted. In such circumstances, it might be best to keep the parties together.

Physical arrangements

Sometimes the physical set-up of the mediation will not lend itself to meeting separately with the parties. For example, if there is no place for the party you are not meeting with to wait while you meet with the other, you should not meet separately.

Principles of the Caucus

- **All discussions are confidential**. Unless the caucusing party authorizes the mediator to share their content with the other party, you must keep all information gained in a separate session private.

- **The mediator meets with each party every time a separate session is called**. Meeting with each party every time a caucus is called serves two purposes. First, it reduces the level of suspicion about what happened during the caucus in which one party participated and the other did not. Second, it provides each party an opportunity to share information with the mediator. There are many reasons why parties may be reluctant to share full information in the presence of the other party and a caucus allows them to speak freely.

- **The goal of every separate session is to discuss matters that are relevant to developing a settlement**. Non-agreement between the parties and "not knowing what else to do" are not reasons to meet separately. It seems overly simple to point out that the parties will not be in agreement from the outset of mediation. However, one of the most common misuses of caucus occurs when the parties state in their opening statements that they do not agree, so the mediator immediately (or very soon after) calls for separate sessions. Because the caucus is called so early, it becomes a summary of what the parties said in joint session rather than being useful. By doing so, the mediator has not provided the parties with the opportunity to negotiate for themselves, and has not fostered joint problem solving.

- **The amount of time a mediator spends with each party in caucus need not be identical**. The mediator should promise equal opportunity to meet separately, not equal time. Although you must provide the opportunity for each party to meet separately with you,

the duration times need not be identical. In fact, it will rarely be identical. If the reason for calling a caucus is to address the recalcitrant party, you will probably spend more time with that party than the other. If you find that you have met with one party and do not have a reason for meeting with the other party, remember that the party may have a reason for wanting to meet with you. You can begin the second meeting by letting the party know that you do not have anything you need to ask or share and ask whether the party has anything s/he wants to share before joining back together. Thus, the second meeting might last only a few minutes. Nonetheless, you have provided the party the opportunity, and since it was the party's decision to end the meeting, the mediator preserves the appearance of impartiality and the party will be less likely to be suspicious as to why the other person met with the mediator for so much longer.

The Mechanics of the Separate Session

When the time comes to meet separately, you will:

- declare your intention (try to avoid using the term caucus which is not a common word for most people);
- indicate the order of the meetings;
- indicate approximately how long the meetings will last (in small claims, try to keep separate meetings to no more than ten minutes);
- excuse one party.

The party that will be waiting outside should be given some direction as to where the waiting area is and be asked to remain close at hand. This may be a great time to offer use of a restroom or water break. Often times, mediators will give the party a task to complete while waiting, such as to think of ways to resolve the dispute.

> The confidentiality of the caucus is **vitally** important to the continued success of the mediation process. A breach would damage the parties' perception of your neutrality and the integrity of the process.

While time may go quickly for the mediator and the party inside the room, it can seem like a lifetime to the party who is waiting outside. If you are going to be longer than expected, it is a good idea to let the party waiting outside know. You do not want to go outside after a 20 minute caucus to find that the other party got frustrated and left because you took longer than expected.

When you have one party in the room, you are ready to proceed. There are a few things that you need to remember as you begin:

- **Record the time that the caucus began**. You may think you will remember how long you have been meeting with each party, but time moves very quickly and you don't want to lose track of it – the party waiting won't!

- **Separate your caucus notes from your regular notes**. You should either have a separate piece of paper with you or use the back of your joint information sheet.

- **Review the rules of confidentiality of the separate meeting and the purpose for meeting with the party**. Remind the parties at the beginning and at the end of the each caucus that it is confidential and you must gain permission to use any information shared.

- **The language used by the mediator in caucus, as in full session, must remain neutral**. Since you are alone with one party, it is easy to get caught up in the language used by that party. Even though the other party is not in the room, you must maintain your neutrality and your language is the most obvious way to demonstrate it.

- **Your reason for calling the caucus will shape your agenda**. For example, if you declared a caucus to evaluate settlement options, you should start your discussion with the issue that is most important in evaluating those options. After finishing your opening remarks, you should move directly to the heart of the matter. Before you begin talking in caucus, you must have thought through why you called it, where you will begin it and how you will end it. Remember, you need not talk about every issue in each separate session. Use your individual time strategically.

