

Family and Divorce Mediation Training

Course Manual for the Online Training

Course Video Agenda:

All Star Family Mediation Training Agenda INTRODUCTION, 1.5 hours

- Introduction by Kamela Love, 0.25 hours
- Introduction to Training by Dr. Clare Fowler, 0.25 hours
- Introduction to Asking Questions by Jim Melamed, 1 hours

THE MEDIATION PROCESS, 9.75 hours

- Introducing the Mediation Process by Clare Fowler, 1 hour
- Confidentiality by Phyllis Pollack (repeat from Basic Training), 1 hours
- Negotiation with Children Introduction by Clare Fowler
- IPV (screening clients, safety assessments) by Don Saposnek, 1.25 hours
- Sample Mediation, in 7 steps, with Explanation by Michael Aurit, part 1, 1.5 hours
- Sample Mediation, in 7 steps, with Explanation by Michael Aurit, part 2, 2 hours
- Supporting a Variety of Cultures, unmarried, and low-income parents by Zenell Brown, 0.25 hours
- Supporting Alternative Family Dynamics by Kamela Love, 0.5 hours
- Deescalating High Emotions by Nina Meierding, 2.25 hours

WORKING WITH CHILDREN, 2.75 hours

- Supporting Children in School with Dr. Lesley Cook, 0.25 hours
- Working with Special Needs Children by Ken Cloke, 0.25 hours
- Parenting Time & Structuring the Conversation by Don Saposnek, 1.25 hours
- Child Custody and the Specific Elements to Include in the Agreement by Anju Jessani, 0.5 hours

FINANCIALS, 5.5 hours

- Financial (division of assets, child support, tax implications, etc.) by Chip Rose, 3 hours
- Spousal Support by Julie Gentili Armbrust, 2 hours

- Collaborative Practice: Work with a CDFA? by Glenn Crawford, 0.5 hours
- Collaborative Practice, Looking at Trust and Estates, by Kamela Love, 1 hour

AGREEMENT, 5.5 hours

- Basics of Agreement by Clare Fowler (repeat from Basic training), 1.25 hours
- Documents (agreement to mediate, confidentiality, MSA) by Jay Bultz, 2 hours
- Ethics by Michael Lang (repeat from Basic training), 1.5 hours
- Ethics part 2 by Michael Lang (repeat from Basic training), 0.75 hours

NEXT STEPS, 1 hour

- Next steps: Marketing and Business Development by Clare Fowler, 0.75 hours
- Closing by Kamela Love, 0.25 hours

Video Materials Outline

Course Video Agenda:	1
Introduction.....	9
INTRODUCTION TO ASKING QUESTIONS BY JIM MELAMED WRITTEN MATERIALS.....	18
Section 1.....	21
Conflict Resolution Theory	21
Section 2.....	30
Section 3.....	36
Negotiation.....	36
Section 4.....	48
Being a Mediator.....	48
Section 5.....	63
Written Materials for The Mediation Process with Clare Fowler.....	63
Getting Started: The SONAR Process	63
Written Materials for Confidentiality Video with Phyllis Pollack.....	77
Written Materials for IPV (screening clients, safety assessments) by Don Saposnek.....	89
Written Materials for Sample Mediation, in 7 steps, with Explanation by Michael Aurit, part 1	116
Section 6.....	121
Mediation Strategy	121
Written Materials for Sample Mediation, in 7 steps, with Explanation by Michael Aurit, part 2	140
Section 7.....	140
Communication & Facilitation	140
Section 8.....	156
Written Materials for Supporting a Variety of Cultures, unmarried, and low-income parents by Zenell Brown.....	157
Written Materials for Deescalating High Emotions by Nina Meierding.....	164
Written Materials for Supporting Children in School with Dr. Lesley Cook.....	172
Section 9.....	174
Parenting Issues	174

Written Materials for Parenting Time & Structuring the Conversation by Don Saposnek	174
Written Materials for Child Custody and the Specific Elements to Include in the Agreement by Anju Jessani	179
Written Materials for Working with Special Needs Children by Ken Cloke	194
Section 10	206
Written Materials for Financial Introduction with Clare Fowler	206
Written Materials for Financial (division of assets, child support, tax implications, etc.) by Chip Rose	207
Written materials for Spousal Support by Julie Gentili Armbrust	213
Section 11	220
Written Materials for Collaborative Practice: Work with a CDFA? by Glenn Crawford	220
Property and Debt	220
Section 12	232
Tax Issues	232
Written Materials for Collaborative Practice, Looking at Trust and Estates, by Kamela Love	232
Section 13	234
Written Materials for Basics of Agreement by Clare Fowler	234
Written Materials for Documents (agreement to mediate, confidentiality, MSA) by Jay Bultz	237
Section 14	258
Ethics	258
Written Materials for Ethics by Michael Lang, parts 1 and 2	258
Section 15	273
Written Materials for Next steps (marketing, biz dev), Getting Started and marketing video by Clare Fowler	274

Contents

Introduction	9
Intro.1 Perception and Parts.....	11
Intro.2 Baby Steps to Agreement	13
Intro.3 Strategic Mediation.....	13
Intro.4 Less is More.....	14
Intro.5 Goals of Mediation	15
Section 1	21
Conflict Resolution Theory	21
1.1 Nature of Conflict	22
1.2 Adjudicatory Model	24
1.3 Types of Conflict	26
1.4 Ways of Dealing with Conflict.....	27
Section 2	30
2.1 Spectrum of Processes.....	30
2.2 The ADR Processes.....	31
2.3 Dispute Resolution Mythology.....	34
Section 3	36
Negotiation	36
3.1 Competitive & Integrative	37
3.2 Principled Negotiation	40
3.3 Negotiation Power.....	44
3.4 Balance Negotiation Power?	44
3.5 Overall Facilitative Structure	47
Section 4	48
Being a Mediator	48
4.1 Science and Art	49
4.2 Roles of the Mediator.....	52

4.3 Benefits of Mediation	53
4.4 Mediation Cultures	56
4.5 Caucusing.....	57
4.6 Subject-Matter Expertise.....	61
Section 5	63
Getting Started	63
5.1 Qualities of Mediation	64
5.2 Initial Contacts	66
5.3 Sample Appointment Letter	67
5.4 Sample Client Information.....	68
5.5 Sample Agreement to Mediate	70
5.6 Mediation Practice Standards.....	73
5.7 Oregon Mediation Association Standards of Practice.....	81
5.8 Family Mediation Standards.....	89
5.9 Family Mediation Standards.....	103
5.10 Sample Introductory Session	116
5.11 Letter Following Initial Meeting.....	118
5.12 Sample Ground Rules	119
5.13 Resolving Pressing Issues.....	120
Section 6	121
Mediation Strategy	121
6.1 Interests and Options	123
6.2 Hypothesis Generation & Testing.....	126
6.3 Doubt and Dissonance	128
6.4 Emotional/Relational Issues	131
Section 7	140
Communication & Facilitation	140
7.1 Rapport Development	142
7.2 Outcome & Evidence Questioning.....	145

7.3 Anchoring.....	153
7.4 An Overall Model	154
Section 8	156
8.1 Prevalence and Effects.....	157
8.2 Effects on Children.....	161
8.3 Emotional Stages of Divorce.....	164
8.4 Reactions of Children.....	168
8.5 Stress in Children	172
Section 9	174
Parenting Issues	174
9.1 List of Parenting Issues	175
9.3 Exchanging the Children	182
9.4 Children's Rights.....	184
9.5 What Parents Can Do to Help.....	185
9.7 Erickson's Psychosocial Stages.....	198
9.8 Adler Time Sharing Guidelines.....	201
9.9 Children in Mediation?	203
Section 10	206
10.1 Child Support.....	207
10.2 California Guideline Model.....	208
10.3 Custom Calculation of Child Support.....	212
10.4 Spousal Support	213
10.5 Custom Calculation of Spousal Support	215
10.6 Oregon Context.....	216
10.7 California Context	218
Section 11	220
Property and Debt	220
11.1 Community or Equity?	220
11.2 Oregon Equity Standards	221

11.3 Community Property Standards	223
11.4 Quantity and Quality.....	225
11.5 Valuation Dates.....	227
11.6 Establishing Values	227
11.7 Personal Property	228
11.8 Retirement Interests.....	229
11.9 Bringing it Together	230
11.10 Marital Home.....	231
Section 12	232
Tax Issues	232
Section 13	234
13.1 Infusing Legal Capacity	235
13.2 Rely on Outside Attorneys?	236
13.3 The Memo of Understanding	236
13.4 Issues for the Mediating Attorney.....	256
13.5 Sample Settlement Agreement	256
13.6 Sample California Agreement.....	257
Section 14	258
Ethics	258
14.1 Family Mediation Standards.....	259
14.2 Model Standards of Practice	272
14.3 OMA Standards of Practice.....	272
14.4 Ethics Section.....	272
Section 15	273
15.2 Careers Section	280

Introduction

Please see videos with Kamela Love and Clare Fowler for an introduction, then read this section.

Mediation: A Fascinating Journey

Mediation is a fascinating journey. It is rational and irrational, cognitive and intuitive. And there is no shortage of challenge!

For starters, we put ourselves in the middle of conflict on a daily basis. This is our life. The people really do not want to be there. They are there because they are somewhat desperate. Their alternatives are even worse. Why else would they be there? It is like going to a dentist with an abscessing tooth. It is their only reasonable choice. They are not thrilled to be paying you either. And note that as soon as you resolve one contested issue, guess what you get to immediately focus on? Yep, the next contested issue! We continue in this seemingly endless cycle until we run out of issues and the people agree and flee or just flee. It is a bit thankless sometimes. Sound like fun?

However they come, they do come. There is no shortage of conflict. It is everywhere and everywhere conflict is these days, mediation is not far behind. Participants are coming more and more to mediation by court, administrative agency or contractual edict. Agreeing in mediation is voluntary, but more and more, as a matter of social, legal and corporate



policy, participation in mediation is being required. We are finding that mediation is more and more the "day in court" that we have really never fully had.

These same people are capable of great things. Mediation, for the author, is about assisting participants to be at their best so that they can make most capable decisions for themselves and the people they care about. Mediation is a safe opportunity to see if we can assist people in really difficult situations to resolve matters and move on with the sweetness of life.

As a mediator, we see people at their worst and at their best, and everywhere in between. We assist people who are capable of war and peace. Even without being religious, one can say that "we do god's work." We are the ones who beat the swords into plows, on a daily basis, sometimes many times a day.

Even when we are successful, which tends to be 70-90% of the time, we rarely get great accolades. The participants are generally glad to be through with it. We do our best in each case, only to then be confronted with the next, seemingly unsolvable situation.

So, for the moment ignoring our own irrational commitment to this thankless lifestyle, perhaps the questions ultimately are along the lines of how can we best assist participants to both be at their best and to reach agreement and to do that as swiftly and economically as possible. All of this, of course, in an "impartial" way.

And, hereto, we have thought of this in terms of assisting people in a face-to-face environment. Increasingly, mediators of all sorts are finding ourselves integrating the Internet into our daily practices. How will the Internet impact mediation?

In time, it is suggested that we will be doing more and more mediation on the Internet and this is good. While we certainly do not want to lose our relationships nor connectivity, as an augmentation to face-to-face meetings, the Internet offers a wonderfully convenient, economic, quiet, resourceful, and accessible means of communicating and contributing toward the

agreement reaching process. It also often offers a means of continuing the dialogue into the future and to others who are not physically present.

Put on your seatbelts and enjoy.

Intro.1 Perception and Parts

Seeking to be an effective mediator is a both challenging and fascinating endeavor. Essentially, the mediator is asked to assist participants who have some measure of disagreement, or at least lack of agreement, to reach sufficient agreement so as to be willing to call the situation "resolved." *In this sense, the mediator seeks to move participants from "the circle of disagreement" to the "circle of agreement."*

Let us more closely examine the "circle of disagreement." From a systems perspective, one may view conflict as *at least one participant declaring that the status quo is no longer good enough*. It only takes one participant to declare a conflict. Once a participant declares that they are unwilling to perpetuate the status quo, other involved individuals are drawn in. Once one participant declares a need to change his or her role, all involved are called upon to examine their roles as well.

This "declaration of conflict" by at least one participant that leads to the mediation intervention is much a matter of "perspective" and "parts." Clearly, conflict is much a matter of perspective. We each do our own idiosyncratic perceiving and interpreting. As organic beings bent on survival (if not thrival), we are always making those choices that we perceive to be best for us and our system. In seeking to make these best possible choices, we tend to perceive our internal competing "voices" or "interests." It is not unusual for mediation participants to have as much internal conflict between their inner voices as external conflict with the other participant(s).

For example, in a divorce conflict, a participant might have the following internal "voices" to consider and integrate:

- A desire for revenge
- An interest in a future cooperative parenting relationship
- A desire to express anger and frustration
- A desire to honor the good parts of the marriage
- A part that is very scared

- A part that is eager to be independent
- A part that wants fairness
- A part that is excited about new relationship possibilities

An employee who believes that he or she is being inappropriately discriminated against might, in deciding whether or not to "declare a conflict," consider such parts, interests or voices as:

- Can I afford to lose my job?
- What would be exposed if this thing went public?
- Will this jeopardize my opportunity for promotion?
- Should I simply apply for another job?
- What would happen with my pension benefits?
- Do I really want to work with a lawyer?

The point is that those in conflict go through an internal dialogue analyzing their various interests, concerns and, in "declaring a conflict" essentially say "the status quo is not enough; the balance has shifted; enough parts are out of line that I prefer to suffer through the difficulties of creating conflict rather than perpetuate the status quo."

The author will consistently speak about participants having "parts" or "voices." For example, in helping a party to resolve internal confusion, inconsistency, or uncertainty, the mediator may become an ally of the participants' "integrating" part, that part of the participant that wants to participate to make best overall decisions. The mediator will thus help the participant to develop proposals that are satisfying of the participant's most important interests and voices, and, hopefully, proposals that are acceptable to the other participant(s) as well.

The mediator also learns to speak to the "part" of each participant that is attracted to making progress toward settlement. Participants, again being made up of parts, can be virtually certain to have both a resistant part as well as a part of them that is (given that mediation is a voluntary process) actively attracted to agreement. Rather than viewing participants as "homogenous beings," the mediator thus learns to view participants as being comprised of bundles of interests, concerns and voices. We help participants

when we help them to identify and satisfy their most important interests, concerns and voices.

Intro.2 Baby Steps to Agreement

So, given the "declaration of conflict," just how does the mediator assist parties to enter the "circle of agreement?" The short answer is "not all at once." In other words, there is no single question or other act that will suddenly leap-frog the participants into spontaneous and instantaneous agreement. Rather, the mediator learns that the progress toward agreement is made gradually and, if the mediator is skilled (and fortunate), steadily.

To the extent that this is true, that participants move toward agreement incrementally, in "baby steps," then it may be said that *the mediator is everinterested in skills, techniques and approaches that will assist the participants to take "baby steps" forward toward agreement. A helpful question for mediators to ask themselves is: "Specifically, what can I do now that will assist the participants to take their next substantial step toward agreement."*

This concept of focusing upon the process of incrementally assisting mediation participants to make progress toward agreement relates to the issue of just what is "success" in mediation? Rather than defining "success" in terms of achieving a particular result at a particular time, the mediator is advised to judge his or her own success in terms of the quality of their facilitative process in seeking to successively help the parties to take "baby steps" toward agreement. We, as mediators, must ask ourselves: *"What can I say or do next to best assist these participants to reach agreement?"*

Intro.3 Strategic Mediation

The answer, according to a suggested concept of "strategic mediation," is that *you as mediator do the exact thing that you believe will best assist these participants at this point in time, under all circumstances, to reach what they view to be their most constructive and fairest agreement.* If you are always doing this, doing that which you calculate to best assist the participants at every moment of time, you are well-focused to maximally assist participants. Notice how this can be a test for your facilitative work. If you ask yourself the question: "*Am I now doing the exact thing that I believe will best assist these participants to reach agreement?*" If the answer is "no," then you might ask yourself why are you doing the exact thing you are doing and what could you best do at this moment in time?

This strategic mediation approach and the mediator's constant selfquestioning as to whether what he or she is doing is the exact best possible thing he or she might be doing should lead to the most efficient and economic mediation possible. In this sense, such conceptual guidance has public policy implications. If we are able to identify those skills that best assist participants to make efficient, economic and incremental progress, the growth of mediation as a cost-effective choice in the public and private sectors becomes that much easier a choice to make.

Intro.4 **Less is More**

The "Columbo" Approach to Mediation

Just as it is suggested that the mediator always does the exact thing the mediator believes will best assist mediation participants to take their next substantial step forward towards agreement, it is suggested that the mediator do that thing *"only so forcefully as necessary to get the job done."* In this sense, "less is more" in mediation. The less that the mediator can do and still get the desired result, the more participants will own the progress as their own and not imposed upon them.

Thus, for example, in working with doubt and dissonance in mediation, the mediator is better off using a feather than a sledge, if the mediator can get the job done with a feather. Similarly, the mediator gently floating options for consideration, rather than specifically recommending solutions, is an example of this understated approach. Rather than saying "Why don't you . . .," the mediator can say: "Might one option, among others I am sure, be something along the lines of . . ." A wonderful approach for so gently raising possibilities is the use of "normative stories" (discussed in detail later in this manual). So, introducing possibilities with: "It's common for folks in your kind of situation to consider . . ." or "Among the options people in your position commonly consider are . . ." are elegant ways of introducing possibilities without creating resistance. When so talking about *other similarly situated people*, mediation participants eagerly await the information. They don't resist the information as you are not talking about them.

This type of approach has the advantage of "*always leaving an out.*" Mediation is not too different from learning to drive. You may remember the driver's education text or videotape saying: "*always leave an out.*" As a mediator, you always want to have a planned next move if a participant, or both participants, are resistant to a certain possibility. If the mediator gives personal recommendations, advice, or opinion, the risk is that there will be no elegant next move. In a multi-issue mediation, the mediator cannot afford to risk his or her facilitative capacity by offering personal recommendations, advice, or opinion. It is perfectly ethical to offer personal recommendations, advice, or opinion. The problem is that doing this does not leave you an out and a planned next move.

Intro.5 **Goals of Mediation**

Fairness and Reasonableness?

Empowerment and Recognition?

An important issue for every mediator is "*what is the goal of my mediation process?*" Most of us would answer with something like: "*helping the parties to reach agreement,*" and we would be "right. We are not always so good in

our actual performance. We sometimes, consciously or unconsciously, narrow the range of agreement that we are prepared to support for our mediating parties.

For example, there is a tendency among those who begin mediation practice to only want to mediate "fair," "reasonable" and "legal" agreements. Many mediators do not want to participate in a settlement beyond the "range of reason." The problem with adopting such standards for the agreements that we mediate is that we may create an implied warranty of fairness, reasonableness and legality for the agreements that leave our office and create substantial liability risk. If we say that we "*only mediate fair, reasonable and legal agreements*," then we may have our mediation clients coming back to us in the future saying: "*look at me now, you call this fair, reasonable and legal?*" The mediator should thus be wary of in any way guaranteeing the quality of the mediated agreement.

Another example might be a mental health professional mediator who plans to ensure that mediated parenting agreements are reasonably in the child's best interests. If the mediator would say that she would only let agreements that represented the child's best interests out of her office, then a number of parents may be calling as their child gets involved in crime, drugs, drops out of school or commits suicide,

Other mediators have adopted a concept of "*transformational mediation*." The concept is that, in addition to the goal of agreement, it is appropriate and desirable for mediators and mediating parties to have additional goals, such as *empowerment and mutual recognition*. Here we have the possibility of a mediator intervening with mediation participants not just for the purpose of helping them to reach agreement. Now it is suggested that there would be additional goals of empowerment and recognition, and these goals would, in part, guide our choice of intervention. Without these goals, all strategic interventions would be guided by whether that intervention is helpful for the parties to reach agreement. Now we might do certain interventions to empower or acknowledge, whether those interventions were necessary or desirable for the purpose of reach agreement.

If the mediator has such "agenda" for the mediation discussions beyond simply helping the parties to reach their own agreement by their own terms,

it is critical that the mediator inform the participants at the beginning of the mediation of the mediator's additional goals (such as empowerment and recognition) and the parties, in deciding to proceed with the mediation, must make an informed decision that those are specific services (in addition to the pursuit of agreement) that are desired.

From another perspective, that of "strategic mediation," it may be that these concepts of mutual recognition and empowerment are "much ado about nothing." Mediators commonly choose to utilize techniques that empower and, perhaps, also create some measure of mutual recognition, not necessarily because empowerment and recognition are the goals of mediation but, rather, because it is the mediator's perception that empowerment and/or recognition is the specific intervention at that point in time that will best assist these participants to make progress toward agreement. In other words, it is suggested that the mediator will commonly utilize empowerment and recognition techniques and strategies not necessarily because the mediator has empowerment and recognition as goals for the mediation but, rather because the mediator believes that such accomplishments will assist the participants to reach what they perceive to be their best agreement.

INTRODUCTION TO ASKING QUESTIONS BY JIM MELAMED WRITTEN MATERIALS

Reference this section below to accompany Jim Melamed's talk on questions.

Questioning in Mediation

Empowering Participants with Process Questions

- Voluntary - "Do you understand that you can leave at any time for any reason or no reason?"
- • Impartial - "Do you agree to speak up if you feel I am favoring one of you over the other?"
- • Neutral - "Do you agree to speak up if you feel that I am favoring any particular resolution?"
- • Informed - "Do you agree to speak up if you want more information on a topic before agreeing?"

Discussion Framing with Questions

"The Ideal Mediator"

Questioning is used differently within strategic approaches.

Examples:

- Interest-Based Problem Solving (Eliciting Questions)
- Hypothesis Generation & Testing (Wondering Questions)
- Doubt & Dissonance (Comparative Questions)

Mediator Strategy

Three Main Mediator Strategies

- Interest-Based Option Development (Elicit)
- Hypothesis Generation and Testing (Wonder)
- Doubt and Dissonance (Compare)

Eliciting Problem-Solving Questions

Key Question Frames

- Outcome & Evidence Questions
- Cumulating Outcomes
- The Conditional Close
- The Reference Point Process
- Associative & Dis-associative Frames

Problem-Solving Framing

How can we best . . . ? or

What is the best way for us to . . . ?

Anticipatory Time Framing

By giving participants early and effective time cues, they can participate most capably in mediation.

Samples:

- Might I hear from each of you for 3-5 minutes as to what is most important . . .
- Briefly, what would you say are
- In summary, what are your thoughts regarding . . .

“Getting Current” Separating Past Difficulty From Future Problem-Solving

“Is there anything that you want to say to the other about the difficulties of the past before we move on to figure out your best solutions for the future?”

One rule: no repetition

Revisit “Getting Current” discussion frame as needed “Easy Points of Agreement” Great Process to Follow “Getting Current” Homework Assignment in advance of a first meeting: “What are all of the things that you might possibly easily agree upon?”

De-Positioning with the “Imagine Question”

Converting Positions to Interests & Positive Intentions

“De-Position” with the word “Imagine”

“Imagine that you got your position, what are ALL of the things that would be satisfied?” Hypothesis Testing Questions

Samples

- I wonder . . . what do you think about . . . ?
- I’m curious . . . , how about . . . ?
- Am I possibly hearing that . . . ?
- Might it possibly be that . . . ?
- Might you be willing to consider . . . ?
- Perhaps something along the lines of . . . ?
- If ___ was willing to consider ___, would you be willing to consider ___?
- If ___ does ___, then would you be willing to do ___?
- What are each of you willing to “give to get?”
- What “package deals” do you think you both might support? Doubt & Dissonance “Heat” – Comparative Questioning
- Why create doubt and dissonance (“D & D”)?
- Warning: D & D must be based on a rapport relationship!
- D & D assumes people will always make the best choice they perceive available.
- D & D may ask participants to re-examine what is best between an imperfect, but available, agreement and “World War III”

Remember the Face-Saving “Reference Point Process”

“If the other was willing to do the Reference Point, would you?”

“If not, what fine-tuning would make that package acceptable?”

Questioning in Mediation: The End!

Section 1

Conflict Resolution Theory

This Chapter reviews conflict resolution theory that has a direct application for the mediator in assisting participants to reach agreement.

Please review Sections 1 – 4 as background information, especially for newer mediators, Before watching The Mediation Process videos.

1.1 Nature of Conflict

Conflict: Varied Perspectives; Belief Systems and Values; Interests

There is, perhaps, nothing more common than conflict. As a mediator, conflict may constructively be viewed as resulting from:

- **varied perspectives** on the situation; ○ **differing belief systems and values** resulting from participant's accumulated life experience and conditioning; and
- **differing objectives and interests.**

Effectively dealing with conflict requires the expression and management of participants' varying perspectives, interests, belief systems and values. It is important to meet the participants exactly where they are. Hear from them fully before trying to lead them anywhere. You cannot effectively move toward resolution until each participant experiences themselves to be heard on "their perspective," "what they want," and "why."

Common Ground - Overlapping Interests and Interdependence

Along with their sometimes too well-known differences, people in conflict share much *common ground*, including:

- **overlapping interests** -- participants share in their own relationship, typically have common friends and colleagues, and also have interest in resolving the conflict in an expeditious and economic way;
- **interdependence** -- no single participant has the ability to unilaterally impose a resolution on another without paying a very substantial price for doing so; and
- **points of agreement** -- even when there are many disputed issues, there may still be a number of points of agreement or possible agreement. The wise mediator assists the parties to identify what they may be easily able to agree on as a foundation for additional discussions.

The Evolutionary Nature of Conflict

Through the integration of participants' perspectives, interests, belief systems and values, conflict and conflict resolution play important roles in individual and social evolution and development. Conflict arises when one or more participants view the current system as not working. At least one party is *sufficiently dissatisfied with the status quo* that they are willing to *own the conflict* and speak up with the hope of being able to influence the situation

to arrive at an improved condition. *Conflict may be viewed as a process we put ourselves through to achieve a new condition and selfdefinition.*

Through conflict we have opportunities to be creatively selfdefining. If nothing else, *conflict allows us to do things differently in the future.*

Through the resolution of conflict, we can, if we choose, evolve and redefine ourselves, our relationships, our community, our society and our world. It is no accident that we most often find ourselves in conflict with those with whom we spend the most time -- family, friends, business associates, and fellow organizational members. There is a great benefit, in terms of the quality of our lives, in being able to constructively resolve conflict with those around us.

Interpersonal and Intrapersonal Conflict

Conflict should also be recognized as existing at *two levels*:

- **the interpersonal level;** and ○
- the intrapersonal level.**

In addition to the typically obvious interpersonal dispute, there almost always exists some measure of intra-personal conflict within each disputing party as that party seeks to assert varied, sometimes contradictory, interests. This inner conflict may be evidenced by *confusion, inconsistency or lack of congruity*. In this condition, the participant has failed to effectively integrate their various "parts" or "voices" to achieve an effective and comfortable representation of personal interests.

Facilitating a Convergence of Means

Conflict Resolution represents *a convergence of means* (or arrangements for the future), not necessarily participants' interests or perspectives.

Participants will commonly come to support the same arrangement or agreement for very different reasons. Conflict resolution does not necessarily resolve tensions between parties. Conflict resolution may simply sufficiently align matters to allow each participant to make enough progress toward his or her desired ends to prefer declaring there to be a *"a state of agreement"* rather than the uncertain and stressful *"state of disagreement."*

1.2 Adjudicatory Model

Is this competitive, adjudicatory approach really the way we resolve conflict in modern American society? The answer is *"yes"* and *"no."* While popular perception holds that we resolve conflict by *"doing battle,"* (stated in terms like: *"see you in court"* or *"you will hear from my attorney"*), the reality is that nearly 97% of all cases filed in courts nationwide are never actually tried and determined by a judge. Rather, the cases are negotiated to settlement or withdrawn. Of the cases that settle, the unfortunate fact is that nearly half of these cases settle within days of trial, *on the courthouse steps, under the duress of the impending trial or hearing.*

The reality then is that we do not so much have an adjudicatory system as a settlement system within a set of adjudicatory assumptions. In most of these settlements, the actual issues of law and fact, despite all of the legal negotiating, are never resolved. The parties simply come to agreement to resolve the conflict. The case simply settles, without parties agreeing on the law or the facts. With all of its costs, delays and polarization, many are now seeking a more efficient, effective and economic means of conflict resolution.

The Adjudicatory Process as Default Process Bargaining in the Shadow of the Law -- and Other Shadows

The adjudicatory option is a necessary default process to be imposed on disputants in the event that they do not choose to resolve their dispute in some other way. As this default process is applied to only about 3% of contested cases that are filed with the courts, it seems to make sense for us to develop more direct and productive approaches to settlement for the 97%

that are prepared to settle. This is the concept behind the development of collaborative negotiation and mediation.

The adjudicatory option is a necessary backdrop to negotiated and mediated resolution. As mediation is a voluntary process in which no resolution will be imposed on any party, there needs to be a *forum of last resort* as a backdrop to the mediation process. The legal standards that parties believe will be applied in that adjudicatory context are highly relevant to, although not determinative of, decision-making in negotiation and mediation. Disputants negotiate and mediate *in the shadow of the law* or, more accurately, *within the context of their (sometimes wishful) perceptions of the law*.

Participants' perception of "*the law*" is certainly one important factor in disputants' minds as they seek to negotiate or mediate settlement. There are, however, many other practical factors, ***other shadows***, (aspects of the perceived contextual circumstances) that influence decision-making in mediation and negotiation including:

- **concerns about the impact of the dispute on the relationship; • time concerns; • expense; • the risk of not prevailing in a contested hearing; • impacts on affected others; • forgone opportunities; • stress; • lack of finality; and**
- **uncertain compliance.**

1.3 Types of Conflict

By evaluating a conflict according to the five categories below - *relationship, data, interest, structural and value* -- we can begin to determine the causes of a conflict and design resolution strategies that will have a higher probability of success.

Relationship Conflicts

Relationship conflicts occur because of the presence of strong negative emotions, misperceptions or stereotypes, poor communication or miscommunication, or repetitive negative behaviors. Relationship problems often fuel disputes and lead to an unnecessary escalating spiral of destructive conflict. Supporting the safe and balanced expression of perspectives and emotions for acknowledgment (not agreement) is one effective approach to managing relational conflict.