When you have accomplished your reason for meeting separately, you will conclude the meeting. Before you do so, you may want to check with the party and see if there is anything else they would like to share with you privately. In any case, at the end of your caucus, ask the parties if there is anything that they would permit you to share with the other side. They may give you blanket authority to share everything discussed, permission to share some amount of information, or ask that nothing they shared be discussed.

If the party is unwilling to reveal to the other party something which you believe may be beneficial to a settlement, you may ask the party if they would be willing to share the information him/herself. Alternatively, you may ask for specific permission and tell the party your reasoning for asking. In the end, whether you agree with the party or not regarding disclosure, you must respect the party's decision.

Second Caucus

To begin the mediator should go get the other party. Do not send the party with whom you have just finished meeting to find the other party. Once settled back in the room, the mediator begins the second meeting in the same fashion as the first (separate your notes, record the time, and invite the party's confidence). The difference is that the party knows that the mediator has just spent time alone with the "other side" and presumably has gained some additional information or insight. The first words out of the second party's mouth may be "So what did he say?" or "What is she willing to do?" The mediator should fight the temptation to immediately reveal information which was learned in caucus – even if the mediator has permission to do so.

Your role as mediator has not changed. After the first separate meeting, you do not switch roles and become an advocate for settlement options proposed by one side or "sell the first party down the river" by immediately revealing his/her concerns.[7]

A good technique to use in caucus is to ask questions as hypotheticals. This allows the mediator to assume the scapegoat role if a suggestion is unacceptable. The party can reject the "hypothetical" without getting angry at the other side for proposing the idea. It also protects offers of movement made by one side. You have not revealed exactly what the other side has tentatively agreed to do or not do.

The end of the second caucus is just like the end of the first. The mediator will determine what information may be shared and then bring the other party back into the room. Sometimes as a result of the information shared in separate sessions, the parties will be in substantial agreement. Other times, the parties are still very far apart.

Regardless of where the parties are on that continuum, the mediator should begin the joint session with some encouraging words. Specifically, the mediator should thank the parties for the opportunity to meet with them separately. If the parties are still far apart, indicate that is the case. Do not immediately end the session, but you may want to share with the parties your assessment and see if either has anything else to add.

---

[7] Keep in mind that the Florida Rules for Certified and Court-Appointed Mediators also prohibit the mediator from "intentionally or knowingly misrepresenting material facts or circumstances in the course of conducting a mediation." Rule 10.310(c).

If the parties are close together or even in substantial agreement, remember that there is no agreement until the parties are together. Thus, the mediator might continue (after thanking them) with a statement along the lines of, "As a result of my individual conversations with each of you, I believe that you are very close to reaching an agreement, but I am not quite certain as to the terms."

Even if you are certain the parties are at the same point, because you are the only one who knows this, you must determine how to reveal this potential consensus to the parties. Basically, you have three options after bringing the parties back together and thanking them:

- the mediator announces the terms of the agreement;
- the parties reveal the agreement to each other;
- some combination of the two options above.

It is preferable to allow the parties to reveal the agreement to each other since it is their agreement. This allows the parties to assume greater ownership over the agreement. However, if the parties are highly emotional or extremely angry at one another, or the agreement is so complicated, the mediator may choose to reveal some or all of the terms. If the agreement is revealed by the mediator, the mediator should be sure to check in with each party after each term is revealed to ensure that there is agreement. At a minimum, the parties should at least be nodding their agreement as the mediator speaks.

CONCLUDING THE MEDIATION

In the end, whether the parties have chosen to settle their dispute or not, it is the mediator's responsibility to end the session. There are four ways in which a mediation session might end:

- **The parties do not reach any agreement**. The word "impasse" is frequently recorded in the court file on the agreement or elsewhere. The mediator assists the parties to the next step in the process which typically is the scheduling of a trial date with court personnel.

- **The parties request a continuance of their case and an opportunity to return to mediation after a specific period of time**. This is usually requested when one or both of the parties want to resolve their dispute, but need additional time to gather information that has bearing on their decisions and actions. A time to meet again is usually scheduled before the parties depart as is a future court date in the event that the parties decide not to return to mediation. Generally, the mediator who began the mediation will complete the mediation, if available.