Data Conflicts

Data conflicts occur when people lack information necessary to make wise decisions, are misinformed, disagree on which data is relevant, interpret information differently, or have competing assessment procedures. Some data conflicts may be unnecessary since they are caused by poor communication between the people in conflict. Other data conflicts may be genuine incompatibilities associated with data collection, interpretation or communication. Most data conflicts will have "data solutions."

Interest Conflicts

Interest conflicts are caused by competition over perceived incompatible needs. Conflicts of interest result when one or more of the parties believe that in order to satisfy his or her needs, the needs and interests of an opponent must be sacrificed. Interest-based conflict will commonly be expressed in positional terms. A variety of interests and intentions underlie and motivate positions in negotiation and must be addressed for maximized resolution. Interest-based conflicts may occur over *substantive issues* (such as money, physical resources, time, etc.); *procedural issues* (the way the dispute is to be resolved); and *psychological issues* (perceptions of trust, fairness, desire for participation, respect, etc.). For an interest-based dispute

to be resolved, parties must be assisted to define and express their individual interests so that all of these interests may be jointly addressed. Interest-based conflict is best resolved through the maximizing integration of the parties' respective interests, positive intentions and desired experiential outcomes.

Structural Conflicts

Structural conflicts are caused by forces external to the people in dispute. Limited physical resources or authority, geographic constraints (distance or proximity), time (too little or too much), organizational changes, and so forth can make structural conflict seem like a crisis. It can be helpful to assist parties in conflict to appreciate the external forces and constraints bearing upon them. Structural conflicts will often have structural solutions. Parties' appreciation that a conflict has an external source can have the effect of them coming to jointly address the imposed difficulties.

Value Conflicts

Value conflicts are caused by perceived or actual incompatible belief systems. Values are beliefs that people use to give meaning to their lives. Values explain what is *"good"* or *"bad," "right"* or *"wrong," "just"* or *"unjust."* Differing values need not cause conflict. People can live together in harmony with different value systems. Value disputes arise only when people attempt to force one set of values on others or lay claim to exclusive value systems that do not allow for divergent beliefs. It is of no use to try to change value and belief systems during relatively short and strategic mediation interventions. It can, however, be helpful to support each participant's expression of their values and beliefs for acknowledgment by the other party.

1.4 Ways of Dealing with Conflict

There are five common ways of dealing with conflict. Learning about the alternative means of handling conflict gives us a wider choice of actions to employ in any given situation and makes us better able to tailor our

responses to the situation. Although listed below in an order of increasing elegance, the reality is that each of us utilizes each of these ways of dealing with conflict at least some of the time. We approach conflict in the way that we believe will be most helpful to us in our life. Our style for dealing with conflict will change with the circumstances.

Denial or Withdrawal

With this approach, a person attempts to get rid of conflict by denying that it exists. He or she simply refuses to acknowledge it. Usually, however, the conflict does not go away. It grows to the point that it becomes unmanageable. When the issue and the timing are not critical, denial may be a productive way to deal with conflict.

Suppression or Smoothing Over

"We run a happy ship here." "Nice people don't fight." A person using suppression plays down differences and does not recognize the positive aspects of handling the conflict openly. The source of the conflict rarely goes away. Suppression may, however, be employed when it is more important to preserve a relationship than to deal with a relatively insignificant issue.

Power or Dominance

Power is often used to settle differences. Power may be vested in one's authority or position. Power may take the form of a majority (as in voting) or a persuasive minority. Power strategies result in winners and losers. The losers do not support a final decision in the same way the winners do. Future meetings of a group may be marred by the conscious or unconscious renewal of the struggle previously *"settled"* by the use of power. In some instances, especially where other forms of handling conflict are not effective, power strategies may be necessary.

Compromise or Negotiation

Although regarded as a virtue, compromise (*"you give a little, I'll give a little, and we'll meet each other half-way"*) has some serious drawbacks. Such bargaining often causes both sides to assume initial inflated positions, since they are aware that they are going to have to *"give a little"* and want

to buffer the loss. The compromise solution may be watered down or weakened to the point where it will not be effective. There may be little real commitment by any of the parties. Still, there are times when compromise makes sense, such as when resources are limited or a speedy decision needs to be made.

Integration or Collaboration

This approach suggests that all parties to the conflict recognize the interests and abilities of the others. Each individual's interests, positive intentions and desired outcomes are thoroughly explored in an effort to solve the problems in a maximizing way. Participants are expected to modify and develop their original views as work progresses.

Participants come to appreciate that the apparent presenting problem does not need to limit their discussions. Participants are encouraged to express the full breadth and depth of their interests, with each participant seeking to identify "value" that they can bring to the discussion and the maximized satisfaction of underlying interests and intentions.

Section 2

Dispute Resolution Alternatives

The Mediator should not only learn everything possible about mediation, but also about the other dispute resolution alternatives available to participants.

In the event that the parties do not fully settle their matters, it is appropriate that the mediator act as a bit of a process advisor assisting the parties, in an impartial way, to consider their remaining alternatives.

One of the advantages of mediation is that it does not preclude any other dispute resolution alternative.

It is also true that issues may be resolved by "non-mediation" processes "within" a mediation or juxtaposed to a mediation. For example, parties may agree to resolve a business valuation issue by an impartial arbitration but retain their ability to decide and mediate the balance of issues.

The mediator is wise to capably understand alternative processes as these alternatives may assist the mediator and the participants to resolve the hardest issues upon which they are not directly able to agree.

2.1 Spectrum of Processes

There is a spectrum of dispute resolution processes, ranging from informal discussion to formal adjudication. The concept behind the development of alternative dispute resolution, or "ADR" is that the traditional adjudicatory model of dispute resolution is not always the best approach. Rather, the concept has developed that "the forum should fit the fuss," and not vice versa.

With time, ADR has come to have a new meaning, "appropriate dispute resolution." In light of the rapid growth of collaborative negotiation, mediation and other settlement processes, there is, in fact, nothing alternative at all about ADR today.

We are finding collaborative negotiation and mediation processes adopted with increasing frequency in legal, governmental, business and family matters.

There are no limits to the types of dispute resolution processes that can be utilized. When it comes to settlement processing, "anything goes," both in terms of the process of reaching resolution and content of any resolution. The only key is that the parties (and assisting professionals) understand and agree to the same process. This concept of "informed consent to the process" permeates the ADR movement. Also common to the ADR processes is the concept of creating a settlement event, some shared experience that increases the likelihood of resolution. All ADR processes have the following effects:

- they motivate the parties and any representatives to fasten their attention the case and prepare for resolution;
- the parties have "their day in court," a "hearing" in which they have the opportunity to present their perspectives on the situation and their sense of a "fair" resolution;
- often for the first time, the parties have the opportunity to experience a capable presentation of the other side's case; and
- the parties have a window of opportunity to identify common interests and points of agreement, and the opportunity to fashion mutually acceptable settlement options to disputed issues.

2.2 The ADR Processes

The ADR processes differ in their formality and placement of decisionmaking power. If the process is mediation, the decision-making power will reside at all times with the parties. In adjudication and arbitration, the decision-making power lies with the third-party neutral.

Adjudicatory Processes

Adjudication - the competitive presentation of evidence to a judge that results in an order, judgment or decree (win/lose decision). The

decisionmaker is selected by the community and rules according to community legal standards. There are formal rules of procedure and evidence. The judge's decision is appealable.

Arbitration - the competitive presentation of evidence to a decision-maker selected by the parties for an award (win/lose decision). The arbitrator is typically selected based upon the arbitrator's substantive expertise. The arbitration is held according to procedural and evidentiary rules the parties agree upon. Arbitration decisions typically cannot be appealed, except in situations of undue influence, bias, duress, etc.

Court Annexed Arbitration - Court-annexed arbitration is not true arbitration as parties have right to trial de novo (a trial as if no arbitration took place). Court-annexed arbitration is really a negotiation process, intended to promote settlement for designated classes of cases, such as property claims under \$25,000. There are often financial sanctions for proceeding to trial, if a party does not improve their position relative to the non-binding arbitration award.

Private Tribunals (Rent a Judge) - By statute in most states, parties can appoint any person as their judge, with full judicial powers. The private tribunal's decision is entitled to entry as a judgment and may be appealed.

Consensual Processes

Ombudsperson - An official appointed by and paid for by an institution, who investigates problems, seeks to prevent conflict and assists to resolve disputes. The ombudsperson is not a true mediator due to the institutional affiliation which, to some extent, compromises his or her impartiality and neutrality.

Fact-finding - An agreed-upon neutral finds facts as an assist to some other processes - negotiation, mediation or adjudication. Fact-finding is often used in the labor-management context. The fact-finder may make findings public, with the parties' consent, to increase pressure for settlement. Alternatively, the fact-finder's recommendations may, by the parties' agreement, be confidential and non-admissible in any subsequent contested hearing.

Negotiation - Communications for an agreement directly between the parties or through their representatives, intended to reach agreement for the future (transactional negotiation) or to resolve a past dispute (dispute negotiation). In negotiation, the desired objective is an agreement, which is typically, but not always, enforceable under law.

Mediation - Facilitated communications for agreement, resolving a past dispute and/or creating agreement for the future, with the assistance of an impartial facilitator. Decision-making power always resides with the participants in mediation. The desired result in mediation is agreement, sometimes, but not always, enforceable under law. Distinguish between voluntary mediation, mandatory mediation and muscle mediation (or medrec). Also distinguish between early neutral evaluation and interest-based mediation.

Conciliation - Conciliation typically consists of independent communications with parties in their separate contexts (their home or work environment), either to improve relations or pave the way for some other process, e.g., mediation.

Mixed Processes

Med-Rec - Mediation-Recommendation begins as mediation, but, if the parties do not come to agreement, the mediator makes a recommendation to the court or other decision-maker as to a recommended resolution.

Med-Arb - Mediation-Arbitration begins a mediation. If the parties fail to come to agreement, the process transforms into an arbitration with the former mediator assuming the role of decision-maker. The process may be modified so that parties may elect out of the process at the close of the mediation component, or the parties may select another arbitrator for their dispute.

Mini-Trial - While there are many types of abbreviated mock or mini trials, they usually include the abbreviated presentation of evidence to one or more expert neutral facilitator(s) and the presence of executives or others with decision-making authority. Following the summarized presentation of evidence and a questioning period, the decision-makers and facilitator will meet for confidential settlement discussions.

Summary Jury Trial - The Summary Jury Trial is another type of mock trial (really a settlement event) using one or more advisory juries. Summary jury trials usually include the abbreviated presentation of complex litigation to advisory juries who then render one or more advisory verdicts for executives with decision-making authority to consider in their settlement discussions, again typically facilitated by an expert advisor or facilitator.

2.3 Dispute Resolution Mythology

Mythology is the means by which individuals and society understand and organize their world and perpetuate their belief system about that world. As Joseph Campbell pointed out in The Power of Myth, mythology is as much a part of our modern-day world as it was for the Greeks centuries ago. Myths are not lies per se, although the term has perhaps been misapplied in popular usage to such an extent so as to be taken as synonymous with untruth. Myths germinate from a seed of truth nurtured by human hopes, desires and the need to believe a certain world view. The individual's operative mythology is a fundamental component of his/her construction of reality - view of the world and how it operates - along with the effect of gender, race, age and developmental stage, and cultural, religious and ethnic heritage.

The pervasiveness, depth and importance of mythology is evident in our culture. Myth is transmitted to us from our earliest years and throughout our lives from many sources. It is inescapable. The operative mythology a party brings to a dispute may, in some sense, need to be pierced, altered or expanded in the mediation process if the conflict is to be resolved. In other words, while myths allow parties to harmonize their lives with reality, they are not reality itself. The mediator will need to work in the space between how the parties believe conflicts ought to be resolved in "fairness" (what is right) and how they will be resolved in fact (what will actually work). The mediator must create a certain measure of dissonance in the parties thinking to gain their commitment to mediation and a practical resolution.

While there are numerous operative myths, four can easily be addressed with regard to the mediation of disputes.

The Myth of Justice

In the myth of justice, each party to a legally framed dispute believes that a thoughtful and compassionate judge will deliberate and make the right and fair decision. In the myth, the judge has touched the sword of Excalibur (King Arthur and the Knights of the Roundtable), assumed the mantle of fairness, the black robe, and ascended to the bench to do justice. Because few clients (or lawyers) believe they are not fair and right in the position they advocate, the expectation is that the judge will vindicate their belief. In law, the myth perpetuates the belief that there is "a remedy for every wrong." The legal system is a "big fix-it" machine. The direct impact of this mythology in legal practice, on both parties and professionals, cannot be underestimated. In virtually every interaction between judges, lawyers and clients, "fairness" and "rightness" is an implicit or explicit subject of discussion, premised on everyone's views and expectations of the justice system. Whether the mythology has been transmitted in a grade school civics lesson or by Perry Mason or LA Law on television, the depth of the belief is unmistakable. If the myth of justice remains intact, the parties will have little motivation to mediate.

The Myth of Finality

The corresponding myth of finality is a belief that a court rendered decision is equivalent to a final settlement that will be accepted, or at least followed, and if not followed, at least enforceable. However, disputes, while they may be "justiciated" (decided) by courts, are seldom resolved; court orders are frequently not the end, but only the beginning of further legal wrangling. Appeals and post-divorce motions can continue years into the future, and effective enforcement of court orders is difficult at best. Yogi Berra's adage, "it ain't over 'til it's over," does not apply in complex disputes, especially family conflicts. The more accurate statement is: "it ain't never over," at least not because the parties have a final agreement or have gone to court.

The Myth of Rationality

This myth posits that decisions made by judges, arbitrators or other experts are purely logical and dispassionate. Law, medicine and other disciplines are viewed from a reductionist perspective as being essentially "cookbook," formula exercises. Facts, once established can be subjected to legal analysis

(diagnosis/prognosis); a strategy decided upon (treatment); and an outcome accurately predicted and obtained (cure). Few determinations are actually derived in this linear manner. Human variables (bias, politics) virtually always color, if not fundamentally alter, final results.

The Myth of Objectivity/Neutrality

This myth is a corollary to the myth of rationality. It is derived from the notion that decision-making is purely an objective enterprise. The professional/expert is thus placed on a pedestal by the parties and he or she believes himself to be "above the fray." In point of fact, no one is neutral; all are participants and part of the system. For this reason, the mediator should not present his or her self as a neutral, the mediator is by definition an active participant in the conflict system. Instead, the mediator should be "balanced," a term that connotes a dynamic, involved role that engages both parties. Instead of being a "neutral" who protects neither party, in being balanced, the mediator seeks to protect both parties.

Section 3

Negotiation

There are **two principle negotiation theories** and strategic approaches to negotiation:

- competitive or positional negotiation; and
- integrative or problem-solving or interest-based negotiation.

3.1 Competitive & Integrative

Distinguish Strategic Approach from Personality

While there may be some correlation between negotiation approaches and personality style, the two do not necessarily go together. For example, a competitive negotiator may be very "pleasant" to work with in terms of demeanor, but utilize extremely competitive tactics. In fact, a negotiator's pleasantries may themselves be part of an overall manipulative approach! A problem-solving negotiator may, on the other hand, be rather ornery in terms of their personality, yet effectively utilize interest-based, problemsolving strategies in negotiation.

The Best Negotiators Will Have Both Sets of Skills

It is also important to appreciate that the most effective negotiators will have a wide array of negotiation skills, both competitive and problemsolving, and will effectively mix and match these approaches depending upon what the negotiator believes will work best with a particular "negotiating partner" depending on the specific issue being negotiated and depending on the nature of the overall negotiating relationship (one-time transaction or continuing relations).

Strategies to Create Value and Claim Value

Another view of negotiation is that certain strategies and behaviors are intended to "create value" (integrative approaches) whereas other strategies and behaviors are intended to "claim value" (be that by competition or principle). The mediator will want to first assist participants to create maximum value for exchange, then help the participants to figure out how to best divide that maximized value.

Dispute Negotiation and Transactional Negotiation

Also notice that negotiations may be divided into two types:

- dispute negotiation, focused on resolving past facts; and
- transaction negotiation, focused on reaching agreement for the future.

While it is often helpful to appreciate this difference between dispute negotiation and transaction negotiation, it is also beneficial to appreciate that many negotiation situations involve the resolution of both past issues as well as planning future relations.

The Competitive Approach

Competitive negotiation strategy is, essentially, a manipulative approach designed to intimidate the other party to lose confidence in their own case and to accept the competitor's demands. This approach is characterized by the following:

- High opening demands;
- Threats, Tension and Pressure;
- Stretching the facts;
- Sticking to positions;
- Being tight lipped;
- Want to outdo, outmaneuver the other side; and
- Want clear victory.

When a competitive negotiator is asked how they will know that they have reached a good agreement, they may reply that the agreement is "better than fair."

Assumptions of the Competitive Approach

There are certain assumptions, a world view really, that lie behind the competitive approach to negotiation. This "distributive" world view includes the following assumptions:

- Negotiation is the division of limited resources;
- One side's gain is the other's side's loss; and
- A deal today will not materially affect choices available tomorrow.

Risks of the Competitive Approach

While competitive negotiation tactics are often effective in "claiming" already defined value, there are also certain risks to competitive negotiation. Foremost among these risks are damage to the negotiating relationship and

a lessened overall likelihood of reaching agreement. Here is a list of the disadvantages of the competitive style:

- Confrontation leads to rigidity;
- There is limited analysis of merits of dispute and relevant criteria for resolving issues; There is limited development of solution alternatives;
- It is hard to predict the outcome of the competitive approach or control the process;
- Competitors are generally blind to joint gains;
- Competitors threaten their future relations; and
- Competitors are more likely to have impasse and increased costs.

The Integrative Approach

The integrative, collaborative or problem-solving approach to negotiation has been described as "enlightened self-interest," rather than the "egocentric variety." This approach consists of joint problem-solving, where gains are not necessarily viewed as at the expense of the other party.

Assumptions of the Integrative Approach

As one might expect, there is a different world view behind the integrative approach to negotiation. The primary assumptions of the integrative approach are the following:

- Some common interests exist between parties;
- Negotiation is benefitted by a full discussion of each participant's perspective and interests; and
- We live in an integrated and complex world and our problems can be best resolved through application of our best intelligence and creativity.

Risks of the Integrative Approach

Risks of the integrative approach are based upon the common-sense observation that "it takes two to collaborate." If one party is unwilling to participate in integrative, problem solving negotiation, the more collaborative negotiator may put themselves at risk in the following ways:

- The negotiator will be forced to either "give in" or adopt a competitive stance;
- The negotiator may see themselves as a failure if they do not reach agreement; and
- The negotiator lays themselves open by honestly disclosing information that is not reciprocated.

3.2 Principled Negotiation

In their book, *Getting to Yes*, Fisher and Ury set forth their concept of "Principled Negotiation." Here is a brief summary of the main points of principled negotiation:

Separate the People from the Problem

Fisher and Ury suggest that we are all people first -- that there are always substantive and relational issues in negotiation and mediation. The authors describe means of dealing with relational issues, including considering each party's perception (for example by reversing roles); seeking to make negotiation proposals consistent with the other party's interests; making emotions explicit and legitimate; and through active listening.

Focus on Interests, Not Positions

Positions may be thought of as one-dimensional points in a space of infinite possible solutions. Positions are symbolic representations of a participant's underlying interests. To find out interests, you may ask questions like: "What is motivating you here?" "What are you trying to satisfy" or "What would you like to accomplish?" You may also ask: "If you had what you are asking for (your position), what would that experientially get you - what interests would that satisfy?"

In negotiation, there are multiple, shared, compatible, and conflicting interests. Identifying shared and compatible interests as "common ground" or "points of agreement" is helpful in establishing a foundation for additional negotiation discussions. Principles can often be extrapolated from "points of agreement" to resolve other issues. Also note that focusing on interests tends to direct the discussion to the present and future, and away from the difficulties of the past. If we have learned anything about the past, it is that "we cannot change it." The past may help us to identify problems needing solution, but, other than that, it does not tend to yield the best solutions for the future.

Invent Options for Mutual Gain

Before seeking to reach agreement on solutions for the future, Fisher and Ury suggest that multiple solution options be developed prior to evaluation of those options. The typical way of doing this is called brainstorming. In brainstorming, the parties, with or without the mediator's participation, generate many possible solutions before deciding which of those best fulfill the parties' joint interests. In developing options, parties look for mutual gains.

Select from Among Options by Using Objective Criteria

Using objective criteria (standards independent of the will of any party) is where the label "principled negotiation" comes from. Fisher and Ury suggest that solution selection be done according to concepts, standards or principles that the parties believe in and are not under the control of any single party. Fisher and Ury recommend that selections be based upon such objective criteria as precedent, tradition, a course of dealing, outside recommendations, or the flip of a coin.

What if They are More Powerful? - Developing a BATNA

In the event that the other party has some negotiating advantage, Fisher and Ury suggest that the answer is to improve the quality of your "best

alternative to a negotiated agreement" (your BATNA). For example, if you are negotiating for a job and want to make a case for a higher wage, you improve your negotiating power by having another job offer available, or at least as a possibility.

What if They Won't Play or Use Dirty Tricks?

Fisher and Ury's answer to the resistant competitive negotiator is to "insist" on principled negotiation in a way that is most acceptable to the competitor. The principled negotiator might ask about the competitor's concerns, show he or she understands these concerns, and, in return, ask the competitor to recognize all concerns. Following the exploration of all interests, Fisher and Ury suggest inducing the competitive negotiator to brainstorm options and to think in terms of objective criteria for decision-making.

Another way of thinking about encouraging principled or integrative bargaining is to think in terms of matching, pacing, leading and modeling. To get a negotiator to shift orientations, it is critical that they first experience themselves as fully heard in terms of content, intensity and emotion. By so matching and pacing with a negotiator (asking a few clarifying questions), the negotiator will become more open to your lead and modeling of productive means of negotiating.

Converting Positions to Interests to Positive Intentions

Negotiating parties tend to come to negotiation with well-rehearsed positional statements about the truth of the situation. As wise negotiators, we know that we want to assist all parties to get below their positions to achieve a full understanding of their respective interests. If you view negotiating parties as, essentially, survivors, wanting to improve their situations, you may be able to assist negotiating parties to recognize that even the most difficult interests, like revenge and anger, can be understood in terms of positive intentions, such as a desire for acknowledgment and respect. So reframed, the mediation effort can become a joint search for mutually acceptable solutions to the parties identified positive intentions. This reframing of the entire mediation effort can dramatically shift the entire atmosphere of your negotiation.

3.3 Negotiation Power

Negotiation power can be defined as "the ability of the negotiator to influence the behavior of another. Commentators have observed a variety of aspects and qualities of negotiation power. It is important for the mediator to take note of these various aspects and qualities of negotiating power as a means of assisting each negotiating party to be at his or her best in representing his or her interests in mediation. Here are a number of aspects and qualities of negotiating power that have been identified:

- Negotiating power is relative between the parties;
- Negotiating power changes over time;
- Negotiating power is always limited;
- Negotiating power can be either real or apparent;
- The exercise of negotiation power has both benefits and costs;
- Negotiating power relates to the ability to punish or benefit;
- Negotiating power is enhanced by legal support, personal knowledge, skill, resources and hard work;
- Negotiating power is increased by the ability to endure uncertainty and by commitment;
- Negotiating power is enhanced by a good negotiating relationship;
- Negotiating power depends on the perceived BATNA; and
- Negotiating power exists to the extent that it is accepted

3.4 Balance Negotiation Power?

Some theorists suggest that the mediator has an obligation to "balance negotiating power," to, essentially, "level the playing field." The author suggests that this is not the best approach. Rather, the mediator's obligation with regard to negotiation power is to ensure that each party in mediation has sufficient capacity to effectively represent their interests in mediation. In other words, each party must have a certain threshold of negotiation effectiveness to be able to effectively and appropriately take part in mediation.

This determination of capacity to mediate should be made with respect to each party's ability to represent their interests, which is only in part a relative determination between the parties. This determination need not be made at the moment the parties walk in the mediation room door, when one or both parties may well be substantially disempowered. Rather, this determination of capacity to mediate should appropriately be made after the mediator has had an opportunity to educate and empower each mediating party and at the point that substantive negotiations begin. This obligation to ensure each party's capacity to mediate then continues on during negotiations until a comprehensive agreement is reached.

The problem with theories that suggest the mediator should "balance bargaining power" are questions such as: "whom is to be balanced against whom?"; "at what level?"; "at what specific point in time?"; and "how good does the balance need to be?" Should we take the more empowered negotiator and seek to "break them down" to the less empowered negotiator's level? Or should we try to capacitate the less powerful negotiator to rise to the more empowered negotiator's level? Or perhaps we should both break down one and empower the other to some "mid-point." All of this pretends as if negotiating power is a single quality or dimension, when we know that it is multi-faceted, changes over time and changes depending on the specific issue being discussed.

Further, in addition to these challenging practicalities of attempting to "balance bargaining power," there are valid concerns about the impact of such an approach on a mediator's ethical obligation to be impartial (not favoring any party over any other party) and neutral (not favoring any particular result). How can the mediator seek to "balance bargaining power" and also remain "impartial" and "neutral?"

The answer is that the mediator should do everything in his or her power to capacitate each mediating party and, having done so, must ask himself or herself the question of whether each mediating party individually (with any desired legal or other support) has sufficient capacity to effectively represent his or her interests in the specific mediation. If the answer to this question is "yes," then the mediation may proceed. If the answer is "no," then the mediation should not proceed. "Balancing bargaining power" has no place in

mediation. Determining whether each participant can effectively represent his or her interests is, however, at the heart of the mediation process.

3.5 Overall Facilitative Structure

As an overall chronologic model for mediation facilitation that is suggested by considering "what works" in conflict resolution and negotiation theory, please consider the following:

Informed Consent as to Process

(the process is always negotiable and must be agreed to)

Sharing Perspectives

(separating relational issues from substantive issues; discuss both, just separately)

Remember the Common Ground

(common interests, interdependence and initial points of agreement)

Establish a Problem-Solving Agenda (questions seeking solutions)

Identify Desired Information and Documentation

Clarify Desired Outcomes, Interests and Positive Intentions

Develop Options

(based upon outcomes, interests and positive intentions; separate from evaluation process)

Select from Options

(Evaluate based upon participant desires, criteria, standards, principle, rationale or rationalization -- and considering personal, procedural and substantive BATNAs)

Integration and Finalization

(Any possible improvement; drafting, review, revision, implementation)

Section 4

Being a Mediator

This Chapter considers issues associated with the mediator's role. Just how does the mediator think about their role? What is the best disposition for the mediator to maintain?

4.1 Science and Art

There is no cookbook recipe for success as a mediator. Each mediation case is different and each mediation participant is unique. As a mediator, you will truly practice mediation, in the way that a devoted pianist practices the piano or an aikidoist practices aikido. Your office will become a place of experimentation and learning -- a dojo. There is always more to learn in assisting others to reach agreement. Every mediation case is an opportunity to learn and serve.

Mediation is both science and art. The science of mediation is well represented in this manual. There is great merit in seeking to comprehensively set down helpful structures and concepts of mediation. To become the best possible mediator, you need to have supportive cognitive structures to work within. Fully understanding the rational side of mediation will not, however, make you an effective mediator. Effective mediation involves skillfully working with real people, not just knowing theoretically how to do that. With time, the structures of mediation practice become ingrained, freeing the mediator to become more out-focused and responsive.

This balance between the science and art of mediation, between the rational and the intuitive, is what attracts many of us to practice mediation. That and the infinite challenge of assisting those in conflict to reach agreement.

Developing Your Toolbox

I ask that practitioners and students view the concepts and skills described in this manual as available tools for your mediation toolbox. Which of the available tools you use is largely a matter of professional judgment and discretion. When it comes down to it, the right way to mediate is the way that works! Fortunately, or unfortunately, what works will vary on a case by case, participant, by participant and mediator by mediator basis. A key for the mediator is to be able to notice, in the moment, whether what he or she is saying or doing is working. If it is not working, the mediator needs to do something different! It is also said that the most flexible component of a system controls that system. As a mediator, you want to be the most flexible

component of the system in selecting and implementing your facilitative tools and techniques.

Meet the Parties Where They Are

If I have learned anything as a mediator, it is that you are not going anywhere unless and until you become one with the mediation participants. It is only by effectively hearing (seeing and feeling) where each participant is at, and by honoring the participant in that place, that you are able to assist participants to shift from their typically righteous views to consider their situation from new perspectives and reach constructive and principled agreement.

Balancing Structure and Responsiveness

Effective mediation is a balancing of structure and responsiveness. If the mediator is too structured, there is the risk of being out of synch with the participants. If the mediator is too responsive, participants will feel lost, will likely plunge into their past-focused drama, and, at best, develop incomplete and fragile agreements. You may want to think of facilitative structures as a supportive context within which to exercise your facilitative intuition. The goal is to strike a maximizing balance between structure and responsiveness.

The Interdisciplinary Nature of Mediation

Becoming a mediator is more a state of mind than it is a set of specific skills. Whatever your profession of origin or background discipline, as a mediator you will no longer have the luxury of approaching clients from that perspective alone. To effectively mediate, lawyers need to understand business and relational issues; mental health professionals must understand business and legal aspects; and other professionals will also need to appreciate all parts of a dispute. Virtually all business disputes have a relational aspect to them, and virtually all relational disputes have business aspects. Business and relational issues frequently have legal ramifications. The effective mediator becomes, with time, conversant with regard to relational, business and legal issues.

The wise mediator also appreciates when it is desirable to recommend the infusion of the mediation process with credible expert information from resources acceptable to all parties. One mistake that many beginning mediators make is to try to do too much -- to be experts in all areas. It is always safer for parties to rely on their own legal counsel, accountants, valuers, and other advisors for expertise in mediation. The mediator's role is to facilitate agreement, not to know all about all things.

Are Mediators Neutral or Balanced

Mediators are often presented as being "neutrals," which may be misleading. "Neutrality" suggests to some that the mediator is objective and "above the fray." This is generally not accurate in interest-based mediation. The mediator to a dispute is, more accurately, a part of the system -- a participant. The mediator is actively engaged with all parties and in different ways. Overall, the mediator's involvement should be balanced between the parties. Thus, rather than separation or distance, "neutrality" in mediation may best be understood as a balanced and active involvement with the parties in a way that does not favor either party nor any particular result.

The "Right Way" to Mediate

The "right way to mediate" is a contradiction in terms. There is no right way (except the way that works). There are, however, certain skills and strategies that can be developed and issues addressed to assure that decisions made by the parties in mediation are truly informed and voluntary. It is crucial to remember that the mediator is responsible for the process, not the outcome, of the mediation.

4.2 Roles of the Mediator

The mediator's ultimate role is to do anything and everything necessary to assist parties to reach agreement. In serving this ultimate end, the mediator may take on any or all of the following roles:

Convener

The mediator may assist in contacting the other party(ies) to arrange for an introductory meeting.

Educator

The mediator educates the parties about the mediation process, other conflict resolution alternatives, issues that are typically addressed, options and principles that may be considered, research, court standards, etc.

Communication Facilitator

The mediator seeks to ensure that each party is fully heard in the mediation process.

Translator

When necessary, the mediator can help by rephrasing or reframing communications so that they are better understood and received.

Questioner and Clarifier

The mediator probes issues and confirms understandings to ensure that the participants and the mediator have a full understanding.

Process Advisor

The mediator comes to be trusted to suggest procedures for making progress in mediation discussions, which may include caucus meetings, consultation with outside legal counsel and consultation with substantive experts.

Angel of Realities

The mediator may exercise his or her discretion to play devil's advocate with one or both parties as to the practicality of solutions they are considering or the extent to which certain options are consistent with participants' stated goals, interests and positive intentions.

Catalyst

By offering options for considerations, stimulating new perspectives and offering reference points for consideration, mediator serves as a stimulant for the parties reaching agreement.

Responsible Detail Person

The mediator manages and keeps track of all necessary information, writes up the parties' agreement, and may assist the parties to implement their agreement.

4.3 Benefits of Mediation

People in disputes who are considering using mediation as a way to resolve their differences often want to know what the process offers. While mediation cannot guarantee specific results, there are trends that are characteristic of mediation. Below is a list of some of the benefits of mediation, broadly considered. Mediation generally produces or promotes:

Economical Decisions

Mediation is generally less expensive when contrasted to the expense of litigation or other forms of fighting. (Pearson and Thoennes, 1984; McIssac, 1981; Kelly, 1991)

Rapid Settlements

In an era when it may take as long as a year to get a court date, and multiple years if a case is appealed, the mediation alternative often provides a more timely way of resolving disputes. When parties want to get on with business or their lives, mediation may be desirable as a means of producing rapid results.

Mutually Satisfactory Outcomes

Parties are generally more satisfied with solutions that have been mutually agreed upon, as opposed to solutions that are imposed by a third-party decision-maker. (Rochl and Cook, 1985; Pearson and Thoennes, 1985; Brett and Goldberg, 1984; Kelly, 1991)

High Rate of Compliance

Parties who have reached their own agreement in mediation are also generally more likely to follow through and comply with its terms than those whose resolution has been imposed by a third-party decision-maker. (Rochl and Cook, 1985; Pearson and Thoennes, 1984; McEwen and Maiman, 1981; Bingham, 1986; Kelly, 1991)

Comprehensive and Customized Agreements

Mediated settlements are able to address both legal and extra-legal issues. Mediated agreements often cover procedural and psychological issues that are not necessarily susceptible to legal determination. The parties can tailor their settlement to their particular situation.

Greater Degree of Control and Predictability of Outcome

Parties who negotiate their own settlements have more control over the outcome of their dispute. Gains and losses are more predictable in a mediated settlement than they would be if a case is arbitrated or adjudicated.

Personal Empowerment

People who negotiate their own settlements often feel more powerful than those who use surrogate advocates, such as lawyers, to represent them. Mediation negotiations can provide a forum for learning about and exercising personal power or influence (Cook, Rochl and Shepard, 1980).

Preservation of an Ongoing Relationship or Termination of a Relationship in a More Amicable Way

Many disputes occur in the context of relationships that will continue over future years. A mediated settlement that addresses all parties' interests can often preserve a working relationship in ways that would not be possible in a win/lose decision-making procedure. Mediation can also make the termination of a relationship more amicable. **Workable and**

Implementable Decisions

Parties who mediate their differences are able to attend to the fine details of implementation. Negotiated or mediated agreements can include specially tailored procedures for how the decisions will be carried out. This fact often enhances the likelihood that parties will actually comply with the terms of the settlement.

Agreements that are Better than Simple Compromises or Win/Lose Outcomes

Interest-based mediated negotiations can result in settlements that are more satisfactory to all parties than simple compromise decisions.

Decisions that Hold Up Over Time

Mediated settlements tend to hold up over time, and if a later dispute results, the parties are more likely to utilize a cooperative forum of problemsolving to resolve their differences than to pursue an adversarial approach (Pearson and Thoennes, 1984; Margolin, 1973; Bingham, 1986).

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There have, historically, been differences between divorce and civil mediation based primarily on the issue of whether legal counsel is present. When legal counsel is not present, many, likely most, divorce mediators will prefer to meet with both parties present, commonly around a coffee table, for multiple two or so hour long sessions, perhaps every two weeks. The mediator is somewhat leery of meeting with the parties separately, knowing that, if this takes place, suddenly the mediator is the only one who knows everything and there is a corresponding shift in power to and reliance upon the mediator. Participants are encouraged to jointly problem solve solutions to their many integrated issues and asked to consult with legal counsel between sessions any before signing any agreement.

Suddenly, when we introduce legal counsel into the mediation session, important changes take place. We will likely, for whatever reason or lack of reason, sit around a conference, rather than a coffee, table. Because the scheduling is so challenging with so many participants involved, we will likely be willing to meet for a substantial length of time, all day if necessary, and, suddenly, we are doing much more caucusing than meeting in joint session. With legal counsel present, the discussion can tend to become more cognitive, rights and power based than problem solving and experience based. As neither legal counsel nor the client are willing to demonstrate much flexibility at all in joint session without first clearing it with the other, a whole lot of caucusing takes place as the parties incrementally shift and work their way to agreement. Some of these caucuses will likely be between the attorney and client without the mediator. There is trust, but not complete trust, in the mediator to convey the proper information, and no more information than that information.

4.5 Caucusing

Recognizing this importance of the mediation "culture" and client and attorney expectations, decisions whether and when to caucus (including which party to meet with first, for how long, what the other participants are doing during the caucus, etc.) are decisions that should be made

strategically, and not automatically. When the mediator chooses to caucus, it should be because, under all circumstances, the mediator has decided that to be the best possible approach for making progress.

Mediators vary dramatically on the issue of whether and when they caucus. Some mediators never caucus, believing that the parties are best off each fully participating in the process and noting that there is increased reliance on the mediator with caucusing. Mediators are also often concerned about possible suspicion that may develop within one or more parties when there are caucus sessions. When the mediator chooses to caucus, the mediator also needs to be aware of the possibility, if not likelihood, that parties will share their respective "secrets" with the mediator. While this may be helpful in understanding each party's true motivations, and thus support settlement efforts, secrets can be very challenging. For example, what is the mediator to do if he or she realizes that full financial disclosure is lacking, that misrepresentations have been made or with regard to important personal information.

Other strategic reasons for caucusing include creating an opportunity to work on unresolved anger issues or to allow consideration of a proposal outside of the presence of the other party. Caucus may be especially appropriate anytime the mediator's intervention runs the risk of creating an appearance of uncertainty, weakness or embarrassment in one or more parties. Most mediators will try to avoid having a party "lose face" in front of the other party(ies). Here is a more complete list of reasons mediators cite for deciding to caucus:

- create a productive pause in the process (relief from tension)
- engage in mediative reference point or "what if" process
- permit party movement without losing face
- offer negotiating advice
- assess alternatives to negotiated settlement
- test whether a party's proposals are realistic
- act as a sounding board
- work to develop settlement proposals

- as means of garnering information that will not otherwise come out

If the mediator chooses to caucus, it is critical that the mediator and the parties reach clear agreement as to the confidentiality of caucus meetings. This can be done in the Agreement to Mediate or less formally during the mediation itself. Better practice is to clarify agreements as to the degree of confidentiality of caucus sessions, and any exceptions to such confidentiality, in writing. Mediators and parties will typically take one of two approaches:

(1) everything said in the caucus is confidential between the mediator and the individual party except as the party expressly instructs the mediator he or she can share; or

(2) everything said in the caucus can be shared except as the party expressly instructs the mediator to not share.

In either case, the mediator is advised to continually clarify what can be shared and what cannot be shared at the close of the caucus session. The mediator can be proactive and ask for permission to share information and proposals he or she believes will move the mediation forward.

The mediator is also advised to generally caucus with all parties, if he or she caucuses with any party. The purpose of this is to maintain balance. There may be situations where this is not necessary, such as where one party wants to specifically discuss a settlement option in private and the other party does not feel that they need to do that.

Another challenge is what to do with the non-caucusing party(ies) while the mediator is working in caucus. First of all, it is recommended that caucus sessions generally be limited in time, to between 10 and 30 minutes, to keep each party actively involved. The mediator may also ask one party to come early and the other to stay late. It is important that the non-caucusing party(ies) have a comfortable place to rest or work. It may be desirable to give them "homework" for their "waiting period" such as:

- list all things you believe we may be able to easily agree on;
- come up with at least two settlement arrangements that would work for you; and

- what would you be willing to give the other to get what you want -- and what would you need to receive from the other to agree to what they want?

Parties can also be asked to describe the following:

- the strengths of their case;
- the weaknesses of their case;
- the strengths of the other's case;
- the weaknesses of the other's case;
- how they think an impartial judge or jury would decide the case;
- what is the best litigated result they might reasonably expect;
- what is the worst litigated result they might reasonably expect; and
- how the other party would respond to these same questions.

In all cases, the mediator is attempting to constructively utilize what might otherwise be "down time" for the non-caucusing party while also attempting to create some flexibility through the inducement of new perspectives or through the creation of doubt and dissonance. In all caucus situations, there is a dramatically increased reliance on the mediator's management of the mediation process.

4.6 Subject-Matter Expertise

Minimally, a mediator needs to be credible and conversant in the terms of the parties' dispute. Sometimes, especially in civil mediation, parties and/or their advocates desire that the mediator be a substantive expert in the area of the dispute. Such expressed desires are important in that disputants are entitled to define both the nature of the process and the type of mediator they would like to work with.

There are reasons, however, why the mediator may want to be cautious about acting as the substantive expert, even if he or she is qualified to do so. First of all, they may not be "right" in their assessment or advice. Beyond that, and even if they are "right," the mediator acting as substantive expert may deprive parties of their own "power" and ability to resolve their dispute on terms that make sense to them. Similar to making a recommendation for settlement, the mediator acting as expert runs the risk of disaffecting at least one party with his or her opinions, quite possibly to the extent of jeopardizing the mediator's ability to effectively continue and the parties' ability to agree

The issue of mediator acting as substantive expert is not subject to "right" or "wrong" analysis. In addition to depending on the desires of the participants, there are many ways expertise can be shared in a mediation. Being "expert" in an area allows a mediator to effectively ask questions to assist the parties to assess the strength of their respective cases. The mediator may be able to direct parties to resources that may assist them to more realistically assess the outcome of a contested hearing. Being "expert" is also helpful in assisting parties to consider:

- the full range of issues that similarly situating parties commonly consider;
- to help participants understand settlement options that are commonly considered on certain issues; and
- to help participants identify possible strengths and weaknesses of each option.

If desired, the "expert" mediator can assure parties that their settlement is "within the bounds of reason." Substantive expertise in mediation is

generally an asset for the mediator. It can be a liability, however, if it leads the mediator to be so advice-giving and judgmental as to deprive the parties of their self-determination and creative power.

Section 5

Written Materials for The Mediation Process with Clare Fowler

Getting Started: The SONAR Process

No two mediations are alike, and no two mediations start exactly alike. Still, there are some interesting common qualities beginning with the fact that most mediations do not begin with a conference call from all participants but, rather, with a communication from one or less than all participants. Immediately, the mediator has substantial ethical and strategic issues to consider.

This Chapter takes us, as mediator, through the beginning of a mediation in rough chronologic order.

The typical process for a mediation is 5-fold:

S: Statement, around 5 minutes where the mediator describes the process and the key components of mediation

O: Opening by the parties. Where the parties outline their conflict and the mediator validates and asks clarifying questions

N: Negotiation, where the parties begin to negotiation their issues, guided by the mediator.

A: Agreement: where the mediator guides parties through drafting their agreement. The mediator usually has a template (such as a Marital Settlement Agreement that they have created or a divorce decree from the court) to work off of.

R: Resolution: where the parties decide how they are going to treat each other after this, what information will be shared, acknowledge the hard work, and paint a new picture for working together.

It may be accurately said that "how a mediation starts is likely how a mediation goes." There are lots of reasons for mediators to be rather exacting of themselves in terms of the beginning of a mediation. A mediation begun well has a greater likelihood of success than a mediation begun poorly, and participants are particularly sensitive to evaluating the mediator during the first portions of a mediation.

This Chapter includes some materials and structures that should assist you to be seen as professional and capable in getting a mediation going.

5.1 Qualities of Mediation

Central to mediation is the concept of "informed consent." So long as participants understand the nature of a contemplated mediation process and effectively consent to participate in the described process, virtually any mediation process is possible and appropriate. In terms of describing the mediation process, either during an introductory session or an introductory phase of a substantive mediation session, the following concepts and language may be helpful.

As an overall definition of mediation, consider: "Facilitated Communications for Agreement" or "Facilitated Negotiation."

Qualities:

Voluntary

You can leave at any time for any reason, or no reason. If you are thinking of leaving, I encourage you to speak up and let me know why. The reasons that you are thinking of leaving can become conditions for your continued participation. For example, if you are thinking of leaving because you do not feel heard, presumably you would continue in mediation if you felt heard.

Collaborative

You are encouraged to work together to solve your problem(s) and to reach what you perceive to be your fairest and most constructive agreement.

Controlled

You have complete decision-making power. Each of you has a veto over each and every provision of any mediated agreement. Nothing can be imposed on you.

Confidential

Mediation is confidential, to the extent you desire, be that by statute, contract, rules of evidence or privilege. Mediation discussions and all materials developed for a mediation are not admissible in any subsequent court or contested proceedings, except for a finalized and signed mediated

agreement for enforcement purposes. I, as mediator, am obligated to describe any exceptions to this general confidentiality of mediation. Confidentiality in mediation may be waived by you in writing, but I, as mediator, retain my own ability to refuse to testify in any contested case. We also need to define the extent of confidentiality for any "caucus meetings," meetings between myself as mediator and you as individual parties.

Informed

The mediation process offers a full opportunity to obtain and incorporate legal and other expert information and advice. Mutually acceptable experts can be retained. Such jointly obtained expert information can be designated as either confidential to the mediation or, if you desire, as admissible in any subsequent contested proceeding. Expert advice is never determinative in mediation. You, as parties, always retain decision-making power. Mediators are bound to encourage parties to obtain legal counsel and to have any mediated agreement involving legal issues reviewed by independent legal counsel prior to signing. Whether legal advice is sought is, ultimately, a decision of each mediation participant.

Impartial, Neutral, Balanced and Safe

The mediator has an equal and balanced responsibility to assist each mediating party and cannot favor the interests of any one party over another, nor should the mediator favor a particular result in the mediation. As mediator, I am ethically obligated to acknowledge any substantive bias I may have on issues in discussion. The mediator's role is to ensure that parties reach agreements in a voluntarily and informed manner, and not as a result of coercion or intimidation. If you ever feel that I, as mediator, am favoring one party over another, or any particular result over another, or if you should ever feel intimidated or otherwise unsafe, speak up. The mediation should not continue unless you come to be satisfied in all these regards.

Self-Responsible and Satisfying

Based upon having actively resolved your own conflict, participant satisfaction, likelihood of compliance and self-esteem are found by research to be dramatically elevated through mediation.

5.2 Initial Contacts

The initial mediation contact often comes over the phone. This is challenging in that such a one-party (ex parte) conversation is truly a caucus discussion (before the mediation participants have been informed of and agreed to rules, such as confidentiality, for caucusing). Recognizing this, it is typically best for the mediator to limit initial phone discussions with individual parties to a general description of the mediation process. Note that callers will often want to get into their issues and may well attempt, in overt and/or covert ways, to influence the mediator. It is for this reason that it is usually best to limit such one-party contacts until the parties mutually agree on rules for such discussions. The mediator is advised to share the general nature of prior contacts at the parties' first joint meeting.

Rely on descriptive materials

Having professional introductory written materials to send to both parties is one way of avoiding long initial phone discussions with individual parties. These materials may include answers to the most commonly asked questions about mediation, a sample agreement to mediate, mediation ethical standards of practice, and the like. If the non-calling party is aware that the calling party is inquiring about mediation services, it is usually fine to send written materials to that non-calling party also. If receiving information about mediation would be a surprise to the other party, then it is likely best to send two sets of materials to the calling party to allow the calling party to share the information with the non-calling party about mediation. It is advisable, in any cover letter or note, to let the non-calling party know that they are welcome to call with any questions they may have.

Have a segregated introductory meeting or phase

While mediation participants may want to immediately jump in and begin their negotiations, it is critical from an ethical perspective that the parties fully understand the nature of their contemplated mediation process before committing to participate in the process. The introductory process description phase of mediation can be a separate meeting or a segregated initial phase of a first meeting. It is critical that parties understand the voluntary nature of mediation, rules of confidentiality and that the mediator has no decision-making power. While it is not yet ethically required to have

a written agreement to mediate prior to beginning actual mediation negotiations, this is certainly advisable.

5.3 Sample Appointment Letter

Here is a sample letter to clients who have scheduled an introductory session enclosing introductory educational materials:

Client 1 address
city

Client 2
address city

Re: Mediation

Dear 2 and 1:

This is to confirm that 2 called inquiring about mediation services. In response, I am enclosing introductory mediation materials for each of you. These include Client Information, a Mediation Retainer Agreement, Standards of Mediation Practice that I subscribe to, and a description of my background.

I also want to confirm that we have scheduled an introductory meeting for Wednesday, _____, at 9:00 a.m. The purpose of this meeting is to fully describe the mediation process and to answer any questions that you have. I will also want to get a sense of the issues in need of resolution and the type of agreement that each of you would like to create. We can resolve any pressing issues during this first meeting.

The charge for this first meeting will be \$120. Beyond this first meeting, I charge \$180/hr for my professional time. I generally request a deposit of the minimum amount I anticipate for the entire mediation process, usually \$1,000.

Please call me with any questions that you have. As I have not yet spoken with 1, I encourage her to feel free to call me. I look forward to seeing you both.

Very truly yours,

James C. Melamed, J.D.

5.4 Sample Client Information

CLIENT INFORMATION

James C. Melamed, J.D.

The Mediation Center

PO Box 51119

Eugene, Oregon 97405

(503) 345-1456

jmelamed@mediate.com

www.internetmediator.com

This information is intended to assist you to maximize and economize your mediation experience. My goal is to assist you to most effectively, comfortably and confidently represent yourself in mediation. In mediation, you will be making all of the decisions. The mediator has no decision-making power. Thus, it is important for you to consider how you can best represent your interests in mediation, as well as the results that you would like to create in mediation.

How long will the mediation take and how much will it cost?

Unfortunately, it is hard to predict with precision how long a mediation will take or how much mediation will cost. These issues depend primarily on how agreeable the participants are. Generally, for divorce, business and organizational matters, we meet between two and six times for approximately two hours each meeting. The cost of a comprehensive mediated agreement generally ranges between \$1,000 and \$3,000. I will be as specific as possible in these regards once I have a better understanding of your situation.

What if we already agree on lots of issues?

Fantastic! The first thing that we want to do in mediation is to identify what you already agree on. We will use those points of agreement as a foundation for your overall Agreement. The standards that make sense to you on certain "easy" issues can often be applied to resolve other issues. We will

want to be sure that your Agreement is well-informed and that you are aware of the many issues that you may want to consider. What is included in your Agreement is up to you. Our goal is to support your well-informed decision-making.

What are our chances for success?

Over the years, approximately 90% of mediating parties at The Mediation Center have reached comprehensive resolution. This high success rate is due to most participants being highly motivated to reach agreement.

What if we don't reach agreement?

In mediation, all discussions and materials, with very few listed exceptions, are confidential. If no mediated Agreement is reached, evidence of the mediation discussions, mediation materials and any draft mediation resolution will not be admissible in court or any other adversarial proceeding.

Who pays for mediation?

Responsibility for mediation fees is an issue to be decided by mediation participants. Participants are encouraged to consider sharing fees to some extent so all will benefit from expeditious and economic resolution.

What about our own attorneys?

As a mediator and attorney myself, I am ethically bound to advise you to have any mediated Settlement Agreement reviewed by individual legal counsel prior to your signing that Agreement. In practice, I have found that it works best for mediating parties to obtain one to four hours of individual legal advice throughout the mediation process. This legal advice may be best obtained early in the mediation, by legal counsel's review of a near-final draft Agreement, and by counsel's review of the final Agreement. This level of consultation will dramatically elevate your comfort and confidence in the final agreement.

What about utilizing experts?

It may make sense, in a particular case, for mediation participants to retain mutually trusted experts. For example, participants may desire a trusted valuation of real property, personal property or a business. It is also not uncommon for mediating parties to choose to jointly consult with an

accountant or tax expert. Mediation participants with parenting concerns may find it beneficial to obtain the thoughts and recommendations of a trusted child psychologist. Mediation participants may choose to jointly retain an impartial advisory attorney who, based upon an agreed-upon set of facts, may render an advisory non-binding opinion on how a court might resolve the identified issues.

What else can I do to prepare?

Perhaps the most important thing any mediating party can do to ensure a satisfying and successful mediation experience is to prepare for the mediation discussions by seeking clarity as to his or her desired outcomes and perceived standards of fairness. Stated otherwise, "What do you want?" and "How will you know that it is alright to agree?"

5.5 Sample Agreement to Mediate

AGREEMENT TO MEDIATE

This is an Agreement between _____ and _____ and James C. Melamed, J.D., hereinafter "mediator," to enter into mediation with the intent of resolving the following issues:

 _____.

The parties and the mediator understand and agree as follows:

1. Nature of Mediation

The parties hereby appoint and retain James C. Melamed, J.D., attorney at law, as mediator. The parties understand that mediation is an agreementreaching process in which the mediator assists parties to reach agreement in a collaborative and informed manner. It is understood that the mediator has no power to decide issues for the parties. The parties

understand that mediation is not a substitute for independent legal advice. The parties are encouraged to secure such advice throughout the mediation process and are advised to obtain independent legal review of any formal mediated agreement before signing that agreement. The parties understand that the mediator has an obligation to work on behalf of all parties and that the mediator cannot render individual legal advice to any party and will not render therapy nor arbitrate within the mediation.

2. Scope of Mediation

The parties understand that it is for the parties, with the mediator's concurrence, to determine the scope of the mediation and this will be accomplished early in the mediation process.

3. Mediation is Voluntary

All parties here state their good faith intention to complete their mediation by an Agreement. It is, however, understood that any party may withdraw from or suspend the mediation process at any time, for any reason.

The parties also understand that the mediator may suspend or terminate the mediation if he feels that the mediation will lead to an unjust or unreasonable result; if the mediator feels that an impasse has been reached; or if the mediator determines that he can no longer effectively perform his facilitative role.

4. Confidentiality

It is understood between the parties and the mediator that the mediation will be strictly confidential. Mediation discussions, any draft resolutions and any unsigned mediated agreements shall not be admissible in any court or other contested proceeding. Only a mediated agreement signed by any parties will be so admissible. The only other exceptions to this confidentiality are if all parties waive confidentiality in writing or in an action brought by any party against the mediator. The parties agree not to call the mediator to testify

concerning the mediation or to provide any materials from the mediation in any court proceeding between the parties. The mediation is considered by the parties and the mediator as settlement negotiations. All parties also understand and agree that the mediator may have private caucus meetings and discussions with any individual party, in which case all such meetings and discussions shall be confidential between the mediator and the caucusing party.

5. Full Disclosure

Each party agrees to fully and honestly disclose all relevant information and writings as requested by the mediator and all information requested by any other party, if the mediator determines that the disclosure is relevant to the mediation discussions. In family mediation cases, each party agrees to fully and accurately disclose all income, assets and debts.

6. Mediator Impartiality

The parties understand that the mediator must remain impartial throughout and after the mediation process. Thus, the mediator shall not champion the interests of any party over another in the mediation nor in any court or other proceeding.

7. Coordination with Legal Counsel

The parties agree that the mediator may discuss the parties' mediation process with any attorney any party may retain as individual counsel. Such discussions will not include any negotiations unless the parties instruct the mediator that their attorney(s) have negotiating authority. The mediator will provide copies of correspondence, draft agreements and written documentation to independent legal counsel at a party's request.

8. Mediation Fees

The parties and the mediator agree that the fee for the mediator shall be \$___ per hour for time spent with the parties and for time required to study documents, research issues, correspond, telephone call, prepare draft and final Agreements, and do such other things as may be reasonably necessary to facilitate the parties reaching full Agreement. The mediator shall also be reimbursed for all expenses incurred as a part of the mediation process.

A payment of \$___ toward the mediator's fees and expenses shall be paid to the mediator along with the signing of this agreement. Any unearned amount of this retainer fee will be refunded to the parties. The parties shall be jointly and severally liable for the mediator's fees and expenses. As between the parties only, responsibility for mediation fees and expenses shall be: _____.

The parties will be provided with a monthly accounting of fees and expenses by the mediator. Payment of such fees and expenses is due to the mediator no later than 15 days following the date of such billing, unless otherwise agreed in writing. There shall be a 1.0% monthly service charge on accounts not paid by the last day of the month.

Should payment not be timely made, the mediator may, in his sole discretion, stop all work on behalf of the parties, including the drafting and/or distribution of the parties' Agreement, and withdraw from the mediation. If collection or court action is taken by the mediator to collect fees and/or expenses under this Agreement, the prevailing party in any such action and upon any appeal therefrom shall be entitled to attorney fees and costs therein incurred.

DATED this ____ day of _____, 201_.

5.6 Mediation Practice Standards

Here are the generally accepted Standards of Mediation Practice of the American Bar Association, American Arbitration Association and Association for Conflict Resolution. You should also identify relevant state standards of practice.

These are the standards of mediation practice jointly defined by the American Bar Association (ABA), Association for Conflict Resolution (ACR) and the American Arbitration Association (AAA) and are generally applicable to the mediation of legal disputes.

The purpose of this initiative was to develop a set of standards to serve as a general framework for the practice of mediation. The effort is a step in the development of the field and a tool to assist practitioners in it--a beginning, not an end. The model standards are intended to apply to all types of mediation. It is recognized, however, that in some cases the application of these standards may be affected by laws or contractual agreements.

Preface

The model standards of conduct for mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. The standards draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice. They are offered in the hope that they will serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation.

I. Self-Determination: A Mediator Shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.

COMMENTS:

- The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.
- A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but is a good practice for

the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

II. Impartiality: A Mediator Shall Conduct the Mediation in an Impartial Manner.

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

COMMENTS:

- A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.
- When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially.
- A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

III. Conflicts of Interest: A Mediator Shall Disclose all Actual and Potential Conflicts of Interest Reasonably Known to the Mediator. After Disclosure, the Mediator shall Decline to Mediate unless all Parties Choose to Retain the Mediator. The Need to Protect Against Conflicts of Interest also Governs Conduct that Occurs During and After the Mediation.

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

COMMENTS:

- A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.
- Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressure from outside of the mediation process should never influence the mediator to coerce parties to settle.

IV. Competence: A Mediator Shall Mediate Only When the Mediator has the Necessary Qualifications to Satisfy the Reasonable Expectations of the Parties.

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively. In court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.

COMMENTS:

- Mediators should have information available for the parties regarding their relevant training, education and experience.
- The requirements for appearing on the list of mediators must be made public and available to interested persons.
- When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.

Written Materials for Confidentiality Video with Phyllis Pollack

As you are watching this Confidentiality Video, we recommend creating a Confidentiality Agreement. This can be a stand-alone paper that will live on your website, or you can email it to your clients in advance of your mediation. The Confidentiality Agreement is also usually included in an Agreement to Mediate that clients review and often sign at the beginning of mediation, and as part of the Marital Settlement Agreement that clients sign at the conclusion of the mediation.

V. Confidentiality: A Mediator Shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality.

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.

COMMENTS:

- The parties may make their own rules with respect to confidentiality, or other accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.
- If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.
- In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.
- Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.
- Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible

persons. Under appropriate circumstances, researchers may be permitted to obtain access to the statistical data and, with the permission of the parties, to individual case files, observations of live mediations, and interviews with participants.

VI. Quality of the Process: A Mediator Shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties.

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

COMMENTS:

- A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.
- Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process. A mediator should not allow a mediation to be unduly delayed by the parties or their representatives.
- The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from the entire mediation process.
- The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should, therefore, refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other processes.

- A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial.
- A mediator shall withdraw from a mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.
- Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.

VII. Advertising and Solicitation: A Mediator Shall be Truthful in Advertising and Solicitation for Mediation

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

COMMENTS:

- It is imperative that communication with the public educate and instill confidence in the process.
- In an advertisement or other communication to the public, a mediator may make reference to meeting state, national, or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

VIII. Fees: A Mediator Shall Fully Disclose and Explain the Basis of Compensation, Fees, and Charges to the Parties.

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees shall be reasonable, considering among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.

COMMENTS:

- A mediator who withdraws from a mediation should return any unearned fee to the parties.

- A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
- Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.
- A mediator should not accept a fee for referral of a matter to another mediator or to any other person.

IX. Obligations to the Mediation Process: Mediators have a Duty to Improve the Practice of Mediation.

COMMENT:

- Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.

5.7 Oregon Mediation Association Standards of Practice

Preamble

Self Determination

Informed Consent

Impartial Regard

Confidentiality

Competence

Encourage Good Faith Participation

Fees

Advertising and Solicitation

Dual-Role Limitations

Preamble

These Standards of Mediation Practice are intended to guide the conduct of mediators in Oregon, to educate participants about appropriate mediator behaviors, and to promote public confidence in mediation as a process for resolving disputes. Each member of the Oregon Mediation Association must agree to abide by these Standards when serving as a mediator. Every mediator is responsible for conducting mediations in a manner that promotes trust in the process and in the integrity and competence of mediators.