- **The parties have a partial agreement on some issues and request a trial on those which they were unable to resolve**. The parties may wish to include in their partial agreement a list of those issue which they would like the court to resolve. Any item included in the signed mediation agreement is not confidential, and thus, could be discussed with the judge.

- **The parties reach agreement on all the issues**. In small claims cases, the agreement is generally written at the end of the mediation by the mediator. At time, the parties may agree to have one of them write the agreement instead, but it is the mediator's ethical responsibility to ensure that the terms of agreement are memorialized (written and signed).

No Agreement

While it is natural to hope that you can assist all parties in reaching a mutually agreeable resolution to their situation, it is the parties who decide whether an agreement will be reached. Some parties will decide not to settle, but that is not a reflection on you as mediator. In fact, if you find that 100% of your mediations result in an agreement (and you have done more than a few) you might be too heavy-handed with the parties.

If the mediation does not result in an agreement, there are a number of things that the mediator can do to end the session in an upbeat manner and increase the likelihood that the parties will reach agreement prior to their trial date (and/or be willing to utilize mediation in the future).

- Review with the parties any issues that may have been resolved and explore the possibility of a partial agreement outlining what issues have been resolved and which issues the parties are requesting the judge's ruling.

- Encourage communication after mediation (and before a trial date) by asking the parties if they wish to exchange business cards or telephone numbers. Often parties lack the ability to contact one another even if they wanted to reach out after the mediation.

- Ask them if they are willing to contact the mediation office to request another session if they think at a later point it will be helpful.

- Most of all – end on a positive note. Do not chastise them for not being able to resolve their problem. You might even accept some responsibility by saying, "I regret that I was not able to assist you in resolving your dispute today."

Agreement

In most county court mediation programs when the parties reach a full agreement, the mediator will write the terms of the agreement by hand at the end of the session before the parties leave the courthouse. This function is extremely important. The agreement is a legally binding and enforceable document. The parties need to understand it and be able to refer back to it. A judge may have to review and enforce it.

There are five basic elements of a written agreement:

- Who **– who are the parties**
- What **– what have the parties agreed to do**
- Where **– the place or location that an exchange will take place**
- When **– date of exchange; time limitations, be specific**
- How **– what form will the exchange take**

Example: **Mr. Joe Smith and Ms. Lee Holt [**who**] have agreed to the following: Mr. Smith will pay [**what**] Ms. Holt one hundred dollars ($100.00) in cash [**how**] on or before the 3rd of June, 2008 [**when**]. Mr. Joe Smith will make payment at Ms. Holt's place of business, The Apple Tree, 421 Park Avenue, Tallahassee, [**where**] no later than 5:00 p.m. on June 3, 2008. Ms. Holt agrees to accept payment as full resolution of this matter. If Ms. Holt is not available, Mr. Smith may leave payment with her assistant, Debbie May.**

Research indicates that mediated agreements have higher compliance rates than those that are ordered by a judge. Mediators who encourage parties to define the steps in implementing the agreement often avoid misinterpretation of the agreement. Do not underestimate the importance of completing this task.

Format of an Agreement

The written agreement should be clear and concise. Here are some guidelines:

- Separate the different elements of the agreement, assign a number to each and list them on a sheet of paper. Do not write a long narrative.

- Do not include "confessions."

- Use the names of the parties, not legal jargon (e.g., complainant or respondent) and make certain the names are spelled correctly. The first time you use the name, write it out completely, then when you refer to the parties later in the agreement you can use just the first or last names (depending on the context of the dispute).

- Write out dates rather than use the numerical equivalents. In addition, avoid using phrases such as bi-weekly, monthly, at the end of the month, the end of the week, in the summer, etc.

- When the agreement involves a monetary settlement, write out the dollar amount. This may appear very old-fashioned, but it is easy to misread numbers or misplace a decimal. In addition, include where and how (e.g., by means of cash with receipt, bank check, money order) the money is to be paid. If there is a payment schedule agreed to of less than five payments, write out each date and amount.

- Keep the tone positive and prospective. A mediation agreement should be forward looking and avoid retelling the history. A useful phrase to include is "in the future" particularly if a party has agreed to do (or not do) something in the future, but is unwilling to acknowledge that they did not (or did) do it in the past.