These Standards are based on core values applicable to all mediators, recognize mediation as a separate profession, and focus on mediator behaviors. Because OMA values diversity among mediators and mediation participants, the Standards are meant to apply to all types, styles, and contexts of mediation. The Standards do not attempt to define "best practice" or to reflect the variety of appropriate practices which continue to develop in the various contexts in which mediation is practiced. The

Comments following each Standard are provided to aid in the interpretation of the Standard, and are not part of the Standard.

The following terms are used in these Standards with these definitions:

"Mediation" - Mediation means a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated. [This definition is taken from the Oregon Revised Statutes Section 36.110(6).] In these Standards, "mediation" refers to the entire continuum of the mediation process, from initial contact with a participant to closure, and "parties" will be referred to as "participants."

"Participant" - A participant is an individual with a stake in the outcome who is participating in mediation.

CORE STANDARDS

I. Self Determination

A mediator shall respect and encourage the self-determination of participants in decisions regarding what process to use and regarding whether, and on what terms, to resolve their dispute or issues.

Comments

1. Self-determination is a fundamental principle of mediation. Participants must have the capacity and freedom to reach a voluntary agreement. The mediator must not decide any substantive issue for the participants.
2. To encourage self-determination, the mediator should clarify the mediation process s/he proposes to use, including the particular style and structure, and should distinguish mediation from other processes such as litigation, arbitration, counseling, fact finding, etc. The mediator may offer his/her process expertise, but participants should be free to choose the particular form of mediation or other dispute resolution process.

3. Each participant should be able to fully comprehend the process, issues, and options for settlement, to make decisions, and should not be acting under fear, coercion, or duress. If the mediator believes that a participant is unable or unwilling to participate effectively in the mediation process, the mediator must suspend or terminate the mediation.
4. The mediator must avoid exerting pressure on a participant, either to participate in mediation or to reach agreement. However, the mediator may encourage participants to consider both the benefits of participation and agreement and the costs of withdrawal and impasse.
5. A participant may withdraw from mediation at any time. Even when mediation is "mandatory" the mediator must respect the participant's determination of whether to continue in the process that is offered.

II. Informed Consent

- A. The mediator shall provide mediation services only when the participants have given their informed consent to participate in the specific mediation process offered by the mediator.
- B. The mediator shall disclose to the participants all information about the mediator and his/her services necessary to enable the participants to make an informed decision whether to use or continue the services of the mediator and whether to participate in the specific mediation process. The mediator shall explain the mediation process and the roles of the mediator, the participants, and their representatives. The mediator shall also disclose information regarding conflicts of interest, relationships, confidentiality and fees as specified in these Standards.
- C. The mediator shall make reasonable efforts throughout the mediation to assure that the participants are free and able to make choices regarding participation in mediation generally and regarding options for reaching agreement.

Comments

1. The mediator's duty to disclose is a continuing obligation throughout the process. All disclosures shall be truthful and shall not mislead by omission.
2. The mediator should make the participants aware of the importance of consulting other professionals to help them make informed decisions.
3. If one or more of the participants withdraws from a multi-participant mediation, the mediator may continue the mediation as long as the remaining participants give their informed consent.

III. Impartial Regard

The mediator shall demonstrate and maintain a commitment to impartial regard by serving all participants at all times. The mediator shall not have any personal stake in the outcome of the mediation. Where the mediator's ability to give impartial regard is in question and that question cannot be resolved s/he shall decline to serve or shall withdraw from serving as mediator.

1. **Conflicts of Interest.** The mediator shall disclose all circumstances that may raise a question as to the mediator's ability to give the participants impartial regard.
2. **Relationships.** The mediator shall disclose any present or prior relationship, personal or professional, between the mediator and any participant or their representative that may affect or give the appearance of affecting the mediator's ability to give impartial regard.

Comments

1. If the mediator has a prior relationship with any participant and has fully disclosed all information required in this Standard, s/he may proceed with the mediation with the consent of all participants.
2. The mediator must exercise his/her judgment and discretion, and must decline to serve, even if the mediation has begun, when:

- a. The mediator's judgment is that a relationship with a participant or a participant's representative will compromise the fact or appearance of the mediator's ability to give impartial regard.
- b. The mediator believes that, apart from relationships, the fact or appearance of the mediator's ability to give impartial regard is compromised by the mediator's personal biases, views, or reactions to any participant, representative, or position.

IV. Confidentiality

A mediator shall maintain the reasonable expectations of the participants with regard to confidentiality, except where confidentiality or disclosure is required by law.

Comments

1. The mediator must clarify with the mediation participants the degree to which communication with the mediator, including communication during any individual sessions, will be confidential.
2. Various laws set out different requirements regarding confidentiality and disclosure. The mediator should educate him/herself and the participants on the applicable requirements.

V. Competence

- A. A mediator shall mediate only when s/he has the necessary knowledge, skills, and abilities to satisfy the reasonable expectations of the participants.
- B. The mediator shall exercise his/her judgment and discretion as to whether s/he is competent to mediate a particular dispute. When the mediator believes that s/he lacks the knowledge, skills and ability to mediate a particular dispute, s/he shall request appropriate assistance, withdraw or decline to serve.

Comments

1. In order to satisfy the reasonable expectations of the participants, the mediator must accurately represent his/her knowledge, skills, and ability to mediate a particular dispute.
2. The mediator should consider factors such as the style of mediation, the subject matter of the dispute, and the specific issues and participants involved when exercising his/her judgment about mediating a particular dispute.
3. A mediator should obtain necessary skills and substantive training, appropriate to his/her area of practice, and should upgrade those skills and training on an on-going basis.
4. A mediator should disclose to the participants the limits of his/her skills or substantive expertise wherever this may be relevant to their mediation.

VI. Encourage Good Faith Participation

The mediator shall encourage participants to participate in good faith. The mediator shall discontinue the mediation if, in his/her reasonable judgment, a participant's bad faith, dishonesty, or nondisclosure is so significant that the fairness and integrity of mediation cannot be maintained.

Comments

1. The mediator must inform participants that it is the obligation of each participant to participate in good faith. The mediator must also inform the participants of the need to be realistic in protecting themselves against possible abuse of the mediation process, since the mediator cannot guarantee that the mediation process will not be abused by any participant.
2. When a mediator believes that a participant is not participating in good faith, such as by nondisclosure or dishonesty, the mediator must encourage that participant to alter the conduct in question. If, after being encouraged to alter the conduct, the participant does not do so, the mediator must decide whether or not to discontinue the mediation.

- a) If, in the mediator's reasonable judgment, the participant's bad faith is so significant that the fairness and integrity of mediation cannot be maintained, then the mediator shall discontinue mediation. The mediator shall do so in a manner that does not violate the obligation of confidentiality.
- b) If the mediator continues the mediation, the mediator is not obligated to reveal the conduct to the other participant, and may not do so if this would violate the obligation of confidentiality.

VII. Fees

- A. The mediator shall fully disclose and explain the basis of any compensation, fees, and charges to the participants.
- B. A mediator shall not charge contingent fees or base fees on the outcome of a mediation.
- C. A mediator shall not accept a fee for referral of a matter to another mediator or to any other person.

Comments

- 1. The mediator must inform participants of any fees or charges for which they are responsible.
- 2. If the mediator receives compensation from a source other than the participants, the mediator must disclose the source, but need not disclose the amount of the compensation.

VIII. Advertising and Solicitation

A mediator shall be truthful in advertising and solicitation for mediation. A mediator shall refrain from promises or guarantees of results.

Comments

- 1. Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the

mediator shall be truthful. No promises or claims of specific results should be made.

2. In an advertisement or other communication to the public, a mediator may make reference to meeting public or private organizational qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been granted the requisite status.

IX. Dual-Role Limitations

A. The mediator shall not engage in any non-mediative role during mediation or during the mediation portion of any hybrid process, such as "med-arb."

B. If the mediator has previously served in a non-mediative role with one or more of the participants, the mediator shall not mediate except with the informed consent of all participants.

C. After mediation, the mediator shall not engage in any non-mediative role with any of the participants with respect to the same or significantly related issues, except with the informed consent of all participants.

Comments:

1. "Non-mediative role" includes services as an arbitrator, judge, therapist, lawyer, counselor, etc., but does not include such non-advocacy activities as providing referrals, information, facilitation, education, and/or training about mediation or the subject matter of the mediation.

2. Lawyers, psychologists, social workers, and other professionals who serve as mediators are bound by ethical codes unique to their other profession that may impact the mediator's role. The mediator shall educate himself/herself and the participants concerning any limitations on the mediator's role deriving from other ethical codes.

3. The participants determine the process to be used, including hybrid processes. However, it is not the role of the mediator to provide legal advice, therapy, or counseling to the participants during mediation.

4. Mediators should be sensitive to the fact that subsequent contacts or dealings with participants in any setting may appear to negate prior impartial regard, but are not necessarily prohibited by these Standards.

-END-

5.8 Family Mediation Standards

Written Materials for IPV (screening clients, safety assessments) by Don Saposnek

As you go through these sections, you can begin to create an intake form, a confidentiality form, and a Marital Settlement Agreement. A sample of these forms can be found in the written manual, or online at <https://onlinemediators.com/pg33.cfm>.

We are arranging these videos in order of what you will need to consider chronologically as you move through the mediation process. We placed Intimate Partner Violence next, along with many accompanying standards, so that you can decide how to screen for violence. This will likely be part of your intake form at the very beginning of your mediation process.

Next, please review the standards in this section. While watching the Intimate Partner Violence video, you might want to begin to create an intake form, deciding if or how you want to screen for Intimate Partner Violence. You might also begin thinking about how you want to structure your Marital Settlement Agreement to protect the spouses and the children if there is a history of violence.

Overview and Definitions

Family and divorce mediation ("family mediation" or "mediation") is a process in which a mediator, an impartial third party, facilitates the

resolution of family disputes by promoting the participants' voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements.

Family mediation is not a substitute for the need for family members to obtain independent legal advice or counseling or therapy. Nor is it appropriate for all families. However, experience has established that family mediation is a valuable option for many families because it can:

1. increase the self-determination of participants and their ability to communicate;
2. promote the best interests of children; and
3. reduce the economic and emotional costs associated with the resolution of family disputes.

Effective mediation requires that the family mediator be qualified by training, experience

and temperament; that the mediator be impartial; that the participants reach their decisions voluntarily; that their decisions be based on sufficient factual data; that the mediator be aware of the impact of culture and diversity; and that the best interests of children be taken into account. Further, the mediator should also be prepared to identify families whose history includes domestic abuse or child abuse.

These *Model Standards of Practice for Family and Divorce Mediation* ("Model Standards") aim to perform three major functions:

1. to serve as a guide for the conduct of family mediators;
2. to inform the mediating participants of what they can expect; and
3. to promote public confidence in mediation as a process for resolving family disputes.

The *Model Standards* are aspirational in character. They describe good practices for family mediators. They are not intended to create legal rules or standards of liability.

The *Model Standards* include different levels of guidance:

1. Use of the term "may" in a *Standard* is the lowest strength of guidance and indicates a practice that the family mediator should consider adopting but which can be deviated from in the exercise of good professional judgment.
2. Most of the *Standards* employ the term "should" which indicates that the practice described in the *Standard* is highly desirable and should be departed from only with very strong reason.
3. The rarer use of the term "shall" in a *Standard* is a higher level of guidance to the family mediator, indicating that the mediator should not have discretion to depart from the practice described.

Standard I

A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.

- A. Self-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions.
- B. The primary role of a family mediator is to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others and to facilitate agreement among the participants.
- C. A family mediator should inform the participants that they may seek information and advice from a variety of sources during the mediation process.
- D. A family mediator shall inform the participants that they may withdraw from family mediation at any time and are not required to reach an agreement in mediation.
- E. The family mediator's commitment shall be to the participants and the process. Pressure from outside of the mediation process shall never influence the mediator to coerce participants to settle.

Standard II

A family mediator shall be qualified by education and training to undertake the mediation.

- A. To perform the family mediator's role, a mediator should:
 - 1. have knowledge of family law;
 - 2. have knowledge of and training in the impact of family conflict on parents, children and other participants, including knowledge of child development, domestic abuse and child abuse and neglect;
 - 3. have education and training specific to the process of mediation;
 - 4. be able to recognize the impact of culture and diversity.
- B. Family mediators should provide information to the participants about the mediator's relevant training, education and expertise.

Standard III

A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.

- A. Before family mediation begins a mediator should provide the participants with an overview of the process and its purposes, including:
 - 1. informing the participants that reaching an agreement in family mediation is consensual in nature, that a mediator is an impartial facilitator, and that a mediator may not impose or force any settlement on the parties;
 - 2. distinguishing family mediation from other processes designed to address family issues and disputes;
 - 3. informing the participants that any agreements reached will be reviewed by the court when court approval is required;

- 4.informing the participants that they may obtain independent advice from attorneys, counsel, advocates, accountants, therapists or other professionals during the mediation process;
 - 5.advising the participants, in appropriate cases, that they can seek the advice of religious figures, elders or other significant persons in their community whose opinions they value;
 - 6.discussing, if applicable, the issue of separate sessions with the participants, a description of the circumstances in which the mediator may meet alone with any of the participants, or with any third party and the conditions of confidentiality concerning these separate sessions;
 - 7.informing the participants that the presence or absence of other persons at a mediation, including attorneys, counselors or advocates, depends on the agreement of the participants and the mediator, unless a statute or regulation otherwise requires or the mediator believes that the presence of another person

is required or may be beneficial because of a history or threat of violence or other serious coercive activity by a participant.
 - 8.describing the obligations of the mediator to maintain the confidentiality of the mediation process and its results as well as any exceptions to confidentiality;
 - 9.advising the participants of the circumstances under which the mediator may suspend or terminate the mediation process and that a participant has a right to suspend or terminate mediation at any time.
- B. The participants should sign a written agreement to mediate their dispute and the terms and conditions thereof within a reasonable time after first consulting the family mediator.
- C. The family mediator should be alert to the capacity and willingness of the participants to mediate before proceeding with the mediation and throughout the process. A mediator should not agree to conduct the mediation if the mediator reasonably believes one or more of the participants is unable or unwilling to participate.

- D. Family mediators should not accept a dispute for mediation if they cannot satisfy the expectations of the participants concerning the timing of the process. **Standard IV**

A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator. The participants shall be free to retain the mediator by an informed, written waiver of the conflict of interest. However, if a bias or conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the participants.

- A. Impartiality means freedom from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual.
- B. Conflict of interest means any relationship between the mediator, any participant or the subject matter of the dispute, that compromises or appears to compromise the mediator's impartiality.
- C. A family mediator should not accept a dispute for mediation if the family mediator cannot be impartial.
- D. A family mediator should identify and disclose potential grounds of bias or conflict of interest upon which a mediator's impartiality might reasonably be questioned. Such disclosure should be made prior to the start of a mediation and in time to allow the participants to select an alternate mediator.
- E. A family mediator should resolve all doubts in favor of disclosure. All disclosures should be made as soon as practical after the mediator becomes aware of the bias or potential conflict of interest. The duty to disclose is a continuing duty.
- F. A family mediator should guard against bias or partiality based on the participants' personal characteristics, background or performance at the mediation.
- G. A family mediator should avoid conflicts of interest in recommending the services of other professionals.

- H. A family mediator shall not use information about participants obtained in a mediation for personal gain or advantage
- I. A family mediator should withdraw pursuant to *Standard IX* if the mediator believes the mediator's impartiality has been compromised or a conflict of interest has been identified and has not been waived by the participants.

Standard V

A family mediator shall fully disclose and explain the basis of any compensation, fees and charges to the participants.

- A. The participants should be provided with sufficient information about fees at the outset of mediation to determine if they wish to retain the services of the mediator.
- B. The participants' written agreement to mediate their dispute should include a description of their fee arrangement with the mediator.
- C. A mediator should not enter into a fee agreement which is contingent upon the results of the mediation or the amount of the settlement.
- D. A mediator should not accept a fee for referral of a matter to another mediator or to any other person.
- E. Upon termination of mediation a mediator should return any unearned fee to the participants.

Standard VI

A family mediator shall structure the mediation process so that the participants make decisions based on sufficient information and knowledge.

- A. The mediator should facilitate full and accurate disclosure and the acquisition and development of information during mediation so that the participants can make informed decisions. This may be accomplished by encouraging participants to consult appropriate experts.
- B. Consistent with standards of impartiality and preserving participant self-determination, a mediator may provide the participants with

information that the mediator is qualified by training or experience to provide. The mediator shall not provide therapy or legal advice.

- C. The mediator should recommend that the participants obtain independent legal representation before concluding an agreement.
- D. If the participants so desire, the mediator should allow attorneys, counsel or advocates for the participants to be present at the mediation sessions.
- E. With the agreement of the participants, the mediator may document the participants' resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed.

Standard VII

A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants.

- A. The mediator should discuss the participants' expectations of confidentiality with them prior to undertaking the mediation. The written agreement to mediate should include provisions concerning confidentiality.
- B. Prior to undertaking the mediation, the mediator should inform the participants of the limitations of confidentiality such as statutory, judicially or ethically mandated reporting.
- C. The mediator shall disclose a participant's threat of suicide or violence against any person to the threatened person and the appropriate authorities if the mediator believes such threat is likely to be acted upon as permitted by law.
- D. If the mediator holds private sessions with a participant, the obligations of confidentiality concerning those sessions should be discussed and agreed upon prior to the sessions.
- E. If subpoenaed or otherwise noticed to testify or to produce documents the mediator should inform the participants immediately. The

mediator should not testify or provide documents in response to a subpoena without an order of the court if the mediator reasonably believes doing so would violate an obligation of confidentiality to the participants.

Standard VIII

A family mediator shall assist participants in determining how to promote the best interests of children.

- A. The mediator should encourage the participants to explore the range of options available for separation or post-divorce parenting arrangements and their respective costs and benefits. Referral to a specialist in child development may be appropriate for these purposes. The topics for discussion may include, among others:
 1. information about community resources and programs that can help the participants and their children cope with the consequences of family reorganization and family violence;
 2. problems that continuing conflict creates for children's development and what steps might be taken to ameliorate the effects of conflict on the children;
 3. development of a parenting plan that covers the children's physical residence and decision-making responsibilities for the children, with appropriate levels of detail as agreed to by the participants;
 4. the possible need to revise parenting plans as the developmental needs of the children evolve over time; and
 5. encouragement to the participants to develop appropriate dispute resolution mechanisms to facilitate future revisions of the parenting plan
- B. The mediator should be sensitive to the impact of culture and religion on parenting philosophy and other decisions.
- C. The mediator shall inform any court-appointed representative for the children of the mediation. If a representative for the children participates, the mediator should, at the outset, discuss the effect of that participation on the mediation process and the confidentiality of

the mediation with the participants. Whether the representative of the children participates or not, the mediator shall provide the representative with the resulting agreements insofar as they relate to the children.

- D. Except in extraordinary circumstances, the children should not participate in the mediation process without the consent of both parents and the children's court-appointed representative.
- E. Prior to including the children in the mediation process, the mediator should consult with the parents and the children's court-appointed representative about whether the children should participate in the mediation process and the form of that participation.
- F. The mediator should inform all concerned about the available options for the children's participation (which may include personal participation, an interview with a mental health professional, or the mediator reporting to the parents, or a videotape statement) and discuss the costs and benefits of each with the participants.

Standard IX

A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly.

- A. As used in these Standards, child abuse or neglect is defined by applicable state law.
- B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve child abuse or neglect without appropriate and adequate training.
- C. If the mediator has reasonable grounds to believe that a child of the participants is abused or neglected within the meaning of the jurisdiction's child abuse and neglect laws, the mediator shall comply with applicable child protection laws.
 - 1. The mediator should encourage the participants to explore appropriate services for the family.
 - 2. The mediator should consider the appropriateness of suspending or terminating the mediation process in light of the allegations.

Standard X

A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly.

- A. As used in these Standards, domestic abuse includes domestic violence as defined by applicable state law and issues of control and intimidation.
- B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve domestic abuse without appropriate and adequate training.
- C. Some cases are not suitable for mediation because of safety, control or intimidation issues. A mediator should make a reasonable effort to screen for the existence of domestic abuse prior to entering into an agreement to mediate. The mediator should continue to assess for domestic abuse throughout the mediation process.
- D. If domestic abuse appears to be present the mediator shall consider taking measures to insure the safety of participants and the mediator including, among others:
 - 1. establishing appropriate security arrangements;
 - 2. holding separate sessions with the participants even without the agreement of all participants;
 - 3. allowing a friend, representative, advocate, counsel or attorney to attend the mediation sessions;
 - 4. encouraging the participants to be represented by an attorney, counsel or an advocate throughout the mediation process;
 - 5. referring the participants to appropriate community resources;
 - 6. suspending or terminating the mediation sessions, with appropriate steps to protect the safety of the participants.
- E. The mediator should facilitate the participants' formulation of parenting plans that protect the physical safety and psychological wellbeing of themselves and their children.

Standard XI

A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons.

- A. Circumstances under which a mediator should consider suspending or terminating the mediation, may include, among others:
 - 1. the safety of a participant or well-being of a child is threatened;
 - 2. a participant has or is threatening to abduct a child;
 - 3. a participant is unable to participate due to the influence of drugs, alcohol, or physical or mental condition;
 - 4. the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable;
 - 5. a participant is using the mediation to further illegal conduct;
 - 6. a participant is using the mediation process to gain an unfair advantage;
 - 7. if the mediator believes the mediator's impartiality has been compromised in accordance with *Standard IV*.
- B. If the mediator does suspend or terminate the mediation, the mediator should take all reasonable steps to minimize prejudice or inconvenience to the participants which may result.

Standard XII

A family mediator shall be truthful in the advertisement and solicitation for mediation.

- A. Mediators should refrain from promises and guarantees of results. A mediator should not advertise statistical settlement data or settlement rates.
- B. Mediators should accurately represent their qualifications. In an advertisement or other communication, a mediator may make reference to meeting state, national, or private organizational qualifications only if the entity referred to has a procedure for

qualifying mediators and the mediator has been duly granted the requisite status.

Standard XIII

A family mediator shall acquire and maintain professional competence in mediation.

- A. Mediators should continuously improve their professional skills and abilities by, among other activities, participating in relevant continuing education programs and should regularly engage in selfassessment.
- B. Mediators should participate in programs of peer consultation and should help train and mentor the work of less experienced mediators.
- C. Mediators should continuously strive to understand the impact of culture and diversity on the mediator's practice.

The *Model Standards* recognize the *National Standards for Court Connected Dispute Resolution Programs* (1992). There are also state and local regulations governing such programs and family mediators. The following principles of organization and practice, however, are especially important for regulation of mediators and court-connected family mediation programs. They are worthy of separate mention.

- A. Individual states or local courts should set standards and qualifications for family mediators including procedures for evaluations and handling grievances against mediators. In developing these standards and qualifications, regulators should consult with appropriate professional groups, including professional associations of family mediators.
- B. When family mediators are appointed by a court or other institution, the appointing agency should make reasonable efforts to ensure that each mediator is qualified for the appointment. If a list of family mediators qualified for court appointment exists, the requirements for being included on the list should be made public and available to all interested persons.
- C. Confidentiality should not be construed to limit or prohibit the effective monitoring, research, evaluation or monitoring of mediation programs by responsible individuals or academic institutions provided that no identifying information about any person involved in the mediation is

disclosed without their prior written consent. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the participants, to individual case files, observations of live mediations, and interviews with participants.

5.9 Family Mediation Standards

Overview and Definitions

Family and divorce mediation ("family mediation" or "mediation") is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants' voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements.

Family mediation is not a substitute for the need for family members to obtain independent legal advice or counseling or therapy. Nor is it appropriate for all families. However, experience has established that family mediation is a valuable option for many families because it can:

1. increase the self-determination of participants and their ability to communicate;
2. promote the best interests of children; and
3. reduce the economic and emotional costs associated with the resolution of family disputes.

Effective mediation requires that the family mediator be qualified by training, experience

and temperament; that the mediator be impartial; that the participants reach their decisions voluntarily; that their decisions be based on sufficient factual data; that the mediator be aware of the impact of culture and diversity; and that the best interests of children be taken into account. Further, the mediator should also be prepared to identify families whose history includes domestic abuse or child abuse.

These *Model Standards of Practice for Family and Divorce Mediation* ("*Model Standards*") aim to perform three major functions:

1. to serve as a guide for the conduct of family mediators;
2. to inform the mediating participants of what they can expect; and

3. to promote public confidence in mediation as a process for resolving family disputes.

The *Model Standards* are aspirational in character. They describe good practices for family mediators. They are not intended to create legal rules or standards of liability.

The *Model Standards* include different levels of guidance:

1. Use of the term "may" in a *Standard* is the lowest strength of guidance and indicates a practice that the family mediator should consider adopting but which can be deviated from in the exercise of good professional judgment.
2. Most of the *Standards* employ the term "should" which indicates that the practice described in the *Standard* is highly desirable and should be departed from only with very strong reason.
3. The rarer use of the term "shall" in a *Standard* is a higher level of guidance to the family mediator, indicating that the mediator should not have discretion to depart from the practice described.

Standard I

A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.

- A. Self-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions.
- B. The primary role of a family mediator is to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others and to facilitate agreement among the participants.
- C. A family mediator should inform the participants that they may seek information and advice from a variety of sources during the mediation process.
- D. A family mediator shall inform the participants that they may withdraw from family mediation at any time and are not required to reach an agreement in mediation.

- E. The family mediator's commitment shall be to the participants and the process. Pressure from outside of the mediation process shall never influence the mediator to coerce participants to settle.

Standard II

A family mediator shall be qualified by education and training to undertake the mediation.

- A. To perform the family mediator's role, a mediator should:
1. have knowledge of family law;
 2. have knowledge of and training in the impact of family conflict on parents, children and other participants, including knowledge of child development, domestic abuse and child abuse and neglect;
 3. have education and training specific to the process of mediation;
 4. be able to recognize the impact of culture and diversity.
- B. Family mediators should provide information to the participants about the mediator's relevant training, education and expertise.

Standard III

A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.

- A. Before family mediation begins a mediator should provide the participants with an overview of the process and its purposes, including:
1. informing the participants that reaching an agreement in family mediation is consensual in nature, that a mediator is an impartial facilitator, and that a mediator may not impose or force any settlement on the parties;
 2. distinguishing family mediation from other processes designed to address family issues and disputes;

- 3.informing the participants that any agreements reached will be reviewed by the court when court approval is required;
 - 4.informing the participants that they may obtain independent advice from attorneys, counsel, advocates, accountants, therapists or other professionals during the mediation process;
 - 5.advising the participants, in appropriate cases, that they can seek the advice of religious figures, elders or other significant persons in their community whose opinions they value;
 - 6.discussing, if applicable, the issue of separate sessions with the participants, a description of the circumstances in which the mediator may meet alone with any of the participants, or with any third party and the conditions of confidentiality concerning these separate sessions;
 - 7.informing the participants that the presence or absence of other persons at a mediation, including attorneys, counselors or advocates, depends on the agreement of the participants and the mediator, unless a statute or regulation otherwise requires or the mediator believes that the presence of another person is required or may be beneficial because of a history or threat of violence or other serious coercive activity by a participant.
 - 8.describing the obligations of the mediator to maintain the confidentiality of the mediation process and its results as well as any exceptions to confidentiality;
 - 9.advising the participants of the circumstances under which the mediator may suspend or terminate the mediation process and that a participant has a right to suspend or terminate mediation at any time.
- B. The participants should sign a written agreement to mediate their dispute and the terms and conditions thereof within a reasonable time after first consulting the family mediator.
- C. The family mediator should be alert to the capacity and willingness of the participants to mediate before proceeding with the mediation and throughout the process. A mediator should not agree to conduct the

mediation if the mediator reasonably believes one or more of the participants is unable or unwilling to participate.

- D. Family mediators should not accept a dispute for mediation if they cannot satisfy the expectations of the participants concerning the timing of the process. **Standard IV**

A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator. The participants shall be free to retain the mediator by an informed, written waiver of the conflict of interest. However, if a bias or conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the participants.

- A. Impartiality means freedom from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual.
- B. Conflict of interest means any relationship between the mediator, any participant or the subject matter of the dispute, that compromises or appears to compromise the mediator's impartiality.
- C. A family mediator should not accept a dispute for mediation if the family mediator cannot be impartial.
- D. A family mediator should identify and disclose potential grounds of bias or conflict of interest upon which a mediator's impartiality might reasonably be questioned. Such disclosure should be made prior to the start of a mediation and in time to allow the participants to select an alternate mediator.
- E. A family mediator should resolve all doubts in favor of disclosure. All disclosures should be made as soon as practical after the mediator becomes aware of the bias or potential conflict of interest. The duty to disclose is a continuing duty.
- F. A family mediator should guard against bias or partiality based on the participants' personal characteristics, background or performance at the mediation.

- G. A family mediator should avoid conflicts of interest in recommending the services of other professionals.
- H. A family mediator shall not use information about participants obtained in a mediation for personal gain or advantage
- I. A family mediator should withdraw pursuant to *Standard IX* if the mediator believes the mediator's impartiality has been compromised or a conflict of interest has been identified and has not been waived by the participants.

Standard V

A family mediator shall fully disclose and explain the basis of any compensation, fees and charges to the participants.

- A. The participants should be provided with sufficient information about fees at the outset of mediation to determine if they wish to retain the services of the mediator.
- B. The participants' written agreement to mediate their dispute should include a description of their fee arrangement with the mediator.
- C. A mediator should not enter into a fee agreement which is contingent upon the results of the mediation or the amount of the settlement.
- D. A mediator should not accept a fee for referral of a matter to another mediator or to any other person.
- E. Upon termination of mediation a mediator should return any unearned fee to the participants.

Standard VI

A family mediator shall structure the mediation process so that the participants make decisions based on sufficient information and knowledge.

- A. The mediator should facilitate full and accurate disclosure and the acquisition and development of information during mediation so that the participants can make informed decisions. This may be accomplished by encouraging participants to consult appropriate experts.

- B. Consistent with standards of impartiality and preserving participant self-determination, a mediator may provide the participants with information that the mediator is qualified by training or experience to provide. The mediator shall not provide therapy or legal advice.
- C. The mediator should recommend that the participants obtain independent legal representation before concluding an agreement.
- D. If the participants so desire, the mediator should allow attorneys, counsel or advocates for the participants to be present at the mediation sessions.
- E. With the agreement of the participants, the mediator may document the participants' resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed.

Standard VII

A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants.