- Invite the parties to create the document with you by reading along, asking for terminology, etc. Pride of authorship belongs to the parties not the mediator. When in doubt about a particular term, ask the parties. Do not make substantive changes or additions to the agreement as you are writing.

Just as you have conducted yourself in a neutral manner, the agreement must be written in a fair and balanced manner. It is useful to start with those items which are mutual obligations, alternating whose name is written first in each sentence. Then alternate obligations of each party. The goal is for the agreement to reflect, to the degree possible, a sense of balance between the parties. If the mediation is successful, everyone should feel as though they achieved something, and the written agreement should reflect that fact.

The parties may agree in mediation to a smaller settlement than their original claim as filed. Some agreement forms for small claims mediation allow the parties to specify the amount the claimant will be entitled to in the event that the other party does not fulfill his/her obligations under the mediated agreement. This is a negotiable issue for the parties. Do not assume that the claimant expects the full amount sued for, or that the claim automatically drops down to the new amount

on which the parties have agreed. Ask the parties what number belongs there. If there is disagreement, help them work it through using all the wonderful skills you have utilized throughout the mediation session.

A frequent question for mediators of small claims cases is, "What about court costs?" The same analysis as above applies. There is no policy, rule or law which governs the payment of court costs at the conclusion of a mediation. The claimant may bring this up as an issue. As mediator, you would add this to your list of issues which the parties will discuss. Their agreement may involve splitting the fee or one or the other paying all of it. If the parties do not bring it up as an issue, most mediators agree that they will not raise the issue.

Enforcement

One advantage of a mediated agreement is in the area of compliance. Since the parties have worked out the agreement themselves, they are more likely to understand it, feel compelled to act under it (because now they have given their word that they will do something) and be able to comply. Often in small claims mediation, the party acknowledges that s/he owes a debt, but does not have the financial wherewithal to fulfill their obligations. A major benefit to mediation is that the parties can work out a payment schedule which the parties are capable of completing.

But what happens if the agreement is not fulfilled? If the case was mediated pursuant to a court referral to mediation, the parties can enforce their mediated agreement in the same manner as a court order which is not fulfilled. In order for the court to enforce the agreement, it must be clear and unambiguous.

In addition, the court probably will only be able to enforce monetary terms. Terms such as, "The parties agree to treat each other respectfully in the future" are useful in mediation agreements which are self-enforcing. Include them if the parties want them, but understand that a court cannot enforce specific performance obligations such as that.

If the mediation is the result of a voluntary submission, the parties still have an enforceable agreement, they just have to take the additional step of filing a court case to enforce their contract (mediation agreement).

If the parties are expressing a great deal of concern around enforcement, you may need to explore whether there are issues which remain unresolved in the mediation. In any case, questions regarding enforcement are best handled by court personnel.

ETHICS

Once a mediator has mastered the skills necessary to be effective, the mediator will still need to determine whether and when it is appropriate to utilize those skills. In thinking about the ethical responsibilities of mediators, it is sometimes hard to separate them from what is good practice. There will be some behaviors which are clearly prohibited and some that are clearly permitted, but many will fall in between, where it will depend on the circumstances and the individual moral code of each mediator. In this chapter, we will discuss the ethical foundation of mediation and the current code of conduct and disciplinary procedures for Supreme Court certified and court-appointed mediators.

Mediator Role Morality

Mediators, like other professionals, have preconceptions of what their job is and what their role is in doing that job. This conception will influence a mediator's reactions to situations and whether the situation presents an ethical dilemma for the mediator. In 1989, Robert A. Baruch Bush, Professor of Law at Hofstra University, completed some research on mediators and ethics. Through interviews with mediators of all different types of disputes, he discovered that mediators described the role of the mediator as fitting into one of the following categories.

To Settle

The mediator's job is to settle cases – as many and as quickly as possible. The credo of this group would be "get the parties in, get the agreement signed, and get them out the door."

To Fix

The mediator's job is not to get just any settlement, but rather to get the optimum settlement as determined by the mediator. Mediators who fall into this category are likely to give direct and indirect suggestions about particular solutions to a dispute.

To Protect

The mediator's job is to make sure that no one gets hurts or taken advantage of in the process or as a result of the process. These mediators are concerned that both the process and the outcome are "fair."