- A. The mediator should discuss the participants' expectations of confidentiality with them prior to undertaking the mediation. The written agreement to mediate should include provisions concerning confidentiality.
- B. Prior to undertaking the mediation, the mediator should inform the participants of the limitations of confidentiality such as statutory, judicially or ethically mandated reporting.
- C. The mediator shall disclose a participant's threat of suicide or violence against any person to the threatened person and the appropriate authorities if the mediator believes such threat is likely to be acted upon as permitted by law.
- D. If the mediator holds private sessions with a participant, the obligations of confidentiality concerning those sessions should be discussed and agreed upon prior to the sessions.

E. If subpoenaed or otherwise noticed to testify or to produce documents the mediator should inform the participants immediately. The

mediator should not testify or provide documents in response to a subpoena without an order of the court if the mediator reasonably believes doing so would violate an obligation of confidentiality to the participants.

Standard VIII

A family mediator shall assist participants in determining how to promote the best interests of children.

- A. The mediator should encourage the participants to explore the range of options available for separation or post-divorce parenting arrangements and their respective costs and benefits. Referral to a specialist in child development may be appropriate for these purposes. The topics for discussion may include, among others:
- 1.information about community resources and programs that can help the participants and their children cope with the consequences of family reorganization and family violence;
 - 2.problems that continuing conflict creates for children's development and what steps might be taken to ameliorate the effects of conflict on the children;
 - 3.development of a parenting plan that covers the children's physical residence and decision-making responsibilities for the children, with appropriate levels of detail as agreed to by the participants;
 - 4.the possible need to revise parenting plans as the developmental needs of the children evolve over time; and
 - 5.encouragement to the participants to develop appropriate dispute resolution mechanisms to facilitate future revisions of the parenting plan
- B. The mediator should be sensitive to the impact of culture and religion on parenting philosophy and other decisions.
- C. The mediator shall inform any court-appointed representative for the children of the mediation. If a representative for the children

participates, the mediator should, at the outset, discuss the effect of that participation on the mediation process and the confidentiality of the mediation with the participants. Whether the representative of the children participates or not, the mediator shall provide the representative with the resulting agreements insofar as they relate to the children.

- D. Except in extraordinary circumstances, the children should not participate in the mediation process without the consent of both parents and the children's court-appointed representative.
- E. Prior to including the children in the mediation process, the mediator should consult with the parents and the children's court-appointed representative about whether the children should participate in the mediation process and the form of that participation.
- F. The mediator should inform all concerned about the available options for the children's participation (which may include personal participation, an interview with a mental health professional, or the mediator reporting to the parents, or a videotape statement) and discuss the costs and benefits of each with the participants.

Standard IX

A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly.

- A. As used in these Standards, child abuse or neglect is defined by applicable state law.
- B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve child abuse or neglect without appropriate and adequate training.
- C. If the mediator has reasonable grounds to believe that a child of the participants is abused or neglected within the meaning of the jurisdiction's child abuse and neglect laws, the mediator shall comply with applicable child protection laws.
 - 1. The mediator should encourage the participants to explore appropriate services for the family.

2. The mediator should consider the appropriateness of suspending or terminating the mediation process in light of the allegations.

Standard X

A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly.

- A. As used in these Standards, domestic abuse includes domestic violence as defined by applicable state law and issues of control and intimidation.
- B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve domestic abuse without appropriate and adequate training.
- C. Some cases are not suitable for mediation because of safety, control or intimidation issues. A mediator should make a reasonable effort to screen for the existence of domestic abuse prior to entering into an agreement to mediate. The mediator should continue to assess for domestic abuse throughout the mediation process.
- D. If domestic abuse appears to be present the mediator shall consider taking measures to insure the safety of participants and the mediator including, among others:
 1. establishing appropriate security arrangements;
 2. holding separate sessions with the participants even without the agreement of all participants;
 3. allowing a friend, representative, advocate, counsel or attorney to attend the mediation sessions;
 4. encouraging the participants to be represented by an attorney, counsel or an advocate throughout the mediation process;
 5. referring the participants to appropriate community resources;
 6. suspending or terminating the mediation sessions, with appropriate steps to protect the safety of the participants.
- E. The mediator should facilitate the participants' formulation of parenting plans that protect the physical safety and psychological wellbeing of themselves and their children.

Standard XI

A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons.

- A. Circumstances under which a mediator should consider suspending or terminating the mediation, may include, among others:
 - 1. the safety of a participant or well-being of a child is threatened;
 - 2. a participant has or is threatening to abduct a child;
 - 3. a participant is unable to participate due to the influence of drugs, alcohol, or physical or mental condition;
 - 4. the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable;
 - 5. a participant is using the mediation to further illegal conduct;
 - 6. a participant is using the mediation process to gain an unfair advantage;
 - 7. if the mediator believes the mediator's impartiality has been compromised in accordance with *Standard IV*.
- B. If the mediator does suspend or terminate the mediation, the mediator should take all reasonable steps to minimize prejudice or inconvenience to the participants which may result.

Standard XII

A family mediator shall be truthful in the advertisement and solicitation for mediation.

- A. Mediators should refrain from promises and guarantees of results. A mediator should not advertise statistical settlement data or settlement rates.
- B. Mediators should accurately represent their qualifications. In an advertisement or other communication, a mediator may make reference to meeting state, national, or private organizational qualifications only if the entity referred to has a procedure for

qualifying mediators and the mediator has been duly granted the requisite status.

Standard XIII

A family mediator shall acquire and maintain professional competence in mediation.

- A. Mediators should continuously improve their professional skills and abilities by, among other activities, participating in relevant continuing education programs and should regularly engage in selfassessment.
- B. Mediators should participate in programs of peer consultation and should help train and mentor the work of less experienced mediators.
- C. Mediators should continuously strive to understand the impact of culture and diversity on the mediator's practice.

The *Model Standards* recognize the *National Standards for Court Connected Dispute Resolution Programs* (1992). There are also state and local regulations governing such programs and family mediators. The following principles of organization and practice, however, are especially important for regulation of mediators and court-connected family mediation programs. They are worthy of separate mention.

- A. Individual states or local courts should set standards and qualifications for family mediators including procedures for evaluations and handling grievances against mediators. In developing these standards and qualifications, regulators should consult with appropriate professional groups, including professional associations of family mediators.
- B. When family mediators are appointed by a court or other institution, the appointing agency should make reasonable efforts to ensure that each mediator is qualified for the appointment. If a list of family mediators qualified for court appointment exists, the requirements for being included on the list should be made public and available to all interested persons.
- C. Confidentiality should not be construed to limit or prohibit the effective monitoring, research, evaluation or monitoring of mediation programs by responsible individuals or academic institutions provided that no identifying information about any person involved in the mediation is

disclosed without their prior written consent. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the participants, to individual case files, observations of live mediations, and interviews with participants.

Written Materials for Sample Mediation, in 7 steps, with Explanation by Michael Aurit, part 1

5.10 Sample Introductory Session

In circumstances where the parties are representing their own interests in mediation, are not experienced negotiators, when information and documentation needs to be developed, and when parties are uncertain whether they want to proceed with actual mediation negotiations, it is common to have a more comprehensive and isolated introductory mediation session. This is especially common in family and divorce mediation. A model agenda for such a comprehensive introductory session follows:

1. Welcome and Introductions

2. Introductory Phase: Easy, Educational, Confidential

a. Prior Contacts

b. Tell Me About You

(Ask about the participants as people, e.g. employment, time lived there, free time, etc., for rapport.)

c. Tell Me About Your Situation

(Ask: "Tell me about your situation?" or, "How can I help you?")

3. An Overview of Mediation

a. Definition (also not arbitration, representation, or therapy)

b. Voluntary

c. Collaborative

d. Controlled

e. Impartial - Neutral

f. Confidential

g. Informed

h. Safe

4. Mediation Fees

- a. How long will it take?
- b. How much will it cost?
- c. Who pays?
- d. Agreement to Mediate
- e. Deposit, billing, responsibility between participants

5. Attorneys and Legal Process

- a. Encourage legal counsel; advise legal review; your choice ultimately
- b. Best use is 1-4 hours, at beginning and to review draft agreement
- c. Send confirming letter to representational counsel
- d. Additional experts, individually or jointly, confidential, non-binding (as you desire)

6. Memorializing Progress - Work Product

- a. Letters of progress
- b. Memorandum of Understanding (Settlement Agreement) draft to final c. Legal process

7. Next Session (future pace experience)

- a. Sign Agreement to Mediate
- b. Review Ground Rules
- c. Share Perspectives
- d. Review Information and Documentation
- e. Review and Expand Points of Agreement
- f. Confirm Overall Mediation Agenda
- g. On each issue: your interests and your principles and standards

8. Homework: All Possible Points of Agreement

5.11 Letter Following Initial Meeting

Here is a sample letter following a comprehensive initial introductory session:

Client 2 address

Client 1

address Re:

Mediation

Dear 1 and 2:

I enjoyed meeting with you on _____ for your initial mediation consultation.

As we discussed, it is my request that you complete and return the questionnaire and budget forms I gave to you at our next meeting. Please also provide all of the indicated documentation, including, minimally, tax returns for the past two years; recent pay statements; debt and account statements; any pension plan statements; and all real property ownership, debt and valuation information.

I anticipate that we will begin your next meeting by reviewing and signing the Mediation Retainer Agreement. I will then want to move on to consider some possible "ground rules" for our discussions and the resolution of any pressing issues.

After sharing and reviewing the documentation you have provided, I anticipate that we will begin with each of you describing the agreement that you would like to create. I will also want to hear from each of you as to all issues that you think you may agree on.

[I am enclosing a copy of my letter to your respective legal counsel advising them of our mediation work and clarifying opportunities for their assistance.]

Please call me with any questions that you have. I look forward to seeing you again on _____. I appreciate the opportunity to work with you both.

Very truly yours,

James C. Melamed, J.D.

5.12 Sample Ground Rules

The mediator may find it advantageous to assist the participants to establish a few behavioral guidelines for their discussions. Any such "ground rules" should be compassionately enforced as a means of keeping the participants on track. Ground rules may be introduced by saying, for example: "Lots of people find some ground rules helpful for their discussions. These are some that I have developed over time. Would you mind taking a look at these and letting me know if these guidelines would work for you, and of any additional understandings that you would like."

Suggested Ground Rules

- You will have a full opportunity to speak on each issue presented for discussion - there is no need to rush or interrupt.
- You are encouraged to ask genuine "questions of clarification." Please avoid asking "questions of attack."
- Please use each other's first names, not the pronouns "he" or "she."
- Speak for yourself only.

- Appeals and attempts to convince should be made to each other and not to the mediator.
- If something is not working for you, speak up.
- Try to avoid establishing hard positions, expressing yourself instead in terms of your interests, intentions, and the outcomes that you would like to create.

5.13 Resolving Pressing Issues

Sometimes it is necessary for the mediator to assist parties to resolve "pressing issues" simply so they can have breathing time and sufficient comfort to do a good job reaching agreement on the full range of their substantive issues. What is also true is that, for some parties, "all of the issues are pressing issues." Using discretion, the mediator may want to suggest that certain interim agreements be reached simply to allow the parties to comfortably and competently mediate. Parties will often be hesitant to reach such agreements fearing that they will set dangerous precedent for themselves. They may also fear reaching interim agreements that, with fuller consideration of the issue, turn out to be clearly inadequate or inappropriate resolutions.

To address these types of concerns and to allow "pressing issues" to be resolved as easily and quickly as possible, it is recommended that pressing issues be resolved according to the following guidelines:

- The resolutions shall be interim only, either for the duration of the mediation or until the parties agree otherwise or a court orders otherwise;

- The resolutions shall not set precedent in any way nor be admissible in any court or other contested proceeding, except for enforcement, if necessary; and
- The eventual resolution to the issue, be that by the parties' agreement or court order, shall be retroactively applied to the beginning date of the interim agreement, to the extent that this can be accomplished. (Thus, for example, if the parties agree to interim wages of \$4,000 monthly and their eventual agreement or the court's order or judgment is \$5,000 monthly, then there would be a payment of \$1,000 additional for each month of the interim agreement.)

Section 6

Mediation Strategy

One way of thinking about mediation practice is to consider various styles or approaches to facilitating agreement. Three mediation approaches are here considered:

1. The Interest-Based Option Generation Approach; 2.

The Hypothesis Generation and Testing Approach; and

3. The Doubt and Dissonance Approach.

To some extent, mediator approaches will be determined by the nature of the dispute and the parties' expectations. For example, in a distributive personal injury case, there may be a tendency toward the utilization of doubt and dissonance as a primary means of inducing the flexibility necessary for the parties to reach agreement. In contexts where speed and efficiency of resolution are important or where the parties appear unable to effectively work together, a mediator centered hypothesis generation and testing style may make sense. In situations where there are multiple issues, the parties have the time and a willingness to work together or there is interest in an ongoing relationship, an interest- based option generation

approach may lead to what the parties perceive to be both their best possible process and result. In taking any specific mediation approach, the mediator should be wary of prematurely evaluating the situation or imposing one's own biases about how certain types of conflict can best be resolved on the parties.

Another way of viewing mediation styles is to consider the various techniques and tools involved in each approach in their own right. Each specific facilitative tool may be able to be utilized either as part of an overall conception approach or in a more ad hoc, intuitive way. In being open to placing the various techniques in your mediation tool box, it is perhaps most important to understand what each technique can accomplish. A good part of effective mediation, like any other complex challenge, is perceiving what needs to be accomplished and being aware of the various tools and techniques that can be utilized to accomplish the desired end. In this sense, effectively organizing one's toolbox is as important as the tools and techniques themselves. Consider organizing your toolbox by purposes, such as "rapport development techniques;" "identifying agreement direction techniques;" "creating flexibility techniques;" "empowerment techniques"

and the like. Unquestionably, the most valuable techniques of all are "techniques for when you don't know what to do next."

6.1 Interests and Options

The Interest-Based Option Generation Style may be viewed as the most empowering of, and dependent upon, the parties themselves for coming up with their own solutions. One way of thinking about this approach is to imagine a series of discussions (or frames) that you as mediator believe will have a good chance of assisting the parties themselves to discover what they perceive to be their fairest and most constructive agreement. The mediator earns permission to guide the parties through these discussion frames by first being responsive to whatever is going on for the parties. It is critical that the mediator meet the parties exactly where they are at, resolving that issue or energy, in order to gain permission to take the facilitative lead. A sample interest-based option generation approach might include the following discussion frames:

Informed Consent as to Process

(the process is always negotiable and must be agreed to)

Sharing Perspectives

(separating relational issues from substantive issues; discuss both, just separately)

Remember the Common Ground

(common interests, interdependence and initial points of agreement)

Establish a Problem-Solving Agenda (questions seeking solutions)

Identify Desired Information and Documentation

Clarify Desired Outcomes, Interests and Positive Intentions

Develop Options

(based upon outcomes, interests and positive intentions; separate from evaluation process)

Select from Options

(Evaluate based upon participant desires, criteria, standards, principle, rationale or rationalization -- and considering personal, procedural and substantive BATNAs)

Integration and Finalization

(Any possible improvement; drafting, review, revision, implementation)

Let's now focus on the "agreement facilitation machine" of this model, beginning with the identification of outcomes, interests and positive intentions to give the parties' agreement direction.

Identification of Outcomes, Interests and Positive Intentions

The mediator cannot provide direction for the content of the parties' agreement. That would be a violation of the mediator's neutrality. Perhaps the most direct way to assist the parties to provide the needed direction for their agreement is to simply ask them: "On this issue, what did you want to create?" To the extent that the parties respond in positional (as opposed to experiential) terms, the mediator is wise to assist the parties to go beneath their positional demands to their underlying interests. Perhaps the easiest way to do this is to ask: "If you had your [positional outcome], what would be satisfied?" To the extent that the parties answer in terms of negative interests (I would avoid this or that) or respond with "revenge motives," the mediator can again ask, "Imagine that you were successful in [avoiding _____ or in getting your revenge], what would you then have?" Through such questioning, you can assist parties to recognize that even negative interests and revenge motives can be appreciated in terms of their underlying positive intentions, such as a desire for acknowledgment, appreciation, safety, security or respect. So reframed, the mediation effort can become a joint search for the mutually acceptable satisfaction of the parties' identified positive intentions. This reframing of the entire mediation effort can dramatically shift the parties' and mediator's experience of the mediation process.

Development of Options

Brainstorming possible solutions to satisfy the parties desired outcomes, underlying interests and positive intentions is central to the Interest-Based

Option Generation Style. This is not to say that there should be brainstorming upon each and every issue. Rather, the parties are assisted to generate a full range of options on the most important substantive issues before them. The concept of brainstorming is that of avoiding premature evaluation by generating all possible solutions before beginning evaluation. When this is done, it is often the case that the ultimate solution is a "package deal," including components of a number of the generated possibilities.

Selection of Options

In contrast to Fisher and Ury's concept of selecting from among options based upon "objective criteria" (standards independent of the will of any individual party), I would like to suggest that mediating parties often make their option selection decisions based upon standards other than "objective criteria." What I offer is that mediating parties commonly make their option selection decisions based upon very subjective and idiosyncratic criteria, standards, principles, rationales or rationalizations. The key point to appreciate here is that parties in mediation will only move to agreement when they can come up with some reasoning to explain to themselves and to significant others why accepting a certain arrangement is a good decision for them. It is this ability to explain that makes the movement to agreement safe.

The mediator is also wise to appreciate that parties are always making their option selection decisions based upon consideration of their substantive, procedural and experiential BATNAs (perceived best alternative to reaching agreement in the present negotiation). In seeking to assist parties to select from among identified options, I will often ask them to first identify any "easy agreements," each option being considered in its own right. I will then commonly suggest that the parties consider any possible "package deals." This inquiry stimulates integrative thinking. This can be a good "homework" item. I may then ask the parties to "prioritize" the remaining items to see if any exchanges may be stimulated by better understanding that which is most important to each party.

Integration and Finalization

Prior to completing discussion of a topic or the mediation as a whole, I like to ask the question: "Can we do any better in a way that may be acceptable to you both (all)." If the answer is "yes," then I say then that: "we are not yet done working." If the answer is "no," I confirm: "then you are telling me that we have reached what you perceive to be the best possible mutually acceptable agreement?" With the parties' gentle head nods "yes," I conclude that we have in fact done our best.

6.2 Hypothesis Generation & Testing

Mediation Facilitation as a Process of Successive Approximation

One way of thinking about your agreement mediative facilitation work is to imagine yourself working in a three-dimensional forest with your goal being to assist the parties to find their "golden path" to their "pot of gold" (what they perceive to be their most constructive and fairest possible agreement.) This approach to mediation is strangely similar to the game of "Twenty Questions."

The way that you assist the parties to find the "golden path" and their "pot of gold" is through a process of "successive approximation." You successively approximate (steadily getting closer and closer) where their "path" and "pot" are. The way that you do this is by asking questions. Your questioning leads to ever-more-accurate hunches or hypotheses as to their perceived best solution. You begin with open-ended questions which lead to increasingly focused "hypothesis testing" questions. To set the stage for all this questioning, it is recommended that you also emphasize three key facilitative techniques: normalization; mutualization and strategic summarization.

Overview of Hypothesis Generation and Testing Style Facilitative Model:

Strategic Summarization Hypotheses Development Hypotheses Testing Revise Hypotheses Test Revised Hypotheses Confirmation and Integration

Strategic Summarization

In facilitating agreement, it is important to appreciate that the mediator does not reflect back all information from the parties as if it was all of equal value. Rather, the concept of strategic summarization is that the mediator reflects back only that information that is "useful" in assisting the parties to reach agreement. Further, the mediator reflects such useful information back in what the mediator perceives to be the most useful way possible. Thus, using this approach, the mediator lets all kinds of accusations, demands, and expressed emotions go right by (you may want to think of being a "Teflon mediator") only reflecting back the bits and pieces that hold some prospect of actually assisting the parties to move forward to agreement.

Hypothesis Development

So, hearing from the parties, and reflecting back for further definition that information that seems useful, the mediator comes to develop "hypotheses" both as to what type of resolution will satisfy each party and both parties. The mediator's evolving hypotheses about what it is going to take to get agreement are the result of identifying the parties' desired outcomes, their interests, their underlying positive intentions and the principles (standards, criteria and rationales) that make sense to them.

Hypotheses Testing

It is the mediator's evolving hypotheses that drive his or her questioning. Questions allow the mediator to test, revise and refine their hypotheses about what it is going to take to get agreement. The revised and refined hypotheses are then further tested until it seems that the "pot of gold" has been identified.

Confirmation and Integration

Under the mediation as successive approximation approach, the mediator helps the parties to identify their best possible (available) agreement. The mediator in this facilitative model seeks to identify what seems to be the maximized integration of the parties' desired outcomes, underlying interests,

positive intentions and principles. This does not mean that all parties will choose to accept that apparently best available agreement. Whether there will be enough "gold" in the "pot" for each party to in fact commit themselves to agreement is an issue that is, appropriately, within the domain and control of each individual party. Under this approach, all the mediator can do is give the parties a best possible opportunity to agree by identifying an apparent maximizing agreement.

6.3 **Doubt and Dissonance**

Creating a Healthy Tension of the Mind

The reality is that most mediating parties need some encouragement to get off of their positional view of the situation and positional approaches to identifying solutions. To help motivate parties to shift, the mediator may seek to create some measure of doubt or dissonance in the parties' thinking. Some of the most powerful mediation techniques of all are "mutualized dissonance producing techniques." These techniques bear down upon all parties to the conflict, simultaneously inducing them to be more flexible. Because the techniques operate upon all of the parties, they are preferable in the sense that they finesse the issue of potential mediator partiality. It is appropriate, probably preferable, to offer these techniques to the parties in joint session.

Sample mutualized dissonance techniques include the following:

Two Sets of Arrangements

Ask each party to develop at least two acceptable sets of solutions to a defined issue. Each party will come up with the first acceptable set in no time (their well-rehearsed positions). They will need to stretch to come up with a second acceptable set of alternatives and this stretching will create some desirable room for additional discussions.

The Exchange Environment

The mediator can create movement toward the center by asking: "What are you prepared to give to the other that you believe they desire to get what

you want?" and "What would you need to receive from the other to agree to what they would like?"

The Hypothetical Question

The hypothetical question introduces a new fact or set of facts not previously assumed. The question is whether the assumption of this new information would lead to a new conclusion.

Fact-Finding Analogue

On challenging factual issues or when the parties or their attorneys have widely divergent conclusions as to value or "the law," the mediator may suggest the possibility of the parties (and their attorneys) submitting summaries of their respective arguments to one or more mutually trusted experts for consideration and the offering of a confidential, non-binding, non-admissible recommended settlement.

Mini-Trial Analogue

In situations where parties have advisory legal counsel outside the mediation who are advising the parties to take extreme positions, the mediator may consider recommending that legal counsel be invited to attend the next mediation session so that they can respectively summarize their perspectives for both parties, opposing legal counsel and the mediator. Commonly, legal counsel will temper their position somewhat when opposing legal counsel is present. Doubt and dissonance will typically be created within each party based upon their experiencing opposing legal counsel's capable presentation.

"It Always Amazes Me"

This technique can effectively follow either the mini-trial analogue described above or the parties' reports of the polarized conclusions of legal counsel. It goes something like this: "It always amazes me how such high educated, skilled and competent legal counsel can come to such vastly different conclusions."

"If You Were to Reverse Representational Roles"

The mediator can ask the parties or their representative legal counsel whether, if they were to reverse roles and be arguing the other side, the arguments and suggestions would be very much different, and if so, how?

The Parade of Horribles

This technique can follow "It Always Amazes Me" or be used on its own. After hearing each party's prediction of the extreme legal position or outcome they believe they are entitled to, the mediator may ask: "Understanding then you have very different legal perspectives, can I ask you if your attorneys are prepared to guarantee those outcomes? Will they guarantee that the result won't be ½ or double; 1/3 or triple; 1/4 or quadruple? And have they said how much it would cost to find out if they are right? And are they prepared to guarantee those costs? That the costs won't be double? Triple? Quadruple? And have they said how long it will take to find out? Can they guarantee that? And have they commented on the likelihood of compliance with a legally imposed result, especially if that result is extreme either way? Have they talked with you about bankruptcy? Or the risk of appeal? Have they said how much the cost of an appeal might be? Or the possibility of a second appeal? A third appeal? And, I am wondering, what will the impact of all of this on your relationship? On your family? Friends? Colleagues? What about the opportunities you will give up by perpetuating this conflict? And the stress? Is this conflict making your life less or more stressful? And all of that to roll the dice in court? Remember, it is you, not your attorneys, who will be living with all of this and I am wondering, given all of the costs and uncertainty, if there might be some possible flexibility in the system, perhaps along the lines of considering . . . "

To the extent that creating doubt or dissonance may result in an individual party losing face, it may be best to create doubt and dissonance in caucus. Individual doubt and dissonance techniques should not be utilized until effective rapport has been established with the party. Highlighting a party's vulnerabilities before effective rapport is established will seem like an attack. Highlighting a party's vulnerabilities after effective rapport is established will seem like you are being a good friend who cares enough about the party to give them some potentially challenging information, in confidence, so that they may make a wise decision under challenging circumstances.

It is, also challenging to induce doubt or dissonance in an individual party consistent with the mediator's impartial role. Presumably, if the mediator takes this approach with one party, he or she is prepared and willing do so with each mediating party. A good example of an individualized doubt and dissonance technique is what I call "**The Eight Questions:**"

1. What do you see as the strengths of your case (or situation)?
2. What do you see as the weaknesses of your case (or situation)?
3. What do you see as the strengths of the other's case (or situation)?
4. What do you see as the weaknesses of the other's case (or situation)?
5. How do you think a judge will view this case (situation) and rule?
6. What is the best ruling you could reasonably expect?
7. What is the worst ruling you could reasonably expect?
8. How do you think the other party would answer these questions?

When utilizing doubt and dissonance techniques, be aware that you are working with the "soft underbelly" of the party's situation, so push lightly. You only need to raise doubt so strongly as necessary to create the "glimmer of recognition" in the party's eyes. If you push any harder, you will create unnecessary resistance to both the concept you are offering and, even worse, to you as mediator.

6.4 Emotional/Relational Issues

There are various approaches to managing mediating parties' past-based emotional and relational issues. Here we are talking about the charged outbursts, passive aggressive behavior and other non-productive and potentially destructive behaviors and expressions common to the mediation of matters between parties who have a difficult history together.

Note that, if the parties desire to have a continuing relationship and the quality of their relations is an issue that they want to discuss, that will be treated as any other substantive issue. What we are talking about here is how can the mediator work through the tension and attacks we so commonly experience. I would like to offer the following approaches:

- A. The Teflon Mediator**
- B. The Relevancy Check**
- C. Use of Ground Rules**
- D. Backtracking**
- E. Normalization**
- F. Mutualization**
- G. Acknowledgment Processes**

H. Referral

The Teflon Mediator

The Teflon mediator concept has already been discussed above in the context of strategic summarization. Here the mediator essentially ignores all of the parties' non-productive and potentially destructive behavior and expressions, choosing instead to positively reinforce and respond to whatever potentially useful morsels may be occasionally expressed by the parties. It is as if the mediator has selective hearing and can only hear that information that, reflected back, may assist the parties to move toward agreement. By ignoring the non-productive behavior and expressions, the mediator, over time, comes to lessen and, hopefully, extinguish the behavior by not reinforcing it. The risk with this approach is that the parties may experience themselves to be ignored and their concerns unattended.

The Relevancy Check

The relevancy check is an extremely powerful process management technique. Rather than ignoring the non-productive and destructive behavior and expressions, this approach confronts the behavior or expression asking a rhetorical question: "How is [what you are doing right now or what you are saying right now or what is going on right now] taking us closer to your best agreement . . . (pause), because, if it is not, I would ask that we get back on track by . . ."

An alternative is that of basing the relevancy check on a ground rule. For example, I will commonly encourage the parties to establish a ground rule that: "We agree to work for what we perceive to be our most constructive and fairest agreement." Establishing that process agreement, I can then offer a relevancy check which states: "How is [what you are doing right now or what you are saying right now or what is going on right now] taking us closer to what you perceive to be your most constructive and fairest agreement. . . (pause), because, if it is not, I would ask that we get back on track by . . ."

Another option is that of basing the relevancy check upon the specific outcomes, interests, or positive intentions you have heard from the party overall or on a particular topic or issue. This version is perhaps the most powerful of all in the sense that it is not based on abstractions such as "best

agreement" or "perceived most constructive and fairest agreement, but, rather, on the actual experiential outcomes, interests or intentions of these specific parties. Such a relevancy check might be: "How is [what you are doing right now or what you are saying right now or what is going on right now] getting you John the specific outcomes you said you want (list) and getting you Mary the specific outcomes that you said you want (list).. (pause), because, if it is not, I would ask that we get back on track by"

In each version of the relevancy check, the mediator is screening out the undesirable behavior or expression by asking the question of how it is related to the ends that the parties came to mediation to achieve. This technique is based upon the task-oriented nature (reaching an agreement) or mediation and is a very powerful transitional device to reestablishing control and progress.

Ground Rules

Reminding mediation participants about their agreed-upon ground rules is another effective technique for managing emotional and relational issues. For example, if a party continues to interrupt the other, we may say: "Did you still want to have that ground rule about not interrupting each other?" Or we might inquire: "Help me again, what was the understanding that you wanted to have about your respective abilities to interrupt one another?" Notice that in each case, we are seeking to bring the issue into the participants' awareness (especially the one doing the interrupting) in a way that does not make the wrong. If a party feels shamed, you run the risk of paying a dear price in terms of perceived partiality. For this reason, it is best to raise the process agreement only so forcefully as to make your point and then to move on rather quickly so as to not make the "offending party" wrong. One way of preparing for such strategic utilization of ground rules is to introduce suggested ground rules in this kind of way: "Lots of folks find that having some sort of understanding about the way we will talk about issues help. I have thus, over the years, developed a set of sample ground rules for participants' consideration. Why don't you take a look at these possibilities and let me know whether any or all might work, and also of any changes or additions that you would like to make." This allows for a very efficient, non-imposing introduction of ground rule possibilities. Many parties simply respond: "These would be fine with me."