To Empower

The mediator's job is to educate the parties to exercise self-determination and responsibility.

To Reconcile

The mediator's main role is to get the parties to see each other in a new way and to develop a new understanding between the parties.

Because one never knows what dilemma one will face as a mediator, and inevitably, the dilemma presented to you will be the one which you have not thought about in advance, a mediator must clearly identify a single role to serve as the foundation. It may be tempting to see the role of the mediator being a little bit of each of those described, however, in real situations, one will necessarily rise to primary role.

Consider, for example, that during a mediation one of the parties becomes emotionally distraught. The party is crying and saying, "I'll agree to anything, just write it up." The mediator who sees his/her role as "settler" will write up the agreement and let the party sign. The "protector" will prevent the person from signing and will likely cancel the mediation right then and there. The "empowerer" will try to assess the situation. This mediator would likely call a caucus and allow the party to collect him/herself and would attempt to find out what the party wants to do. In essence, what the empowerer ultimately would do in this situation would depend on the party.

Having made the case for choosing a single role as the foundation, Professor Bush encouraged the drafters of Florida's Code of Conduct for Mediators to select a role and be consistent to that role conception in the obligations placed on mediators.

In 1992, the Supreme Court of Florida adopted a code of conduct which is based on the foundation that the mediator's role is "to empower." When faced with a dilemma, mediators should hearken back to what would the "empowerer" mediator do.

"My man called for a fastball and your man threw a slider."

The mediator code of conduct is codified in the Florida Rules for Certified and Court-Appointed Mediators.

- **Rule 10.100** contains the qualifications for certification by the Supreme Court of Florida as a mediator in each of the current certification areas (county, family, circuit and dependency) and the good moral character requirements.

- **Rules 10.300 – 10.380** contain the Mediator's Responsibility to the Party.

- **Rules 10.400 – 10.430** contain the Mediator's Responsibility to the Mediation Process.

- **Rules 10.500– 10.530** contain the Mediator's Responsibility to the Courts.

- **Rules 10.600 – 10.690** contain the Mediator's Responsibility to the Mediation Profession.

- **Rules 10.700 – 10.880** contain the Discipline Procedures.

- **Rule 10.900** contains the Procedures Governing the Mediator Ethics Advisory Committee which provides advisory ethics opinions to certified or court-appointed mediators.

In addition, mediators who are appointed by the courts to mediate civil cases pursuant to Chapter 44, Florida Statutes, "have judicial immunity in the same manner and to the same extent as a judge." Section 44.107, Florida Statutes. This is a very broad grant of immunity and basically means that in the event a mediator (who fits within the definition of the statute) is sued by a party as a result of activities conducted within the mediation, the party would most likely be unsuccessful in obtaining monetary damages from the mediator.[8] This statute will not prevent a party from filing a grievance against a mediator. Incidentally, the Florida Statutes also provide that in the event a grievance is filed against a mediator, the confidentiality of the mediation is waived for the limited purposes of resolving that grievance. Section 44.405(6), Florida Statutes.

In the first eight years of the grievance procedure, an average of five to six grievances have been filed statewide for all the different types of mediation conducted by certified mediators. A complete summary of the grievances filed is included in the Appendices. The most common grievances relate to charges of lack of impartiality on the part of the mediator and concerns regarding coercion by the mediator. These include instances where the party wanted to leave the mediation and were not permitted to do so, as well as where the party felt that the mediator was compelling them to agree to a particular settlement.

[8] It is important to note that the immunity statute is only applicable to court-ordered civil mediation cases. In the event a certified mediator conducts a private or pre-suit mediation, this provision is not applicable.

Grievance Procedures

Grievances are handled by the Mediator Qualifications Board (MQB). The MQB is divided into three divisions (northern, central and southern).[9] The members in each division fall into the following categories:

- three circuit or county judges;
- three certified county mediators;
- three certified circuit mediators;
- three certified family mediators, at least two of whom are non-lawyers;
- not less than one nor more than one certified dependency mediator;
- three attorneys who are licensed to practice law in Florida and have a substantial trial practice and are neither judges nor certified mediators during their term of service on the Board. At least one of whom must have a substantial divorce law practice.