Way back when, I remember starting many mediations suggesting that the parties develop ground rules from scratch. My thought then was that participants might develop their agreement-reaching capacity on these process issues before getting into the substantive issues (the ones they really care about). This worked to some extent, in the sense that the parties got involved. What I also found was that they got resentful at spending so much time (and money) identifying their process understandings. It is for this reason that I have shifted to the more suggestive sample ground rules, as follow:

Sample Suggested Ground Rules

The mediator may find it advantageous to assist the participants to establish a few behavioral guidelines for their discussions. Any such "ground rules" should be compassionately enforced as a means of keeping the participants on track. Ground rules may be introduced by saying, for example: "Lots of people find some ground rules helpful for their discussions. These are some that I have developed over time. Would you mind taking a look at these and letting me know if these guidelines would work for you, and of any additional understandings that you would like."

Suggested Ground Rules

- You will have a full opportunity to speak on each issue presented for discussion - there is no need to rush or interrupt.
- You are encouraged to ask genuine "questions of clarification." Please avoid asking "questions of attack."
- Please use each other's first names, not the pronouns "he" or "she."
- Speak for yourself only.

- Appeals and attempts to convince should be made to each other and not to the mediator.
- If something is not working for you, speak up.
- Try to avoid establishing hard positions, expressing yourself instead in terms of your interests, intentions, and the outcomes that you would like to create.

As each ground rule is introduced, the mediator may want to "anchor" the meaning with a key word or two, or with a gesture. For example, the "no interrupting" ground rule may be anchored with the slight raising of the hand as if the mediator were naturally and elegantly asking a party to refrain from talking. By the association of the gesture (the anchor) and the meaning (no interrupting), the gesture will take on that meaning and the mediator has developed for him or herself the ability to end interruptions by simply raising their hand in that certain way. Each ground rule can be so anchored so that "enforcement" becomes a matter of elegant, often non-verbal, compassionate reminders to "behave."

Backtracking

One easy means of "snapping participants to attention" is to summarize what you have heard thus far or "backtrack." Even in an emotional state, parties demonstrate the capacity to snap out of their emotions to be sure that you, as mediator, are accurately summarizing what they have stated.

Normalization

It is common for people in conflict to view themselves as unusual or incapable for being unable to resolve the conflict on their own. Most participants coming to mediation will experience themselves to be "unsuccessful negotiators" in not having been able to agree on their own. They have experienced the conflict to be "unsolvable." This frustration and anxiety can elevate emotional and relational issues and make things difficult in mediation.

Normalization is a technique that assists participants to experience their plight as similar to others. If the mediator is wise, the mediator will share

how others, similarly situated, have been successful in reaching agreement the great majority of the time. The mediator might offer the following: "I know of others, similarly situated, in comparably difficult situations, if not more difficult situations, who have, the great majority of times, been able to reach quality solutions to these very challenging issues in a very few sessions, in spite of the difficult emotions that commonly accompany these discussions.

Normalization is a part of the process of seeking to create a "mediation persona." Most people have not been through mediation and don't know exactly what is involved or what is expected of them. This gives the mediator the opportunity to influence the participants' expectations. In this sense, the mediator may seek to "future pace success." The mediator can assist participants, by recounting how others have successfully solved problems, assist parties to be at their best in mediation. This is a great challenge for the mediator as it is generally the case that participants come to mediation "at their worst," rather than "at their best." Normalization is a very efficient way of speaking to those parts of participants that want to believe the situation is resolvable and that they can do it, just as others before them have.

Mutualization

The reason that the situation has not been resolved to this point is, of course, because of the other party. "If they would just be reasonable (and recognize that everything I say is true), we could have this matter fully resolved in no time. It's their problem . . ." In response to "the blame game," the mediator is smart to "mutualize" the situation as "both of their problem." And, normalizing the situation, "a problem that is fully solvable only by your combined efforts."

Mutualization techniques include identifying certain "preconditions for progress." For example, when one party says: "We'll get agreement when they change," the mediator may inquire whether it is "possible for us to get an agreement where only one-party changes." Other mutualizing techniques include emphasizing common interests, the parties' interdependence ("why would you attack the one who has the keys to you getting what you want?"; and identifying points of easy agreement.

Sharing for Acknowledgement

A getting current process, or some similar process, that allows parties to safely, effectively and efficiently convey relational or emotional messages to the other party(ies) is another powerful approach to managing difficult past-focused emotions and relational issues. Consistent with Fisher's and Ury's concept of separating the people and the problem, the concept here is that the mediator creates a clear separation between the participants' past-focused, relational/emotional discussions and their future-focused discussions for a best possible agreement. The key is to avoid the participants' past difficulties contaminating their best efforts to reach agreement for the future.

If the mediator fails to effectively separate these discussions, it is common that the parties' agreement, if it is able to be reached, will be more of a symbolic representation of past difficulties than a clean effort at developing a substantive agreement that will truly serve them in the future.

It is for these reasons that I, as mediator, like to give participants an opportunity, to the extent they desire to exercise it, at the beginning of each meeting, to say anything that they would like about their past difficulties. Note that the goal here is not to reach agreement about the past. This is not necessary. Getting Current is simply an opportunity for the parties to share their perspectives on the past and to have their respective perceptions acknowledged. The concept is that, with this honoring of respective perspectives, participants no longer need to divert their energy into getting this information out and can better focus on reaching agreement on substantive issues.

If it turns out that one or more participants do not choose to exercise this opportunity to share their perspective on past difficulties, that is fine. The key is that they have the opportunity to share and that the mediator has created this frame distinction so that, if such past-focused relational/emotional discussions should come up during the mediation, the mediator can direct such venting into the established appropriate and separate frame for discussion.

If it turns out that one participant dwells on the past and continually repeats themselves, it may be helpful for you to have the other party affirmatively

acknowledge what they are hearing. You may also want to list the messages one party wants to get to the other party on a flipchart. This will help you to assist the sharing party to avoid repeating the same message. When the sharing party is done, you, as mediator, may want to physically give the flip chart sheet with the messages to the other party. The party that has had a hard time moving on from the past will finally experience the other party to have finally "gotten" the messages.

If participants focus on the past, be that by the content of their discussion or their tonality, the mediator can ask them to choose whether they want to get current or work on their future agreement. By forcing the participants to make this choice, the mediator protects their future-focused efforts from being contaminated by past difficulties.

You may also want to consider anchoring this frame distinction between the past and the future, for example, by closing your file when the parties are having past-focused "getting current" discussions and opening your file (to take notes) when the parties are focusing on developing their future agreement. Before long, if you start to reach for your file to close it when the participants start getting into their "stuff," they will catch themselves and say something like "you're right, let's move on, we have already been through that." In shifting out of the "getting current" process, to assist the parties to focus on their best agreement for the future, you may say, "perhaps if we know anything about the past, it is that we would like to do it differently in the future. Specifically, how would you like to do it differently?" Common ground techniques, such as asking the parties to list all things that they may possibly agree on, can also be an effective transition out of the getting current process.

A getting current (or sharing perspectives) on the past frame thus:

separates past-focused problems from future-focused solutions;

separates relational and emotional issues from substantive issues; and

may be "anchored" in with a statement or gesture that reminds participants of the desirability of separating their past-focused relational discussion from their future focused substantive discussion.

Referral

I will not personally go deeper into participants psychology than the sharing for acknowledgement processes described above. Knowing that I know just enough about psychology to be dangerous, I refer participants to counseling if it my sense that their emotional/relational issues preclude them from making progress in mediation. Note that I would not refer participants just because I thought that one, both or all of them needed help (who in conflict could not use some help) unless those difficulties precluded progress in mediation. In the extreme case, I might require counseling as a condition of my willingness to continue offering mediation services. Commonly, I will suggest that the participants might benefit, and the mediation might benefit, from some "parallel counseling."

Still, many participants will resist the time, expense and difficulty of counseling and, thus, the mediator is left to do the best he or she can, oftentimes moving the agreement forward through some measure of continuing tension in the room. Ultimately, there is nothing that seems to help the emotional/relational issues more than resolution of the disputed issues. Whatever techniques the mediator employs to manage emotional/relational issues, it is helpful for the mediator to stay focused on assisting the parties to reach what they perceive to be their best agreement, typically in the context of some measure of continuing relational difficulty.

Written Materials for Sample Mediation, in 7 steps, with Explanation by Michael Aurit, part 2

Section 7

Communication & Facilitation

Be Flexible!

There is no single right way to mediate. The right way is the way that works -- and what works will vary from case to case. Your ability to flexibly respond to the needs of the specific situation before you (rather than playing out any personal agenda about how mediation is supposed to work or some cookbook approach to mediation) will dramatically improve your effectiveness as mediator. There is a saying that the most flexible component of a system controls that system. You as mediator want to be the most flexible component of the mediational system as a means of gaining and maintaining control over the process. It is paradoxical, yet true, that we gain control as mediators by being flexible, rather than adhering to or imposing structure.

Be Outfocused!

Encourage yourself to be outfocused to allow yourself to notice whether what you are doing is working. As a mediator, you are sometimes in focused, thinking about what you are going to say or do next, and sometimes outfocused, noticing the impact of your interventions (questioning) and the impact of each of the participant's behavior and statements on each other. Beginning mediators, wanting to do it right, tend to spend too much time focused upon the structure on their notepads or taking notes on the parties' discussion and too little time noticing the parties' truthful immediate responses to the discussion that is taking place. By being outfocused, you give yourself the opportunity to notice, at the earliest possible time, whether what you are doing is working. If what you are doing is not working, or a party is negatively responding to another party, you then give yourself the best opportunity to positively intervene.

Look for Attraction and Resistance Responses

By being outfocused, you give yourself the best opportunity to notice participants' immediate true responses to what is being discussed.

Participants will generally have either an attraction or a resistance response to statements or questions offered by you as mediator and to statements made by and to each other. Occasionally, there will be a seemingly neutral response, often when a party is confused, uncertain or desiring additional information. Whatever the parties' responses, and they will often be different, it is important that you as mediator immediately notice these responses to give yourself the greatest chance to make an effective next statement or inquiry.

Sometimes that intervention will be as easy as a timely "or" (which wipes the slate clean and lets the participants know that there is another mutually exclusive alternative about to be offered) or the word "and" (which lets the participants know that the second part of a cumulative option is coming). Sometimes, you may choose to reflect back your impressions of the parties' responses, to check the accuracy of your perception, gain rapport, and/or preempt the development of a more resistant response. By being outfocused, you give yourself the most time possible to so constructively craft your interventions as a mediator. In other words, why wait for a party to turn "red light" when you can intervene at the "yellow light?" With time, you will become so adept at reading parties' responses that they will not even get to "yellow light." You will notice the blinking "don't walk" sign in their attraction or resistance cues. The theory here is that often parties first respond to possibilities, then they figure out the reasons (rationalizations, justifications, etc.) for that response. If you know that a difficult response is being fashioned, it may make sense to preempt that difficulty with your adept facilitative work.

7.1 Rapport Development

Rapport Development

Matching, Pacing and Leading

In response to a question about what are the three most important skills for a mediator, an accurate answer might well be: "Rapport, Rapport, Rapport." Simply stated, the mediator is not going anywhere with the participants until they feel heard and the mediator has established an effective personal working relationship with each participant. If you are not making progress in mediation, ask yourself if you are in rapport with all participants. If not, you will want to consider what you can do to reestablish rapport.

Matching

Matching is the process of establishing a physically and substantively responsive relationship with mediation participants. Physically, the mediator wants to reflect about 50% of each party's physicality. This can be challenging as it is common for parties to be in very different physical postures. The mediator does well to strike some physical positioning, in terms of leg position, hands, arms, back, head, etc., so that each mediating party feels comfortable. While a somewhat conscious effort for the mediator, all of this must be under the radar of the parties. If parties become aware that you as mediator are trying to physically match them, then the matching will become mockery and highly unproductive, if not destroy the mediation effort.

Pacing

Pacing is the process of graceful mirroring and moving in response to the mediating parties. As if matching (or cross matching) two or more mediating parties was not difficult enough, mediating parties have the nerve to actually move in mediation! And it is critical that the mediator not get left behind. Note that the mediator does not want to do a "Harpo Marx" where the mediator moves in synchrony with each mediating party. This would too quickly be detected by the parties and create highly undesirable results. Rather, the mediator wants to "check in" every couple of minutes with the situation to be sure that they have not fallen out of physical rapport with the parties. If so, the mediator can gracefully adjust physical posture to better

reflect a physical mid-point between the parties, using inflection or a gesture to disguise the purposeful movement.

The mediator may also want to consider adjusting their posture so as to more strongly reflect (and support) the non-speaking party. The unconscious message being sent is that, "Hey, I know that you are there and want you to feel supported." When that party then comes to speak, the mediator may just happen to fall into a physical position more supportive of the new nonspeaking party.

Leading

Leading naturally follows from effective matching and pacing. There comes an unconscious point in the mediator's facilitative relationship with the parties where sufficient rapport has been developed so that the parties will automatically and unconsciously follow the mediator's physical lead. This lead might be a lean forward to a more involved physical position (often using "props" like ground rules or a provision for consideration) or it may be a turn to the flip chart. You may want to think of leading as the "yawning phenomenon." My guess is that you are familiar with situations where you are out with family or friends and one person in the group yawns. An unconscious signal is sent to the others that it is alright for them to also be in touch with their tiredness and, low and behold, a stream of yawns follows. You might also think of your response in a group when one person cleans between their teeth with a finger nail how tempted you are to do the same (or at least to search between your teeth with your tongue).

Physical Rapport as a Metaphor for Substantive Rapport The techniques of matching, pacing and leading that we have been discussing are both valuable in their own right and also, in a way, metaphors for how we as mediators can most effectively work with parties with regard to their perceptions, belief systems and values, and the substance of their dispute. It is only when a participant senses that you fully understand them -- which is the result of effective reflective listening (matching) and probing for additional understanding (pacing) -- that you as mediator receive permission from that party to take the lead in helping them to think about their situation and possible solutions in a new way. There is a saying that "resistance is a sign of insufficient pacing." If you find that one or more

mediating parties are simply not following your suggested considerations, the odds are that at least one-party experiences that you have not fully absorbed and reflected back what they are trying to communicate. Parties in mediation have typically been rehearsing their "performance" for weeks. They are not going anywhere with you as mediator until they are fully convinced that you genuinely and fully understand where they are coming from, what they have experienced and what they are trying to say. It is only at this point, when you as mediator are able to summarize where they are at perhaps even better than they have ever been able to, that you as mediator will be given unconscious permission to "take the lead" in helping that party to move on to consider their next step.

Language to Use to Match, Pace and Lead

"Appreciating that you . . . , I wonder whether . . .?"

"Respecting that you feel that way, I am curious as to whether you also . . . ?"

"Understanding how strongly you feel about this issue, is it also true that . . . ?"

In each case, you instantly build rapport by entering the other participant's world and acknowledging his or her state of being and communications (rather than ignoring them with words like "but" or "however"). You create a bonding frame of agreement and open the door to redirecting the consideration without resistance.

Additional Variables for Building Rapport

There are many additional ways to support your having an effective working relationship with each participant. Many are listed below. Perhaps the greatest challenge is to develop rapport with each individual party in a way that does not threaten your rapport with the other party. The mediator constantly needs to balance the conscious and unconscious attention being paid to each participant so that they each feel honored and heard and ready to work toward solution. Consider the following additional opportunities for building rapport.

Small talk

Matching key phrases and words

Matching representational systems

Style/formality of clothing
 Gestures
 Body position (whole body or part body)
 Breathing
 Voice tempo
 Voice volume
 Tonality and intonation of sentences and phrases

Dealing with Belief Systems and Resistance

Simply put, mediation is not the place to try to change participants' belief systems and values. As if assisting contentious parties to reach agreement were not enough of a challenge, it is suggested that it is pure folly for the mediator to think that they can change a lifetime of integrated learning in a very limited number of hours. What is also true is that, If the parties have not been able to change each other's perception of reality prior to the mediation, it is unlikely that they will be able to change each other's beliefs and values in the mediation.

7.2 Outcome & Evidence Questioning

In working toward the parties' "pot of gold," there is no skill more important than mastering the asking of "outcome" and "evidence questions."

Attraction and Resistance to Agreement

Somewhat paradoxically, participants come to mediation both wanting agreement and resisting agreement. How do we know that participants want to reach agreement? In that mediation is a voluntary process (under existing circumstances), we can presume that participants have considered the alternatives and made an informed choice to participate in mediation. This is not to say that mediation is an idyllic choice. Few, if any, people desire to be in mediation. Mediation is kind of like going to the dentist. Few, if any, people desire to go to the dentist. Yet, if you have a bad enough toothache, you will drive many miles on a sunny Sunday afternoon to find a dentist who can help you. Mediation is somewhat similar. Under the difficult circumstances of being at odds with another with regard to a critical area of life experience, an increasing number of people recognize that mediation is the best place for them to be, and the sooner the better.

We know then that participants voluntarily come to mediation because, under difficult circumstances, they "want" to be there. Why do they want to be there? They want to be there because mediation offers them the opportunity to receive assistance to reach agreement. It may thus be said that we know that participants in mediation are attracted to reaching agreement because they are there. The voluntariness of the mediation process ensures this.

Somewhat paradoxically, we also know that participants in mediation are resistant to reaching agreement. How do we know this? It is the same answer: because they are there! If each party did not have some form of resistance -- some experience or set of experiences that they need to have to reach agreement and have not yet had -- they would, presumably, be at agreement. Participants in mediation are thus both attracted to reaching agreement and have resistance to reaching agreement. They need to receive some satisfaction or set of satisfactions in mediation to be willing to give up their resistance.

For some participants, this needed satisfaction experience may involve clearly communicating certain information to the other party(ies); or it may involve the other party(ies) acknowledging certain perspectives or feelings; or it may be the need to comprehensively consider all possible resolution options; or it may involve consulting with experts or an advisory attorney; or it may be all of these things! If participants in mediation did not have some resistance to reaching agreement, some unsatisfied need or set of needs, then they would be at agreement!

Mediating parties thus come to mediation both attracted to agreement and, paradoxically, resisting agreement! These basic energy forces, the attraction or "lean forward," and the resistance or "lean backward," are critical for the mediator to recognize, define, manage and address.

A good part of mediation thus involves clarifying what participants want (addressing their attraction to agreement) and how they will know that it is alright to agree (addressing their resistance to agreement).

The Outcome Question

In response to the parties' intrinsic attraction to agreement, the primary question for the mediator to ask may be called an outcome question. A simplistic example of an outcome question is: "What you want?" Any question that asks parties for information as to the experiential results that they would like to create, either through their mediation process or through the substantive terms of their agreement, may appropriately be called an outcome question. Examples of outcomes questions follow:

"What would you like to achieve through the mediation process?"

"Why are you here?"

"What results do you want?"

"How would you like it to be?"

"How do you see these issues being best resolved?"

The Evidence Question

In response to the parties' intrinsic resistance to agreement, the primary question for the mediator to ask may be called an evidence question. A simplistic example of an evidence question is: "How will you know that it is alright to agree?" Any question that asks participants for information about the experience(s) that they will need to have to be willing to agree (give up their resistance) may appropriately be called an evidence question.

Additional examples of evidence questions follow:

"How will we know that we have the best possible agreement?"

"How will you know that the agreement is fair?"

"On what basis would you be prepared to agree?"

"What will you need to experience to be willing to agree?"

Ask Outcome and Evidence Questions at all Levels of Generality/Specificity

Outcome and evidence questions can and should be asked at all levels of generality/specificity. In a complex mediation, the mediator may ask a hundred or more outcome and evidence questions. One of the nice things about outcome and evidence questions is that they are appropriate and effective ways out of the mediator being "stuck." The mediator can rub his or her chin (looking wise) and ask: "Help me again, specifically what were

you wanting to achieve here?" or "How was it again that you would know that we had a good agreement here?"

It may be helpful to think of outcome and evidence questions at three levels of generality/specificity. The first level, having to do with the parties' overall interest in and resistance to agreement, may be called the global level. Thus, the mediator may begin the mediation by asking: "Help me understand. Why are you here?" or "About the only thing that I know about people who come to mediation is that they would like to reach some kind of agreement. What type of agreement would you like to reach? What will it do for you?" The parties' answers to these most general inquiries about their participation in mediation and their overall agreement may be called global outcome statements. As we shall see, remembering these global outcome statements can be very helpful to the mediator down the line, especially to screen out non-productive behavior and to assist the parties to get back on track.

Similarly, the mediator is encouraged to ask parties global evidence questions, such as: "How will you know then that it is a good decision to come to agreement?" or "Understanding then the type of agreement that you would like to create, how will you know that it is actually alright to agree? What will your process be for making that decision?" Notice that parties' responses to these type of evidence inquiries will vary dramatically. Some parties will say "it will feel right." Others may say that "it is fair" or "my attorney will tell me that it is alright to agree." Still others may say that "he will finally get how serious I am about this" or "she will understand that I am no pushover." Often such global evidence statements (what the person perceives them self-needing to experience to be willing to agree) will be followed by a specifying or clarifying question such as: "How will you know that the agreement is fair" or "how will you know that he takes you seriously." The goal here is to assist parties to define the specific experience that they perceive them self-needing to have to be willing to agree.

With this definition of the evidence (or experience(s)) the party perceives them self-needing to have to be willing to agree, the mediator now understands, and has helped the parties to understand, how they will be making their ultimate decision about the acceptability of any agreement in mediation. This is absolutely critical information. These stated standards

help to guide the mediator in how the mediator communicates with participants, e.g., "Does this option feel better" or "Do you perceive yourself as being taken seriously now?" Global evidence statements also help to guide the mediator's overall facilitation. For example, if the mediator knows that a party will be deciding based upon an attorney or other non-present third-party's opinion, then the mediator will want to do everything he or she can to assist the party in assembling the best possible information for that third-party's consideration. The mediator may even want to help to facilitate those discussions. Knowing how participants will ultimately be making their decisions on the acceptability of any agreement is thus a critical set of information that helps guide the mediator's facilitation.

Outcome and evidence questions can also be beneficially asked with regard to each Topic (agenda item) up for discussion and also with regard to virtually any and all Issues and Subissues that emerge. Again, it is almost always appropriate and desirable for the mediator to ask: "On this [topic] [issue] [subissue], what would you like to create" and "On this [topic] [issue] [subissue], how will you know that it is alright to agree?"

An example of a topical outcome question might be: "On this issue of financial management, what would you like to create?" An example of an issue outcome question might be: "With regard to the type of bank accounts that should be maintained, what are your thoughts?" An example of a subissue outcome question might be: "With regard to the number of needed signatures to cash in a certificate of deposit, how would you like to do that?" In each case, the mediator is simply asking the basic outcome question: "what do you want?" This basic question can be asked hundreds of different ways and with regard to any level of generality/specificity.

Similarly, a topical evidence question might be: "On the issue of spousal support, how will you know that we have a good agreement?" An example of an issue evidence question might be: "With regard to the issue of review and modifiability of spousal support, how will you be deciding that?" An example of a subissue evidence question might be: "With regard to the actual payment of spousal support, be that by withholding, wire transfer, direct deposit or direct transfer, what are your criteria for making that decision?"

In each case, the mediator is simply asking the basic evidence question: "how will you know that it is alright to agree?"

The responses that the mediator gets to an inquiry such as "Why are you here?" or "What would you like to accomplish through your Agreement?" or "What results would you like to create?" (all global outcome questions) lead, logically, to responsive global outcome statements from participants. For example, one party may say: "Well, what I would like to create is an atmosphere of respect and trust, be sure that I am being paid at least the prevailing wage for my type of work, and also get dental coverage." The other party may say that: "I would like to be sure that productivity stays high, that we are not paying any more than our competitors for comparable work, and I would like to get medical and dental costs under control." Simply repeating these global outcome statements back to the parties is a facilitative technique almost certainly guaranteed to increase the parties trust in and rapport with the mediator. Participants like to hear the mediator repeat back an effective rendition (often somewhat generalized) of what they said they want. If nothing else, this convinces participants that the mediator knows how to listen.

Cumulating Outcome Statements

As mediators, we learn to appreciate and be satisfied with "baby steps" or incremental movement toward agreement. Cumulating parties' respective outcome statements is one such incremental step toward assisting the parties to reach agreement. All we are doing here is combining the parties' respective outcome statements about why they are in mediation, such as the following: "What I am hearing then is that we are here to do the following. For you John, I understand that we are seeking to create is an atmosphere of respect and trust, trying to make sure that you are being paid at least the prevailing wage, and also that we would explore trying to get you dental coverage. For you Martha, I understand that we will be aiming to keep productivity high, try to make sure that you are not paying more than a reasonable wage, and doing our best to get medical and dental costs under control. Am I correct about all of that?" As you are merely repeating back, slightly generalized, what you have heard from the parties, you are almost guaranteed to get a solid nod "yes" from each of the parties (gaining trust and rapport). Less obvious is that you are also getting the parties to, often

for the first time, affirmatively acknowledge that the mediation will be seeking to satisfy each of their desired outcomes (not just one of their desired outcomes). This induced ability of the parties to consider not only their desires but also the perspective of another is also our first example of a meta frame, a concept that we will be considering further down the line.

The Conditional Close

The conditional close is an affirmative statement of all conditions necessary for agreement and the first comprehensive blueprint for the parties' success in mediation. The conditional close is an extension of the parties' cumulative outcome statements that asks the parties to acknowledge, if only unconsciously, that each party may not get all that they ideally want in the mediation and that they may each need to be somewhat flexible, in a principled way, if comprehensive agreement is to be reached. For example, following the asking of global outcome and evidence questions to Martha and John, the following conditional close statement might be offered:

"It seems then that we will have agreement if we can, for you John, create an atmosphere of respect and trust, make sure that you are being paid at least the prevailing wage, and get you dental coverage -- and for you Martha, if we can ensure that productivity will stay high, be sure that we are not paying more than a reasonable wage, and do our best to get medical and dental costs under control. And, if we can't do all of these things perfectly, then it would seem that we would only have agreement if each of you was convinced that the necessary flexibility to reach agreement was shared in some way that each of you perceive to be reasonable and fair. Am I correct about this?"

The difference between cumulated outcome statements and the conditional close is that, with the conditional close, we are asking the parties to go beyond appreciating that the other party also has desires that need to be addressed to agree that, if we cannot perfectly satisfy each party's desires, there will have to be movement on both sides, and that any such movement will only be made if both parties believe that the requested movement is reasonable and balanced under the circumstances.

The Reference Point Process

The reference point process is the most interventionist that I will be as mediator. This process involves offering the parties a centralized concrete option for resolution. This option is determined based upon what the parties have said they want (their desired outcomes) and based upon how they know they will have a good agreement (their evidence standards). The reference point is not based upon what the mediator thinks is right or best and it is not a recommendation. Rather, it is a noticing of what may work for the parties. A reference point can be offered at any level of generality or specificity, from an overall possible settlement to a possible solution on the narrowest of issues. It will often make sense to caucus individually with parties following the offering of a reference point so that neither party has to move first and they can comfortably and fully consider the settlement possibility. If not acceptable, parties can be encouraged to massage or modify the settlement option in a way that will work for them. Based upon these changes, the mediator may want to issue one or more revised reference points for the parties' consideration.

Having heard from each of you as to what you would like to create and also what you perceive to be fair, I would like to offer the following as a reference point for your consideration, asking each of you, in caucus, to let me know if this would be acceptable and, if not, what changes to this possibility would make it acceptable. Note this is not my personal judgment as to what is best or fair. I have not even processed the information in that way. Rather, this is a possible resolution that may work given your expressed desired outcomes and standards. Here it is . . . "

7.3 Anchoring

Anchoring is the association of a word, phrase or gesture with a particular concept, state of being or experience in a way that allows the concept, state of being, or experience to be restimulated and recreated by the repeated offering of the word, phrase or gesture.

Conceptual Anchoring

The mediator may want to develop gestures and key lines to help in facilitating parties' discussions. For example, the use of hand signals to preempt interruptions, the use of a time-out signal, or developing a gesture that means "You decide, I don't decide anything" are ways for the mediator to elegantly and effectively communicate important concepts to the parties without even saying a word.

Establishing and Anchoring Resource States

You can safely assume that parties will come to mediation at their worst. People are not generally at their best when they are in conflict. One of your challenges as mediator is to assist participants to be in a more empowered state. One way to do this is to assist participants into resource states. A resource state may be defined as "A state of being in which the mediation participant is comfortable, positively disposed, open, flexible and creative."

Easier said than done, you say? Here are some suggestions:

Use your perceptual skills to detect when a participant is in the type of resourceful state that you would like to work with in mediation. A participant may be in such a state when talking about his or her work (or in the exact opposite state), about a vacation, or about some sporting activity. Notice that the repetition of the key words that led into that discussion will almost certainly recreate that state of being.

You can also access such a resource state by asking a person questions that require them to internally experience things that they enjoy or think fondly of. For example, even to a divorcing couple, you can inquire as to "how they met and fell in love" (talk about creating dissonance). To a committed gardener, you might ask "What do you enjoy most about gardening?" Notice

how people respond to questioning about what they like to do with their free time.

On my mediation intake questionnaire, I literally ask people "what they like to do with their free time" (sandwiched between where do they work and what their goals are for the mediation) and I find participant responses to this question to be some of the most valuable information I am able to obtain in terms of assisting parties to "elevate," to be at their best in mediation. I will typically mark off that most special area of their life with a key word and gesture, being aware that I can restimulate that state of being simply by repeating the word or gesture.

In divorce mediation (or just about any mediation) an effective way to create a resource state is to ask participants if they have pictures of their child(ren). Participants, no matter their level of present conflict, are almost always positively disposed toward their children. The children's names become anchors restimulating the parents' pride.

I also have a picture of my son, Jeremy, with his face planted squarely in the middle of his first birthday cake (no one told him to use a fork). It is a picture that for whatever set of reasons seems to shift parties' states-of-being and I will commonly refer to the image in mediation.

To anchor a participant's state-of-being, you associate the desirable resource state with a gesture, word, or phrase, making sure that you can accurately repeat the anchor. The repeated stimulus restimulates the prior experience when the anchor was set and has the ability to shift the person back to that desired state of being.

7.4 **An Overall Model**

Desired Outcomes

Interests

Positive Intentions

Give Direction to Agreement

Attraction to Agreement
New Perspectives
Doubt and Dissonance

Create Flexibility and a Desire to Agree

Principles, Standards and Criteria
Rationales and Rationalizations

An Explanation makes Agreement Safe

Section 8

Psychology of Divorce

Divorce is a crazy time for the parties and their children. The most common strategy for assisting parties to get through what is almost certainly a difficult time is "normalization." The reality is that divorce is crazy for just about everyone. With that as a background, parents can be assisted to reach quality agreements for their children and for the future.

Written Materials for Supporting a Variety of Cultures, unmarried, and low-income parents by Zenell Brown

8.1 Prevalence and Effects

To help build empathy and compassion for your clients, it may be helpful to understand a little about divorce and the typical effects it has on men, women and children. The divorce rate in the United States is the highest in the world. Fifty percent of marriages end in divorce. Sixty-seven percent of all second marriages end in divorce. As high as these figures are, what is also true is that the divorce rate appears to be dropping. The reasons for this change are not clear. Many people cannot afford to divorce, many people cannot afford to marry. Another reason is that "baby boomers," who account for a large proportion of our population are no longer in their 20s and 30s, the ages when divorce is most prevalent. The societal expectation is that divorced life is less satisfying than married life. Divorce is associated with an increase in depression--people experience loss of partner, hopes and dreams, and lifestyle. The financial reality of divorce is often hard to comprehend: the same resources must now support almost twice the expenses.

Fifty percent of all children are children of divorce. Twenty-eight percent of all children are born of never married parents. Divorce is expensive. Aid for Dependent Children (AFDC) resources are drained by the needs of divorced and single parent families; including the cost of collecting child support. Given the current population and judicial system growth, the State of Oregon Justice 2020 report predicted that by the year 2020 the average waiting time for trial would be approximately 190 months (almost 16 years).

Let's also look at the prevalence of unwed parents:

Mediating with Never Married Parents Zenell B. Brown, Esq.

First comes loves, then comes marriage, then comes mother with a baby carriage.... Not so much!

There is a significant number of families that absent the bonds of matrimony

These family units are referenced in various ways:

- Never-married parents
- Never- married families
- Fragile Families
- Single parent household
- Children born out of wedlock
- Outdated and offensive terminology “Bastards”

The parents were not married to each other at the birth of the child. Paternity may or may not have been established.

Births to Unwed Mothers 2021 Data from the CDC

- Number of live births to unmarried women: 1,464,121
- Percent of all births to unmarried women: 40.5%

Never-Married Parents Are Different than Divorcing Parent Families

They are :

- More likely to have started parenting in their teens,
- Less likely to have lived with both biological parents growing up,
- More likely to have had children with other partners,
- More likely to earn less

Never-Married Parents Are Different than Divorcing Parent Families

- More likely to suffer from depression
- More likely to report substance abuse
- More likely to have spent time in jail, and
- Disproportionately African American and Hispanic.

Data is from the Fragile Families Study completed by Princeton University.

<http://www.fragilefamilies.princeton.edu/documents/FragileFamiliesandChildWellbeingStudyFactSheet.pdf> (link now inactive)

Never-Married Parents Are Different than Divorcing Parent Families

Because paternity establishment is required by most statutes when a person receives a form of public assistance, courts are a major referral source for mediation for Never-married parents.

Remember, these are generalities about Nevermarried families collectively; All, some, or none of these descriptions may apply to a specific individual family.

Mediator Check-in Question

- Are you impartial and neutral? Mediation Scenarios, Dynamic, and Themes
- Parents have multiple children with different parents.
- Mother is often the custodial parent. Laws may favor mother, regarding presumptions of custody. Father may have been unaware of pregnancy and birth.
- There is court action pending. The parties may have assigned certain rights and not be able to totally negotiate the agreement they want.
- Economics may be a stressful subject if the parties have limited resources. Support payers feel that they are unable to give consistent financial support as ordered by the court. Support payer may resent court involvement.

Mediation Scenarios, Dynamic, and Themes

- There may be a social marriage or there may be a complete lack of joint parenting and financial decision making.
- Parents may think parenting time and child support payments are quid pro quo issues.
- Custodial parents may be inflexible regarding parenting agreements. Parenting time is a right to be earned (timely visits, expectation that father will act in a certain way, etc.)

Mediation Scenarios, Dynamic, and Themes

- Men are interested in being good fathers, but may lack parenting skills.
- Fathers may be entering the child's life years after the birth or after a period of absence.
- Parents lack of understanding of legal system and processes.
- Parties may not have access to attorneys or other specialists to help them in the mediation process.

7 Effective Mediation Strategies

- Build an environment of trust if there is a lack of history of talking and making joint decisions (schedule multiple sessions, identify concerns, and help generate options that address concerns)
- Recognize the role of the court and its limits on parties' self determination regarding an outcomes
- Help parties create a parenting vision: they need to communicate what their lives are like how they will co-parent

- Use the BATNA: mediation vs. legal process
- Take baby steps in reaching ultimate parenting goals - temporary agreements or progressive agreements • Educate parties on parenting time child support, and custody
- Allow venting – this may be done in caucus Questions and Answers Zenell B. Brown Zenell@allinspiringminds.com www.linkedin.com/in/zenell-brown2901b872

Here are some of the experiences of men and women in divorce.

For women:

1. Women initiate divorce twice as often as men
2. 90% of divorced mothers have custody of their children (even if they did not receive it in court)
3. 60% of people under poverty guidelines are divorced women and children
4. Single mothers support up to four children on an average after-tax annual income of \$12,200
5. 65% divorced mothers receive no child support (figure based on all children who could be eligible, including never-married parents, when fathers have custody, and parents without court orders); 75% receive court-ordered child support (and rising since inception of uniform child support guidelines, mandatory garnishment and license renewal suspension)
6. After divorce, women experience less stress and better adjustment in general than do men. The reasons for this are that (1) women are more likely to notice marital problems and to feel relief when such problems end, (2) women are more likely than men to rely on social support systems and help from others, and (3) women are more likely to experience an increase in self-esteem when they divorce and add new roles to their lives.

7. Women who work and place their children in child care experience a greater stigma than men in the same position. Men in the same position often attract support and compassion.

For men:

1. Men are usually confronted with greater emotional adjustment problems than women. The reasons for this are related to the loss of intimacy, the loss of social connection, reduced finances, and the common interruption of the parental role.
2. Men remarry more quickly than women.
3. As compared to "deadbeat dads," men who have shared parenting (joint legal custody), ample time with their children, and an understanding of and direct responsibility for activities and expenses of children stay involved in their children's lives and are in greater compliance with child support obligations. There is also a greater satisfaction with child support amount when negotiated in mediation. Budgets are prepared, and responsibility divided in a way that parents understand.
4. Men are initially more negative about divorce than women and devote more energy in attempting to salvage the marriage.

8.2 Effects on Children

In the last few years, higher-quality research which has allowed the "metaanalysis" of previously published research, has shown the negative effects of divorce on children have been greatly exaggerated. In the past we read that children of divorce suffered from depression, failed in school, and got in trouble with the law. Children with depression and conduct disorders showed indications of those problems predivorce because there was parental conflict predivorce. Researchers now view conflict, rather than the divorce or residential schedule, as the single most critical determining factor in children's post-divorce adjustment. The children who succeed after divorce, have parents who can communicate effectively and work together as parents.

Actually, children's psychological reactions to their parents' divorce vary in degree dependent on three factors: (1) the quality of their relationship with each of their parents before the separation, (2) the intensity and duration of the parental conflict, and (3) the parents' ability to focus on the needs of children in their divorce.

Older studies showed boys had greater social and academic adjustment problems than girls. New evidence indicates that when children have a hard time, boys and girls suffer equally; they just differ in how they suffer. Boys are more externally symptomatic than girls, they act out their anger, frustration and hurt. They may get into trouble in school, fight more with peers and parents. Girls tend to internalize their distress. They may become depressed, develop headaches or stomach aches, and have changes in their eating and sleeping patterns.

A drop-in parents' income often caused by the same income now supporting two households directly affects children over time in terms of proper nutrition, involvement in extracurricular activities, clothing (no more designer jeans and fancy shoes), and school choices. Sometimes a parent who had stayed home with the children is forced into the workplace and the children experience an increase in time in child care.

A child's continued involvement with both of his or her parents allows for realistic and better balanced future relationships. Children learn how to be in relationship by their relationship with their parents. If they are secure in their relationship with their parents, chances are they will adapt well to various time-sharing schedules and experience security and fulfillment in their intimate relationships in adulthood. In the typical situation where mothers have custody of the children, fathers who are involved in their children's lives are also the fathers whose child support is paid and who contribute to extraordinary expenses for a child: things like soccer, music lessons, the prom dress, or a special class trip. One important factor which contributes to the quality and quantity of the involvement of a father in a child's life is mother's attitude toward the child's relationship with father. When fathers leave the marriage and withdraw from their parenting role as well, they report conflicts with the mother as the major reason.

The impact of father or mother loss is not likely to be diminished by the introduction of stepparents. No one can replace Mom or Dad. And no one can take away the pain that a child feels when a parent decides to withdraw from their lives. Before embarking on a new family, encourage clients to do some reading on the common myths of step families. Often parents assume that after the remarriage "we will all live as one big happy family." Step family relationships need to be negotiated, expectations need to be expressed, roles need to be defined, realistic goals need to be set.

Most teenagers (and their parents) eventually adjust to divorce and regard it as having been a constructive action, but one-third do not. In those instances, the turbulence of the divorce phase (how adversarial a battle it is), has been shown to play a crucial role in creating unhealthy reactions in affected teenagers.

Joan Kelly, PhD, former president of the Academy of Family Mediators and prominent divorce researcher from California reports that, depending on the strength of the parent-child bond at the time of divorce, the parent-child relationship diminishes over time for children who see their fathers less than 35% of the time. Court-ordered "standard visitation" patterns typically provide less.

Divorce also has some positive effects for children. Single parents are often closer to their children than married parents were. This is can also be negative as when a child takes on too much responsibility because one or both parents are not functioning well as a parent, or when a parent talks to a child about how hurt they are by the other parent, or how horrible that other parent is. Often a separated parent will make an effort to spend quality time with the children and pay attention to their desires (Disneyland, small gifts, phone calls, etc.). And you can imagine that some children might find some benefit in celebrating two Christmases and birthdays each year. If both parents remarry, they may have twice as many supportive adults/nurturers. At the very least, when parents can control their conflict, the children can experience freedom from daily household tension between parents.

8.3 Emotional Stages of Divorce

Written Materials for Deescalating High Emotions by Nina Meierding

Strategies for Dealing with High Emotions in Divorce

This practical, skills-based session focuses on how to work with people in various stages of grief, fear, anxiety and anger as they journey through their separation and divorce in the mediation process.

What you will learn:

Gallups Five Elements of Well Being

Elizabeth Kubler Ross' Stages of Grief (through a flexible lens)

Stress and Divorce

Emotional Flooding

Resilience

The Thomas Kilmann Grid and How it Pertains to Divorce

Culture and Emotional Expression

The Four Steps in Working with High Emotion

Self Assessment

Process and People Assessment

Environment Assessment

Customized Strategies in Dealing with Frustration and Anger

Supportive text for High Emotions

The decision to end a relationship can be traumatic, chaotic, and filled with contradictory emotions. There are also specific feelings, attitudes, and dynamics associated with whether one is in the role of the initiator or the receiver of the decision to breakup. For example, it is not unusual for the initiator to experience fear, relief, distance, impatience, resentment, doubt, and guilt. Likewise, when a party has not initiated the divorce, they may feel shock, betrayal, loss of control, victimization, decreased self-esteem, insecurity, anger, a desire to "get even," and wishes to reconcile.

To normalize clients' experiences during this time, it may be helpful to know that typical emotional stages have been identified with ending a relationship. It may also be helpful to understand that marriages do not breakdown overnight; the breakup is not the result of one incident; nor is the breakup the entire fault of one party. The emotional breaking up process typically extends over several years and is confounded by each party being at different stages in the emotional process while in the same stage of the physical (or legal) process.

It is also quite normal to do different things to try to create distance from the former partner while divorcing. Unfortunately, this distancing often takes the form of fault finding. Not to be disrespectful, but it's not unlike the process one goes through in deciding to buy a new car: somehow every flaw in that favorite old car needs to be noticed and exaggerated in order to feel okay about selling it. Also, if the other person is portrayed as really awful, one can escape any responsibility for the end of the marriage. A common response to divorce is to seek vengeance. When parties put their focus on getting even, there is an equal amount of energy expended on being blameless. What's true is that blaming and fault finding are not necessary or really helpful. Psychologist Jeffrey Kottler has written a very helpful book on this subject entitled *Beyond Blame: A New Way of Resolving Conflicts in Relationships*, published by Jossey-Bass.

Another normal rationalization is that the marriage was a wholly unpleasant experience and escaping it is good. Or the marriage was unpleasant and now the other partner must make this up in the divorce. Thinking that the marriage was wholly unpleasant is unfair to both parties and can hinder

emotional healing. Both stayed in the marriage for as long as they did because there were some good things about it. There were also some things that did not work for them and these are why they are divorcing.

Much of your clients' healing will involve acceptance, focusing on the future, taking responsibility for their own actions (now and during the marriage), and acting with integrity. Focusing on the future they would like to create may require an acknowledgment of each other's differing emotional stages and a compassionate willingness to work together to balance the emotional comfort of both parties.

The following information on the emotional stages of ending a relationship is provided to help parties through the emotional quagmire of ending a relationship and assist in their personal healing.

I. DISILLUSIONMENT OF ONE PARTY (sometimes 1-2 years before verbalized)

- A. Vague feelings of discontentment, arguments, stored resentments, breaches of trust
- B. Problems are real but unacknowledged
- C. Greater distance; lack of mutuality
- D. Confidential, fantasy, consideration of pros and cons of divorce
- E. Development of strategy for separation
- F. Feelings: fear, denial, anxiety, guilt, love, anger, depression, grief

II. EXPRESSING DISSATISFACTION (8-12 months before invoking legal process)

- A. Expressing discontent or ambivalence to other party
- B. Marital counseling, or
- C. Possible honeymoon phase (one last try)
- D. Feelings: relief (that it's out in the open), tension, emotional roller coaster, guilt, anguish, doubt, grief

III. DECIDING TO DIVORCE (6-12 months before invoking legal process)

- A. Creating emotional distance (i.e., disparaging the other person/situation in order to leave it)
- B. Seldom reversible (because it's been considered for a while)
- C. Likely for an affair to occur
- D. Other person just begins Stage I (considering divorce) and feels denial, depressed, rejected, low self-esteem, anger
- E. Both parties feel victimized by the other
- F. Feelings: anger, resentment, sadness, guilt, anxiety for the family, the future, impatience with other, needy

IV. ACTING ON DECISION (beginning the legal process)

- A. Physical separation
- B. Emotional separation (complicated by emotional flareups)
- C. Creating redefinition (self-orientation)
- D. Going public with the decision
- E. Setting the tone for the divorce process (getting legal advice and setting legal precedent: children, support, home)
- F. Choosing sides and divided loyalties of friends and families
- G. Usually when the children find out (they may feel responsible, behave in ways to make parents interact)
- H. Feelings: traumatized, panic, fear, shame, guilt, blame, histrionics

V. GROWING ACCEPTANCE (during the legal process or after)

- A. Adjustments: physical, emotional
- B. Accepting that the marriage wasn't happy or fulfilling
- C. Regaining a sense of power and control, creating a plan for the future, creating a new identity, discovering new talents and resources
- D. This is the best time to be in mediation: parties can look forward and plan for the future; moods can be more elevated (thrill of a second chance at life)

VI. NEW BEGINNINGS (completing the legal process to four years after)

- A. Parties have moved beyond the blame and anger to forgiveness, new respect, new roles
- B. Experiences: insight, acceptance, integrity

Comparing Mediation and Litigation

Why is mediation a compassionate and appropriate venue for helping people in divorce? On the average, it takes family members approximately four to eight years to recover from the emotional and financial expense of a bitter adversarial divorce. In an adversarial divorce, there is no possible resolution of the emotional issues, only decreased trust and increased resentment.

A litigated divorce can cost each party \$5,000 to \$35,000. The focus is on assigning blame and fault and skirmishing for the most powerful position (changing locks, freezing bank accounts, getting temporary custody of the children). Communications between parties break down. Negotiations proceed through attorneys and are strategic and positioned. Attorneys have an ethical responsibility to zealously advocate for the best interest of their client. Often there is no consideration of the best interests of the children or recognition for the need for parties to have an ongoing relationship because they have children, friends, extended family, and community together. Going to court is an expensive risk; someone who does not know you makes decisions for you that will affect your whole life.

Mediators may save clients thousands of dollars in immediate and future legal and counseling fees. Mediators can focus parties on creating their best possible future and help parties resolve their emotional issues for the best interests of their children and their own psychological wellbeing. Mediators can help parties feel understood, accept responsibility for the failure of the marriage and, when there are children, begin to reshape their relationship from one of partners to coparents. Mediators can empower clients by helping them be at their best (rather than their worst) during a challenging time in their lives, enable them to have an active role in their separating (creative choice vs. court imposition), create a clear and understandable road map for the future, make informed decisions, and to look back at their behavior in the mediation of their divorce with integrity and self-respect.

8.4 Reactions of Children

Much of children's post-divorce adjustment is dependent on (1) the quality of their relationship with each parent before the divorce, (2) the intensity and

duration of the parental conflict, and (3) the parents' ability to focus on the needs of the children in the divorce. Typically, children whose parents are going through a rough divorce engage in behaviors which are designed to help them feel secure. What follows are some typical experiences of children to divorce and separation:

A. DENIAL

This especially occurs in young children and surfaces as storytelling (Mommy and Daddy and me going to Disneyland; we're moving into a duplex and Daddy will live next door; they will also have reconciliation fantasies).

B. ABANDONMENT

When parents separate, children worry who will take care of them. They are afraid they too are divorceable and will be abandoned by one or both of their parents. This problem is worsened by one or both parents taking the children into their confidence, talking about the other parent in front of the children, using language like "Daddy is divorcing us," being late for pick-up, or abducting the children. Children who are feeling insecure will say things to a parent which is intended to evoke a mama bear/papa bear response (a demonstration of protectiveness). If children do not have "permission" to have a good relationship with the other parent, or if they think they need to "take care of" one of their parents in the divorce, they are likely to end up having feelings of divided loyalties between their parents or, in the extreme, they may become triangulated with one parent against the other parent.

C. PREOCCUPATION WITH INFORMATION

Children will want details of what is happening and how it affects them. Communication from the parents needs to be unified and age appropriate.

D. ANGER AND HOSTILITY

Children may express anger and hostility with peers, siblings, or parents. School performance may be impaired. Hostility of children toward parents is often directed at the parent perceived to be at fault. Hostility turned inward looks like depression in children.

E. DEPRESSION

Lethargy, sleep and eating disturbances, acting out, social withdrawal, physical injury (more common in adolescents).

F. IMMATURITY/HYPERMATURITY

Children may regress to an earlier developmental stage when they felt assured of both parents' love. They may do some "baby-talk" or wet their beds. Children may become "parentified" by what they perceive to be the emotional and physical needs of their parents ("Someone needs to be in charge here.")

G. PREOCCUPATION WITH RECONCILIATION

The more conflict there is between the parents, the longer children hold onto the notion of their parents' reconciliation. It is clear that the parents are not "getting on" with their lives. Children will often act out in ways which force their parents to interact (negatively or positively). Children whose parents were very conflictual during the marriage often mistake the strong emotions of conflict with intimacy. They see the parents as engaged in an intimate relationship.

H. BLAME AND GUILT

Because so much marital conflict may be related to the stress of parenting, children often feel responsible for their parents' divorce--they feel that somehow their behavior contributed to it. This is especially true when parents fight during exchanges of the children or in negotiating schedules: children see that parents are fighting over them. They may try to bargain their parents back together by promises of good behavior; they may have difficulty with transitions or refuse to go with the other parent.

I. ACTING OUT

Children will often act out their own and their parents' anger. In an attempt to survive in a hostile environment, children will often take the side of the parent they are presently with. This may manifest in refusals to talk to the other parent on the phone or reluctance to share time with the other parent.

Adolescents will typically act out in ways similar to how the parents are acting out.

In summary, expect that children will test a parent's loyalty, experience loyalty binds, not want to hurt either parent, force parents to interact because they don't want the divorce, try to exert some power in the situation, express anger over the divorce, occasionally refuse to go with the other parent (normal divorce stress, loyalty conflict/triangulation, or they may simply not want to stop doing what they're doing at the moment-similar to the reaction we've all gotten when we pick our children up from child care, or we want to go home from the park).

The most common problem which arise tend to stem from triangulation, divided loyalties, and projection. Some indicators of each are:

- a. Triangulation:** Child refuses to have time with the other parent or talk to the other parent on the phone, child badmouths the other parent.
- b. Divided loyalties:** When a child tells each parent different and opposing things about what they want it is a good indication that the child is trying to please both parents and is experiencing divided loyalties.
- c. Projection:** Children are barometers of a parent's emotional well-being. Usually a parent reporting the stress of a child cannot see that the child is acting on the parent's anxiety. Parents should ask themselves how they are feeling about the divorce, the other parent, and the time-sharing arrangements before assuming the child is having difficulty adjusting or assuming the problem is with the other household.

8.5 Stress in Children

Written Materials for Supporting Children in School with Dr. Lesley Cook

Sometimes parents need help identifying stress in children, especially little ones. What follows are some typical experiences and signs of stress in children of different ages.

I. INFANTS AND TODDLERS:

- A. Regression in terms of sleeping, toilet training or eating; slowing down in the mastery of new skills
- B. Sleep disturbances (difficulty going to sleep; frequent waking)
- C. Difficulty leaving parent; clinginess
- D. General crankiness, temper tantrums, crying.

II. THREE TO FIVE YEARS:

- A. Regression: returning to security blankets and discarded toys, lapses in toilet training, thumb sucking
- B. Immature grasp of what has happened; bewildered; making up fantasy stories
- C. Blaming themselves and feeling guilty
- D. Bedtime anxiety; fitful/fretful sleep; frequent waking
- E. Fear of being abandoned by both parents; clinginess
- F. Greater irritability, aggression, temper tantrums.

III. SIX TO EIGHT YEARS:

- A. Pervasive sadness; feeling abandoned and rejected
- B. Crying and sobbing
- C. Afraid of their worst fears coming true
- D. Reconciliation fantasies
- E. Loyalty conflicts; feeling physically torn apart
- F. Problems with impulse control; disorganized behavior.

IV. NINE TO TWELVE YEARS:

- A. Able to see family disruption clearly; try to bring order to situation
- B. Fear of loneliness
- C. Intense anger at the parent they blame for causing the divorce
- D. Physical complaints; headaches and stomach aches
- E. May become overactive to avoid thinking about the divorce
- F. Feel ashamed of what's happening in their family; feel they are different from other children.

V. ADOLESCENTS:

- A. Fear of being isolated and lonely
- B. Experience parents as leaving them; feel parents are not available to them
- C. Feel hurried to achieve independence
- D. Feel in competition with parents
- E. Worry about their own future loves and marriage; preoccupied with the survival of relationships
- F. Discomfort with a parent's dating and sexuality
- G. Chronic fatigue; difficulty concentrating
- H. Mourn the loss of the family of their childhood.

Section 9

Parenting Issues

The mediator assists participants to reach agreement on parenting issues in a variety of ways. The mediator may be a bit of an educator for participants in terms of the likely needs of their children and how others sometimes arrange things to take care of those needs. In addition to acting as an empowering information base, the mediator may also act as devil's advocate as to whether certain arrangements are going to work for them and their children.

In this Chapter, we review a number of resources that the mediator may utilize to empower participants to "do right" by their children.

Written Materials for Parenting Time & Structuring the Conversation by Don Saposnek

As you are watching this video, we recommend developing different options for your Marital Settlement Agreement Template that explain different types of parenting plans. You might want to create a checklist for yourself to discuss with your clients, such as different holidays and vacation schedules. Many examples of this are available in Jay Bultz's Master Agreement Template.

More information about drafting a parenting plan is available here:

<https://www.mediate.com/ten-tips-for-developing-and-drafting-effective-parenting-plans-in-mediation/>

9.1 List of Parenting Issues

A. Legal Custody Label, Primary Residence

B. Time-Sharing Plan

1. Overall Intentions and Guidelines
2. Weekly Schedule
3. Summer Vacation
4. Halloween (Trick or Treating; Costume)
5. Veteran's Day
6. Thanksgiving Day/Weekend
7. Hanukkah 8. Winter Break
 - a. Christmas Eve/Day
 - b. New Year's Eve/Day
9. Martin Luther King Day
10. President's Day
11. Spring Break
12. Easter
13. Mother's Day/Father's Day
14. Memorial Day/Weekend
15. Independence Day
16. Labor Day/Weekend
17. Children's Birthdays (Day; Party)
18. Parent's Birthdays
- 19 Other Three-Day Weekends Resulting from School/Legal Holidays 20. Guidelines for Flexible Time
 - a. initiated by a parent
 - b. initiated by a child
21. Holiday Schedule Supersede Weekend Schedule

C. Transportation & Responsibility for Meals

1. Sharing transportation within ____ miles w/o renegotiating
2. For sharing time with parents
3. For medical appointments, extracurriculars, school attendance 4. Who has responsibility for feeding children when exchanges occur at meal times

D. Prompt Exercise of Time with Child

1. Arrangements when a parent is ill
2. Arrangements when a child is ill
3. Calling ahead if vary exchange by more than ___ minutes

E. Parental Decision Making

1. Making an effort to work together
2. Major life decisions
 - a. Children's Residence
 - b. Education
 - c. Health care providers and procedures
 - d. Spiritual training
 - e. Upbringing
- i. Extracurriculars that are dangerous ii.
Extracurriculars that need both parents iii.
Haircuts, perms, coloring, tattoos, piercing
3. Day-to-day decisions
4. Address for school records
5. Address for medical records
6. Future conflict resolution process (See "W")

F. Parental Communications

1. As needed? Scheduled? When? How?
2. Not discussing difficult issues in front of children
3. Discussion ground rules to avoid arguments
4. Winning cooperation

G. Communicating with a Child

1. At parent's initiative:
 - a. Unlimited/Limited
 - b. Reasonable hours
2. At child's initiative:
 - a. Unlimited/Limited
 - b. Long-distance charges

H. Fostering Affection and Respect

1. Access to other parent, extended family members

2. Not estranging children from other parent
3. Refraining from arguing, making derogatory comments about other parent
4. Not discussing the financial settlement of the divorce with the children
5. Not blaming the other parent for the divorce to the children

I. Substitute Child Care

1. Other parent to have first option if child care needed in excess of ___ hours
2. Responding to request within ___ hours
3. If parent not available then who:
 - a. Mutually-acceptable child care providers or
 - b. Alternate child care at parent's discretion
4. Financial responsibility for child care

J. Health and Well Being

1. Stability and continuity
 - a. Same routines (bed and meal times)
 - b. Same expectations (chores, homework, discipline, diet, hygiene)
 - c. Cooperative and unified parenting response
2. Discipline
3. Notification of intent to take child out of state
4. Not using a child to relay a message to other parent
5. Not asking child about personal life of other parent
6. Not asking child to keep a secret from the other parent
7. Not using a child as a confidante or depending on child for emotional support
8. Seeking input from children while ensuring children understand it is parent's responsibility to determine what is best for children
9. Responsibility for annual medical/dental examinations
10. Safety devices: driving, bicycling, boating
11. Violence
12. R-rated movies
13. Alcohol and drug use when child is present
14. Second-hand smoke
15. Guns and other arms
16. Changing the children's names

17. Calling another adult "Mom" or "Dad"
18. Child's sleeping arrangements
19. Introducing the child to a new partner

K. Children's Possessions

1. Books, toys, clothes, pets
2. Exchanged between households? Redistribute as needed?
3. Kept in separate households?
4. Packing and returning children's possessions
5. Needs for special clothing, equipment for particular activity.

L. Access to Information from Schools and Care Providers

M. Financial Responsibility for Child's Expenses 1.

Child Support

2. Housing, food, clothing, utilities
3. Work-related child care
4. Extraordinary expenses: sports, equipment, lessons, major clothing purchases, school supplies, trips
5. Review (if income, time, expenses change)

N. Educational Expenses (college, private school)

O. Life Insurance (to help raise children if parent becomes deceased)

1. Amount
2. Beneficiary

P. Agreement to Make a Will

1. Percent of Net Estate to the Children?
2. Legal Guardians

Q. Health Insurance

R. Uninsured Health Care Expenses

S. Gifts to Children

T. Dependent Deductions and Head of Household Filing

U. Future Conflict Resolution Process

1. Direct negotiation
2. Gathering information; seeking second opinions
3. Mediation
4. Child development specialist as (binding or nonbinding) arbitrator

V. Future Review of Parenting Arrangements 1.

How often? Annually? Biannually?

2. Remarriage or Cohabitation of Either Parent
3. Change in Employment Schedule
4. Accident/Disability to a Parent
5. Family Emergency
6. Child's Adjustment/Developmental Needs
7. Child's Request
8. Upon recommendation of child's teacher, counselor
9. Moving further than ___ miles from other parent

Written Materials for Child Custody and the Specific Elements to Include in the Agreement by Anju Jessani

Please also follow along with the accompanying power point.

1. Order of topics in a mediation - parenting usually first
2. Brief history of child custody
3. Definitions of physical custody and legal custody
4. (NJ) Court rules on Custody and Parenting Time/Visitation Plans in Contested Cases
5. List of Issues to be Addressed in the Parenting Plan
6. 28-Day Parenting Schedule including pickups/dropoffs
7. Vacations/Holidays
8. Modifications to the Schedule
9. Relocation Now/Future
10. Decision Making Education/Medical, etc.
11. Other issues in Parenting

12. Resources on Parenting Plan

9.2

Parenting Planning in Oregon

[Oregon Courts Parenting Plan Information](#)

Oregon Statutory Language

107.101 Policy regarding parenting. It is the policy of this state t

- (1) Assure minor children of frequent and continuing contact with parents who have shown the ability to act in the best interests of the child;
- (2) Encourage such parents to share in the rights and responsibilities of raising their children after the parents have separated or dissolved their marriage;
- (3) Encourage parents to develop their own parenting plan with the assistance of legal and mediation professionals, if necessary;
- (4) Grant parents and courts the widest discretion in developing a parenting plan; and
- (5) Consider the best interests of the child and the safety of the parties in developing a parenting plan. [1997 c.707 §1]

107.102 Parenting plans; contents. (1) In any proceeding to establish or modify a judgment providing for parenting time with a child, except for matters filed under ORS 107.700 to 107.735, there shall be developed and filed with the court a parenting plan to be included in the judgment. A parenting plan may be either general or detailed.