A complaint may be filed by anyone with knowledge of the alleged activity and may be filed with the trial court administrator in the circuit in which the complaint arose or directly with the Dispute Resolution Center in Tallahassee. If the complaint is filed with the trial court administrator, s/he must send it to the DRC within five days.

[9] See Rule 10.730, Florida Rules for Certified and Court-Appointed Mediators for the circuits contained in each division.

Upon receipt of the complaint by the DRC, staff will review the complaint to ensure that it is notarized and that it contains the name of a mediator subject to these rules. If it is in proper form, the complaint will be referred to a complaint committee from the division in which the complaint arose. The complaint committee will consist of a random selection of the following members:

- one judge or attorney, who acts as chair of the committee;
- one mediator, certified in the area to which the complaint refers;
- one other certified mediator from the division, which may or may not be from the area to which the complaint refers.

For example, if a complaint is filed against a county mediator in the Northern Division, a judge or attorney from the Northern Division would be selected to chair the complaint committee. In addition, a county mediator and another mediator (both from the division) would be selected to serve on the committee. Thus, there will always be a majority of mediators on the complaint committee, at least one of whom will be directly familiar with the types of cases which were mediated.

The complaint committee will review the complaint to determine if it is "facially sufficient." Specifically, the complaint committee will determine whether the allegations, if true, would be a violation of the code of conduct for mediators. If the complaint committee finds that even if true, the complaint does not state a violation, the complaint will be dismissed and the mediator and the complainant will be notified.

If the complaint is found to be facially sufficient, the committee will prepare a list of possible rule violations for the mediator to consider when s/he responds. If facially sufficient, the DRC will send a copy of the complaint and the possible rule violations to the mediator who will then have 20 days to respond to the complaint.

The mediator's response, if any, will be returned to the complaint committee for further consideration. At this point, the complaint committee has many different options. They may:

- find no violation has occurred and dismiss the complaint;
- appoint an investigator to assist the committee;
- investigate the complaint themselves;
- meet with the mediator and the complainant in an effort to resolve the matter (the non-adjudicatory resolution of the complaint). During this meeting, the mediator may agree to sanctions;
- find probable cause, draft formal charges and forward the complaint to a hearing panel of the MQB;
- find probable cause but dismiss the complaint because it is de minimus or some combination of the above.

A hearing panel is made up of the following 5 members of the MQB from the division in which the complaint was filed. No one who served on the complaint committee may also serve on the hearing panel.

- a judge, who serves as chair;
- three certified mediators, at least one of whom is certified in the area to which the complaint refers;
- one attorney.

The hearing procedures are much more formal than at the complaint committee level. While the rules provide for the hearing to be "informal," the rules of evidence, liberally construed, are applicable. In addition, the DRC will generally be instructed by the complaint committee to hire someone to investigate and prosecute the complaint.

The MQB has adopted the philosophy that their focus is on rehabilitation rather than retribution. In other words, they are much more concerned with educating mediators as to appropriate behaviors, rather than punishing them for past mistakes. As a result, most complaints are resolved at the complaint committee stage, frequently by a meeting with the mediator and complainant. In addition, while the possible sanctions range from admonishments and reprimands to suspension and decertification, the sanction of choice has been to require mediators to complete additional training.[10]

[10] A complete list of possible sanctions is found in rule 10.830(a), Florida Rules for Certified and Court-Appointed Mediators.

All MQB proceedings are confidential, until sanctions are imposed either by agreement of the mediator (at the complaint committee level) or upon direction of the hearing panel. If sanctions are imposed by the hearing panel, all documentation becomes public with the exception of those matters which are otherwise confidential. If sanctions are agreed to by the mediator, only the basis of the complaint and the agreement are released to the public.

For all complaints, regardless of whether sanctions are involved, the DRC publishes a summary of the complaint – for educational purposes – in the DRC's newsletter, *The Resolution Report*.

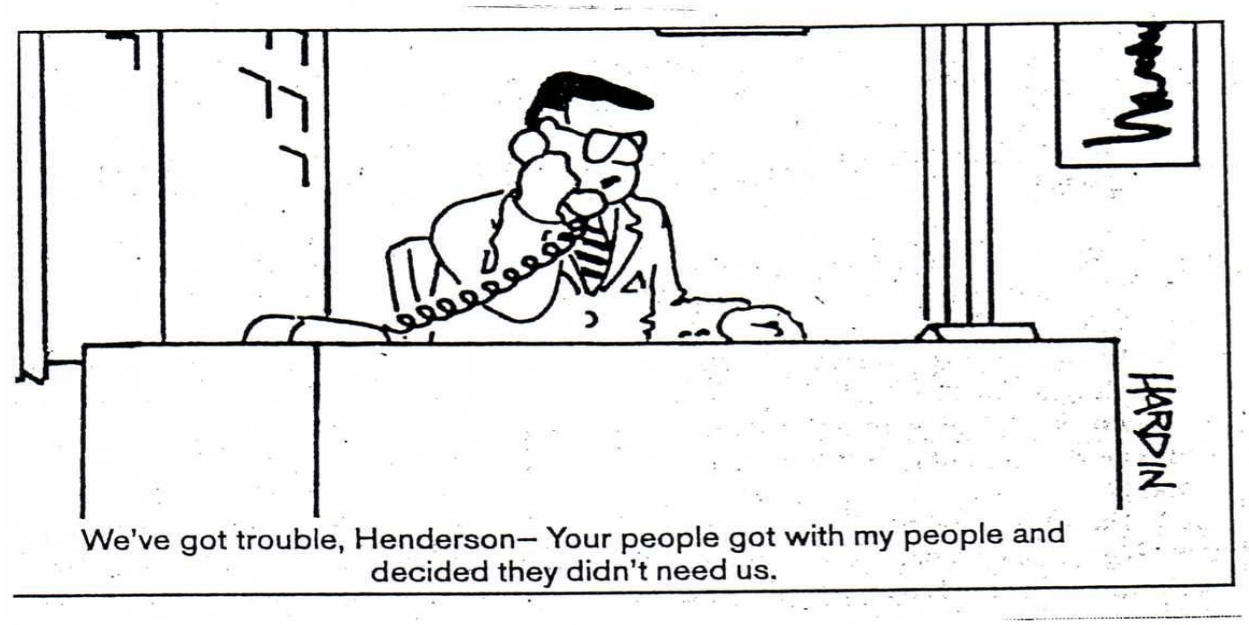
Mediator Code of Conduct

The mediator code of conduct is applicable to all certified mediators (regardless of type of case) and mediators appointed pursuant to court order (regardless of the mediator's certification status). This means that as a certified mediator, you will be required to adhere to the code of conduct, not only for your court-connected mediation cases, but also for all other types of mediation you conduct (e.g., CDS, mobile homes, NASD). The full code is included in the appendices.

In 1994, the Supreme Court of Florida created the Mediator Qualifications Advisory Panel (MQAP) to provide advisory ethical opinions to mediators who have questions on the code of conduct. In April 2000, the MQAP became the Mediator Ethics Advisory Committee (MEAC), a name change that more accurately reflects its function of providing ethical opinions.

The MEAC is a nine-member body made up of one certified county mediator, one certified family mediator, and one certified circuit mediator from each division. At least one member must also be certified as a dependency mediator. The Committee meets as necessary to consider written requests from mediators subject to the rules for advisory opinions which are answered in writing. The MEAC is not a "hotline." The opinions are published in *The Resolution Report*.

In addition to thinking about the foundation of mediation, a helpful way to think through an ethical dilemma is to consult with your colleagues and/or the staff at the DRC. You can reach us at (850) 921-2910, by fax at (850) 922-9290, or by email at DRCmail@flcourts.org.



CONCLUSION

This manual includes various skills, strategies and approaches for use when serving as a mediator in a county court mediation program. Your service is critical to the program's success. The task of mediating is not easy, but can be immensely fulfilling. Hopefully, you will continue to learn with each mediation you conduct. Some of the insights and guidelines offered here will become more meaningful to you as you become more experienced, and we fully expect your own experience to augment the guidelines contained in this manual.

You are embarking upon a service from which you may reap great personal satisfaction. The service you provide is extremely valuable. That value can be concretely demonstrated by the courts and the legislature. The true value of county mediation, however, is that which you provide to the parties and that can only be accomplished when they are able to talk about their concerns, feel listened to by you (and hopefully the other party), figure out for themselves how they want to resolve it and learn that they too are empowered to resolve conflicts. We must never lose sight of that goal.