- (2) A general parenting plan may include a general outline of how parental responsibilities and parenting time will be shared and may allow the parents to develop a more detailed agreement on an informal basis. However, a

general parenting plan must set forth the minimum amount of parenting time and access a noncustodial parent is entitled to have.

- (3) A detailed parenting plan may include, but need not be limited to, provisions relating to
- (a) Residential schedule;
 - (b) Holiday, birthday and vacation planning;
 - (c) Weekends, including holidays, and school in-service days preceding or following weekends;
 - (d) Decision-making and responsibility;
 - (e) Information sharing and access;
 - (f) Relocation of parents;
 - (g) Telephone access;
 - (h) Transportation; and
 - (i) Methods for resolving disputes.

(4)(a) The court shall develop a detailed parenting plan when:

- (A) So requested by either parent; or
- (B) The parent or parents are unable to develop a parenting plan.

(b) In developing a parenting plan under this subsection, the court may consider only the best interests of the child and the safety of the parties.
[1997 c.707 §2]

9.3 Exchanging the Children

When children are sharing time with their parents in two different households, an issue which needs to be addressed is how to exchange the children. Sometimes parents share this responsibility; sometimes one parent provides all of this transportation. What follows are some possibilities and some benefits and drawbacks of each:

1. The parent who has the children brings them to the other parent at the beginning of the children's time with that parent. This results in an equitable sharing of the transportation responsibility. If a parent can do this cheerfully, the inherent message to the children is "It's okay with me for you to have time with the other parent." This solution gives the current parent the responsibility to ensure the children are dressed, have their needed belongings together, and are on time. The caution involved in this option is to be considerate of the other parent and the children and be sure you are at home when the children are scheduled to arrive. The children can hop out of the car and go to the parent's home, or be escorted to the door by the transporting parent. Coming in should be by invitation of the parent only.
2. The parent who is scheduled to have the children picks them up from the other parent's. This also should result in an equitable sharing of the transportation responsibility. When it is comfortable for the parents, this option may allow a child to show a parent her room, a recent project, etc. This also allows the "receiving" parent to borrow special equipment like bicycles and skis when they have a special activity planned. Sometimes children have difficulty with transitions and may resist being "taken away" by the other parent. Be sure the children are ready to go when the other parent arrives. The parent can pull into the driveway and tap their horn, or come to the door and ring the bell. Coming in should be by invitation of the parent only.
3. Parents meet half-way between their households to exchange the children. This results in an equitable sharing of the transportation. Where parental safety or comfort is a concern, this option allows parents to meet in a neutral or public place. Possible meeting places are a mall, a restaurant, the library, or even the police station. The possible drawback here again, is

to be sure to be on time and have a clear location identified. Waiting in a public place with the children in the car is stressful. There may also be no way to reach the other parent if you are delayed.

4. Parents exchange the children at school or child care. This may be attractive to parents who are very uncomfortable with each other because they rarely have to see each other. Also, the children do not have to witness their parents' discomfort or arguments. The drawback is tracking the children's belongings. Parents will need to create clarity regarding the time their parental responsibilities are exchanged in case a child becomes ill in school and needs to go home. Again, being on time is very important. A child cannot wait at the curb outside school waiting for you.

5. Parents exchange the children at a friend or relative's house at different times. This option also eliminates the parents from having to interact in person and saves the children from witnessing the parental discomfort. It also may allow the children to have some distracting playtime during exchanges. It eliminates the problem of a child waiting on the curb and provides a place for a parent to call if they are delayed. A drawback is tracking the children's belongings.

6. One parent provides all the children's transportation for time sharing. Sometimes this is seen as sharing the children's transportation needs equitably because the other parent is shuttling the children to school, extracurriculars and medical/dental appointments. Sometimes only one parent has a car.

7. A representative of one or the other of the parents provides the transportation for exchanging the children. This neutral option may allow for parental comfort and safety. Let the other parent know who is driving the children. Be sure this person is known to the children. Be clear about what that person's role is, that is, they are just chauffeuring, they do not carry messages between parents, or interact with either parent in a hostile manner.

9.4 **Children's Rights**

1. Each child has the right to develop and maintain an independent relationship with each parent.
2. Each child has the right to be free of the conflict between the parents.
3. Each child has the right to be free from having to take over the parental responsibility for making custody and visitation decisions.
4. Each child has the right to be free from having to take sides with, defend, or downgrade either parent.
5. Each child has the right to be guided, taught, supervised, disciplined, and nurtured by each parent, without interference from the other parent.
6. Each child has the right to be financially supported by both parents, regardless of how much time each parent spends with the child.
7. Each child has the right to know both parents, and to spend time with both parents on a regular basis, for holidays, and for vacation periods, regardless of whether or not financial support is given.
8. Each child has the right to a personal sleeping area and space for possessions in each parent's home.
9. Each child has the right to be physically safe and adequately supervised when in the care of each parent.
10. Each child has the right to be protected from people under the influence of alcohol or illegal drugs.
11. Each child has the right to be protected with a car seat or seat belt (as appropriate to the child's age) whenever a passenger in an automobile.
12. Each child has the right to a proper fitting protective helmet whenever bicycling or motorcycling.

13. Each child has the right to a stable, consistent, and responsible child care arrangement when not supervised by the parents.
14. Each child has the right to develop and maintain meaningful relationships with other significant adults, (i.e., grandparents, stepparents, and other relatives) as long as these relationships do not interfere with or replace the child's primary relationship with the child's parents.
15. Each child has the right to expect that both parents will follow through with the child's residential plan, honoring specific commitments for scheduled time with the child.
16. Each child has the right to both parents being informed about medical, dental, educational, extracurricular, and legal matters concerning the child, unless such disclosure would prove harmful to the child.
17. Each child with special needs (developmental, mental, emotional, and physical) has the right to appropriate consideration and adaptation in any child care plan.
18. Each child has the right to participate in age-appropriate activities so long as these activities do not significantly impair the relationship between the child and either parent.

**Adapted from the Family Center of the Conciliation Court of Pima County, Arizona (1991).*

9.5 What Parents Can Do to Help

1. Parents do not have to be friends after divorce, being considerate and business like is more realistic. Treat the other parent as you would a business partner. Keep in mind the "mission statement" of this new business is to raise the best children possible. Consider how you would behave with a

business associate you were trying to close an important deal with (you probably wouldn't resort to name calling).

2. Be on time. Being late is inconsiderate of the other parent and the child. Being late can interfere with the other parent's plans and hurt the feelings of the child who is waiting for you. It can also disrupt the child's routine.

3. Stay out of conflict with the other parent. When discussing a challenging parenting issue, take a time out, take a concern "under advisement," cool down, do some processing, and then contact the other parent with your thoughts. There are two sides to effective parenting communication after divorce: (1) learn to raise issues respectfully and without blaming and (2) learn to respond to a parent's concerns without defensiveness and argument. You will need to learn to attack problems together, not attack each other because there is a problem. Former partners know how to push one another's buttons and this can sabotage a business-like relationship. The following is a possible way to address concerns respectfully:

a. Begin by asking if this is an acceptable time to talk. Make sure you can have the other parent's (and give your own) undivided attention for a sufficient amount of time to have a productive discussion.

b. Avoid making statements which can be interpreted as blaming or attacking the other parent. Make a statement to encourage cooperative problem solving such as: "We have a problem; I need your help."

c. Calmly and objectively describe the situation and how it is a problem for you or the child.

d. Avoid interrupting. Sometimes the need to interrupt can be helped by taking notes while the other parent is talking. You want to learn to respond, not react.

- e. Before responding with your perspective, ask questions of the other parent and listen to their answers. You want to really understand the problem from the other parent's perspective. After both parents have shared perspectives, it's much easier to find solutions that will work for both of you and the child.
 - f. Remember you are trying to win cooperation from the other parent to solve the problem in your child's best interests. If you blame and attack, you will alienate and invite counterattack.
 - g. Also remember you are having a respectful conversation because you love your children and value a cooperative co-parenting relationship.
 - h. If you get uncomfortable, feel defensive, or find yourself wanting to blame or attack the other parent, disengage before an argument begins. Take the matter "under advisement." Make a statement such as, "I need to think about this. I'll call you back tomorrow."
 - i. When calm, continue discussions and work together to find a solution acceptable to both of you.
 - j. Create an implementation plan for addressing the problem: who is going to do what by when.
 - k. When appropriate, take turns putting your plan/agreement in writing and share it with the other parent.
4. Never allocate the other parent's resources (emotional, physical, financial) without their permission. This means not signing a child up for an extracurricular activity (like soccer or a paper route) when it is the other parent's time with the child without talking it over with the other parent first. When a child is invited to a birthday party, and he or she is supposed to be with the other parent that day, have the child call the other parent and make the arrangements with that parent. It is so easy to get involved in these situations, try to remember this is their business, not yours.
5. Avoid putdowns and talking negatively about the other parent when the children are present. Children love both of their parents. Very often,

children need "permission" from a parent to have a good relationship with the other parent. Encourage the children to have contact with the other parent. If a child complains about the other parent or the other parent's household, encourage them to discuss it with the other parent and let them know you are confident in their ability to work it out with the other parent. "Mom really loves you. I think you need to let her know this is bothering you. I'm confident that you two can work this out together." When parents speak negatively about a parent to a child or act disrespectfully toward that parent, the child will pick up on that behavior and attitude, and act it out with the other parent (and you). Help your child have love and respect for both parents.

6. Help a child understand that Mommy and Daddy are getting a divorce, not Daddy (or Mommy) and the child. Parenthood lasts a lifetime. Avoid language like "She left us."

7. Act responsibly so children are secure in knowing a responsible adult is taking care of them. For example, responsible adults with a business-like relationship do not engage in name-calling, yelling, and other emotional outbursts. Another thing to remember is not to give children the responsibilities which belong to a parent. An example of this is leaving the determination of the time-sharing schedule to a child. This puts the child in an awkward position. For one thing, it is too much responsibility for a child. And, a child should never be asked to choose between his or her parents. It is far better to seek a child's input and for the parents to then determine the time-sharing schedule. If when seeking input from a child, the child tells one parent one thing and the other another thing, this is a pretty clear indication that the child is experiencing a loyalty bind. This child may need to express him/herself to a neutral, supportive person like a counselor or teacher. Sometimes a child can talk with both parents together about his or her timesharing preferences. This is easier to do with an older child. What needs to be made clear to the child is (1) we would like your input, (2) this is our decision, (3) please don't think you need to take sides or would hurt one of us by your thoughts or preferences, (4) it would hurt us more to think you felt you needed to protect us from your wishes.

8. Do not ask a child to relay a message to the other parent. This puts the child in the middle of the parents' relationship. It also places more responsibility on a child than is appropriate. Suppose the child forgets, or loses the letter? Suppose the other parent gets angry when they get the message? Who then suffers?

9. Do not ask a child what is going on in the other parent's life or household. This is asking a child to violate a trust. Don't grill children about how they spent their time when they come back from the other parent's home. The children can end up feeling like it wasn't okay that they had a good time. Remember, except in abusive situations, you cannot control what the other parent does with the child when they are having their time together. If you have concerns, express them to the other parent. If the child has concerns, encourage him or her to bring them up with the other parent. It might be tempting to agree with your child if s/he complains about the other parent, but you should tell the child to take his or her complaint to the other parent.

You need to encourage the development of a healthy relationship with your child and the other parent.

10. If your children tell you the other parent lets them stay up very late, eat donuts for dinner, and therefore you should too, tell your children that they will follow your rules when with you and that you cannot tell the other parent what to do in their house.

11. Do not use a child as a confidante or depend on a child for emotional support. This is more responsibility than a child should have and also puts the child into a loyalty bind.

12. Regarding secrets--do not ask a child to keep a secret from the other parent. This also puts the child into a loyalty bind. Do not agree with your child to keep a secret from the other parent. This undermines that parent's parenting role and cuts the parent out of significant events in the child's life.

13. Do not discuss the financial or emotional details of the divorce (or problems with child support) with the children. If they ask questions, ask them what their concerns are and then tell them that Mom and Dad will

discuss them. Children need to know that their parents are working responsibly to resolve all the issues, and that they don't need to worry.

14. Try to create as much stability and continuity between households as possible. Following the same basic routines around bedtimes, mealtimes, and having similar expectations around discipline, training, homework, chores, hygiene, and diet will help children transition between households more easily.

15. Give your children your time and attention. It is normal to feel like you have to entertain your child when you have time with them after divorce, but you don't have to disrupt your life or spend a lot of money on them to make up for lost time. Be yourself and just have a good time together whether you're doing laundry or playing checkers.

16. When you cannot see your child regularly, telephone, write, e-mail, send postcards and pictures, make audiotapes of you reading their favorite stories, send them a video cassette of where you live, work, your pets, friends, etc. Arrange to read the same book, watch the same movie or tv show and then talk about it together. When the other parent is far away, videotape a child's softball game and send it to the other parent. Send the other parent copies of school projects, artwork, and funny things they said that week.

17. Think of the other parent as an asset for your child and yourself. Call the other parent when you need child care, a break, or when you think the child needs the other parent.

18. Avoid trigger words like "I let you have the kids..." "My son...." Think and speak in terms of "sharing our kids."

19. Understand that sometimes a child will share exaggerated or fabricated information with the parent they are currently with. This is a natural event and usually an effort to please that parent. The child may be motivated out of loyalty, concern for the parent's hurt feelings, wanting to gain favor with the parent, wanting to evoke a "mama-bear/papa-bear" response, and so on. The child is not lying but rather is attempting to

survive, feel secure, diminish fears of abandonment, and create a positive relationship with the parent with whom s/he is sharing time.

20. Post a timesharing schedule where the children can see it. Even children as young as 12 months can follow along with a color-coded timesharing schedule where days with one parent are red, days with the other parent are blue, for example. They can even help "check off" the days as they go by and thereby know where they are in time and when they will see the other parent again.

21. Before becoming distressed at your child's seeming reluctance to transition to the other parent, take note as to whether the child is reluctant because she or he is seeking to avoid being with the other parent, wanting to have some control, demonstrating loyalty to you, or, as may often be the case, is the child having a fun time and just isn't ready to stop doing what they're doing and go.

22. Divorced parents can stay emotionally hooked to one another and easily fall into fighting. Because kids tend to want parents to be together, they may see their parents' fighting as a way for their parents to stay together. They may even do things to promote the fighting. This is especially true in families where there was fighting followed by "kiss and make-up" in the marriage.

23. Divorced spouses do not permit themselves to get through the divorce transition when they are focused on the other parent and refuse to let go. Focus on your future.

24. Considering that children have fantasies of their parents' reconciliation for many years after the divorce, introduce the children to new partners very slowly. It is not usually necessary for the children to meet a casual date or develop a relationship with a series of new partners. Children may experience separation loss and be confused about what "family" and "marriage" mean. Consider only introducing your children to a new partner after some form of commitment has been made between you and that new partner. Going slowly will also help the chances of the children building a positive relationship with that

person. Children often have difficulty if they perceive themselves to be in competition with that new partner for your attention. During the introductory phases of helping the children adjust to your new relationship, have some one-on-one time with each of your children in addition to time you spend as a new family. Talk with your children about any concerns they may have. A key part of the children's acceptance of your new partner will be the reaction of the other parent. Find a time to discuss these issues with the other parent to avoid problems.

25. Create developmentally appropriate time-sharing plans.

Consider that children's desires and needs change over time. What a six-month-old and a ten-year-old can do and what they need are very different. In general, the following are important considerations in developing an age-appropriate time-sharing plan:

a. Children Under Three:

- i. Children under three are learning to trust others: They express their needs and someone comes to take care of their need. That person is a "primary caregiver" in the child's life. The child knows s/he can depend on that person to meet the child's needs. The child is learning if other people are trustworthy.
- ii. When children are separated for long periods of time from someone they know to be dependable, and placed with someone who they do not yet know to be as dependable, they experience anxiety and insecurity. They learn not to trust their needs will be met.
- iii. This concept is called attachment. It refers to the bond a child develops with his/her primary caregiver(s). Yes, a child can have more than one primary caregiver. It can be anyone who the child has learned will consistently and dependably respond to a cry for help. In terms of emotional development, it is critical that children form secure attachments with their primary caregivers.
- iv. The attachment bonds formed in childhood have been shown to have a very strong impact on how we relate to others as adults especially in intimate relationships.

v. Children under three are developing their attachment bonds and need frequent contact with both parents and no prolonged separation from their primary caregiver(s).

vi. A parent can become a primary caregiver to a child with frequent contact, changing diapers, feeding, comforting, bathing, etc. It's not enough to just have time with the child; it must be nurturing, caretaking time.

b. Children 3-5:

i. Once children are passed their "attachment phase," more flexibility and longer blocks of time with each parent are possible.

ii. Children under five still need frequent contact with both parents because of their undeveloped sense of time.

iii. A posted, color-coded time-sharing calendar in both parents' households can be helpful to a child in this age group.

c. Children 6-12 are usually the most flexible.

i. If the schedule is workable for the parents, it will most likely be workable for the child. Children in this age group are somewhat like barometers of their parents' adjustment.

ii. Regardless of a child's age, a child should have a sense of being listened to in expressing their preferences for having time with both parents.

d. Children 13 and up:

i. Children in this age group usually prefer fewer transitions and longer blocks of time with parents,

ii. Or they may prefer to have one primary home and "make dates" to have time with the other parent. Don't let this hurt your feelings. As children grow older, their relationships with their friends are more important to them than their parents. Adolescents are creating an identity that is separate from their parents. They need to "roost" (which means "hang out in their space"). They also need to be easily available to their friends by phone.

9.6 Creating Appropriate Plans for Children with Special Needs

[Written Materials for Working with Special Needs Children by Ken Cloke](#)

Developmentally Appropriate Parenting Plans

Children need security, continuity, and stability. This is even more important during divorce when children wonder who will take care of them and if they are also divorceable. When parents are in conflict about time-sharing plans, it may help to distinguish between what is fair for them, and what is best for their children. Most parents will say that they want what is best for their children. Unfortunately, for most of us, it is very difficult to distinguish what is best for me from what is best for my child. Most parents take comfort in the role of the "good" parent. As any parent who got up in the night to change messy diapers knows, a good parent makes personal sacrifices and feels good about him or herself in the morning, even when feeling tired and bleary eyed. A "good" parent makes sacrifices. To reach agreement on parenting issues, it is essential to move off your self-interest (what's fair to you) to a place where your goal is to achieve what is in your children's best interests. How does one do this? It is usually helpful for parents to understand what their children are experiencing emotionally and developmentally. Parents can usually understand that children's needs change over time. With some amount of information about what components go into a developmentally appropriate parenting plan, the parent who

initially wanted a six-month-old child six consecutive weeks in the summer can see that six consecutive weeks in the summer may be a better plan for a 10-year-old child.

Parents needing help identifying the best interests of their children and reframing their relationship into a parenting partnership may need information to read as well as referrals to child development specialists, parent education centers, and family therapists. What follows is some helpful information for you about the components of a developmentally appropriate parenting plan.

The idea that children pass through different developmental stages as they mature was first introduced by Freud, later refined by Adler and Erikson into psychosocial developmental stages, and expanded by other developmental psychologists into our current understanding of human development.

Erikson's theory is that at each stage of our life, we face the task of establishing an equilibrium between ourselves and our social world. He describes development in terms of the entire life span, divided by specific crises or turning points in life. At these turning points, we have the potential to move forward, that is to achieve successful resolution of the developmental conflict, fixate (remain "stuck" in a stage) or regress because of the failure to successfully resolve the developmental conflict. Usually a child needs support and help mastering these conflicts. The help usually comes from an understanding parent who will not take an adolescent's struggle for differentiation and identity formation as a personal rejection. A child needs a parent who understands what the child is experiencing and can provide the child with the security of their unconditional love.

This next section looks at a child's need for security. Security, stability, and continuity used to refer to a geographical location: the child's home. The maxim was that a child whose parents were divorcing needed "one home." Current empirical research however questions if we have sacrificed a child's relational security for the sake of geography. Security, stability, and continuity may be better provided by the relationship the child has with each parent. In thinking about the developmental needs of children and the need for security and continuity, many contemporary psychologists refer to

attachment theory. Attachment theory is a useful contemporary framework to describe the role that enduring affectional bonds have in shaping the life course. John Bowlby developed the theory of attachment to explain the behaviors that infants employ to maintain feelings of security through physical proximity with their primary caregivers. When the distance from the caregiver is too great, a child smiles, cries, follows, and does whatever he or she can until comfortable proximity with the caregiver is reestablished. Crucial to the development of the child's enduring beliefs about the self as worthy of care and support, and others as responsive and caring, is the responsiveness of caregivers to infants.

Attachment researchers hold that children also develop psychological representations of relationships, also known as "working models," through early experiences with their primary caregivers. These representations are stable over time and manifest in later relationships. Alfred Adler believed that during the first three to five years of life, influenced by the family constellation of siblings, values, and emotional atmosphere, and motivated by the desire to find his or her own unique place in the group, a child seeks to create a logical and coherent view of self, others, and the world. These early perceptions lead to the development of an internally consistent schema for viewing the self, others, and the world, which Adler termed the individual's style of life.

In later work, Mary Ainsworth and John Bowlby extended the theory of attachment to explain the development of emotional attachments after infancy. Bowlby was interested in the development of the attachment bond and whether attachment formed or not. Ainsworth was interested in the quality of the attachment formed. According to Ainsworth, the quality of an infant's attachment to his or her primary caretaker is dependent on the quality of the interactions the child and caretaker have experienced. The quality of those interactions results in the categorization of infants into one of three basic attachment styles: secure, insecure-ambivalent, insecureavoidant. In the secure attachment style, the child has learned to depend on the responsiveness of the primary caretaker. "This is someone who I can count on to meet my needs. They will change my diaper, feed me when I am hungry, comfort me when I am cold, tired, or hurt." The insecure-ambivalent style develops in response to the caretaker's

inconsistent or arbitrary responsiveness to the child. "This is someone who I can sometimes count on to meet my needs." The insecure-avoidant can be characterized as having relinquished trust in the responsiveness of the caretaker. "I cannot count on this person to take care of me."

In formulating developmentally appropriate parenting plans in a child's best interests, it is important to consider the child's existing attachment bonds and the age of the child. The attachment bond is a developmental task that begins in infancy and continues into a child's third year. A healthy parenting plan should balance between providing the child with his or her secure base (primary caregiver), and the opportunity to expand this secure base to both parents if only one parent has fulfilled this role for the child. A secure attachment bond is created by frequent caretaking contact. Caretaking contact means a parent has time with a child, changes diapers, feeds, clothes, bathes, plays, and holds a child. If only one parent has fulfilled this role for the child, the caretaking contact initially should occur in reasonable proximity to the primary caretaker, or for very short periods of time away from that primary caretaker. Abruptly removing the child from his or her primary caretaker for long periods of time may be a traumatic separation for the child who would wonder "Who will take care of me?" without knowing that the other parent can fulfill that role. Time and experience will help the child feel secure with both parents.

In summary, in younger children, security is provided by their relationship with their parents. Adolescents are learning to develop security in themselves and have a greater need for their peers, their "space," and an opportunity to define themselves as someone other than or different from their parents.

Divorcing Parties Have an Attachment Style

Beyond helping to identify what is best for children in terms of time-sharing plans, attachment theory can help understand different clients' reactions to divorce. Many attachment researchers have found that the attachment system developed in childhood has a major influence on adult relationships and social competencies and may be activated by any close relationship which has the potential to provide or threaten love, security, and comfort. As

adult behaviors designed to achieve security become activated in response to perceived stress and loss, it is likely that those behaviors will surface in response to the distress, anxiety, fear, and loss that divorce is for many people.

There are three styles of adult attachment behaviors: dismissing, free to evaluate, and preoccupied. In adult relationships, the secure attachment style is characterized by confidence and composure in emotional relationships. The securely attached style individuals view themselves as happy, trusting, and friendly, and accepting and supportive of their partner despite faults. Individuals of the securely attached style can recognize and acknowledge their distress, appropriately seek support from family members, manage negative feelings such as anxiety and hostility, and engage in constructive problem solving. Individuals of the preoccupied (anxious/ambivalent) style are characterized by neediness, obsession, emotional extremes, jealousy, and desire for reciprocation and union, and have shown high levels of anxiety and hostility. Individuals of the dismissing (avoidant) style are characterized by independence, self-reliance, emotional aloofness, fear of intimacy, jealousy and emotional extremes. They do not acknowledge feelings of insecurity, fear intimacy, are more hostile and sensitive to rejection than the other styles.

Another critical piece in developing parenting plans is to discuss the impact of ongoing conflict between parents on the children. Researchers now view conflict, rather than the divorce or residential schedule, as the single most critical determining factor in children's post-divorce adjustment. The children who succeed after divorce, have parents who can communicate effectively and create a respectful co-parenting relationship.

9.7 Erickson's Psychosocial Stages

First Year of Life

Infancy: Trust v. mistrust

If significant others provide for basic physical and emotional needs, infant develops a sense of trust. If basic needs are not met, an attitude of mistrust toward the world, especially toward interpersonal relationships, is the result.

Ages 1-3

Early childhood: Autonomy v. shame and doubt

A time for developing autonomy. Basic struggle is between a sense of self-reliance and a sense of self-doubt. Child needs to explore and experiment, to make mistakes and to test limits. If parents promote dependency, child's autonomy is inhibited and capacity to deal with world successfully is hampered.

Ages 3-6

Preschool age: Initiative v. guilt

Basic task is to achieve a sense of competence and initiative. If children are given freedom to select personally meaningful activities, they tend to develop positive view of self and follow through with their projects. If they are not allowed to make their own selections, they tend to develop guilt over taking initiative. They then refrain from taking an active stance and allow others to choose for them.

Ages 6-12

School age: Industry v. inferiority

Child needs to expand understanding of world, continue to develop appropriate sex role identity, and learn basic skills required for school success. Basic task is to achieve a sense of industry, which refers to setting and attaining personal goals. Failure to do so results in a sense of inadequacy.

Ages 12-18

Adolescence: Identity v. role confusion

A time of transition between childhood and adulthood. A time for testing limits, for breaking dependent ties, and for establishing new identity. Major conflicts center on clarification of self-identity, life goals, and life's meaning. Failure to achieve a sense of identity results in role confusion.

Ages 18-35

Young adulthood: Intimacy v. isolation

Developmental task is to form intimate relationships. Failure to achieve intimacy can lead to alienation and isolation.

**Materials adapted from: Corey, G. Theory and Practice of Counseling and Psychotherapy.*

Pacific Grove, CA: Brooks/Cole Publishing Company, 1986.

9.8 Adler Time Sharing Guidelines

Based on the research findings that children experience long-term adverse effects from ongoing parental conflict and that children need frequent contact with each parent to maintain a close relationship with that parent, Robert Adler calls for overall balance in parenting plans. Adler, a well-known specialist in the field of child development and divorce, believes there are as many good schedules for sharing time with children as there are good parents who are able to create and maintain them. There must be a balance between the children's need for stability and predictability of schedule and the need for a resolution of parental conflict. The children's needs for frequent and continuing contact with both parents must be balanced with the parents' schedules. The needs of older children must be balanced with the needs of younger ones.

- I. BIRTH TO 6 MONTHS:** One primary home. The other parent spends two or three hours, two or three times per week with the child; becomes primary caretaker one weekend day per week, or one 24-hour stretch once per week.
- II. 6 TO 18 MONTHS:** One primary home. The other parent spends from two or a full day, two to three times per week with the child, or one 24-hour stretch once per week. Or, two homes, although the child spends significantly more time at one of them and no more than two overnights per week at the other (for mature, adjustable children and cooperative parents).
- III. 18 TO 36 MONTHS:** One primary home. The other parent has the child during the days up to three times per week, on a predictable schedule. Or add one overnight per week. Or, two homes, with the child spending somewhat more time in one than the other--two or three overnights spaced regularly throughout the week.
- IV. 3 TO 5 YEARS:** Two or three nights at one home, spaced throughout the week, the remaining time at the other home. Or, three consecutive days and nights with one parent, four with the other.
- V. 6 TO 12 YEARS:** If parental conflict is low, school-age children can do well with many different parenting plans that allow for frequent and adequate contact with both parents.

- A. Friday after school until Sunday evening or Monday morning, every other week, plus one or two overnights during the two-week stay with the other parent.
- B. Three days with one parent, four with the other.
- C. Alternating weeks with each parent.
- D. Alternate weekends with each parent, two or three days at each home during the week.
- E. Three and one-half days with each parent; weekends also split.
- F. Two weeks with each parent, with one or two mid-week overnights with the other parent.
- G. Older children may be able to handle even longer stays if frequent telephone contact and some physical contact with the other parent.
- H. Children in one home for school year, with other parent for vacations, supplemented with frequent telephone calls and visits.

VI. 13 YEARS AND UP:

- A. Home base with one parent, a mixture of scheduled and spontaneous overnights, shorter visits, and outings with the other parent.
- B. Children spend school year as above. During summer vacation and other long holidays, the situation is reversed.
- C. Work out year-by-year arrangements with older children that respond to teen's needs for continuity in friendships and school.

*Adapted from Adler, Robert E., PhD. *Sharing the Children: How to Resolve Custody Problems and Get on with Your Life*. Maryland: Adler & Adler, Publishers, Inc., 1988.

9.9 Children in Mediation?

Parents often come to mediation with the mistaken assumption that a mediator's job is to settle a dispute. When the dispute is regarding custody or time-sharing, parents often have opposite views of what they believe their children want and ask the mediator to talk to the children. For numerous reasons, confronting a child with such a question can put the child into a dangerous psychological position:

1. Children need to know they have parents they can depend on to make good decisions for them.
2. Children should not be asked questions that force them to choose between their parents.
3. Children are often too immature to know what is in their best interests. They'd love to be with the parent who will let them have chocolate cake for breakfast.
4. Children have great difficulty disappointing a parent they are completely dependent upon.
5. Children are often "prepped" to tell the mediator what the parent wants.
6. Children fear retribution (real or imagined).

Contrary to popular belief, there is no age when the child can legally decide where s/he wants to live. Recognizing the age of majority as the legal ability to decide residence and the potential emotional damage to a child, judges do not like to see children in the courtroom. If they talk to a child, they often prefer to do it in chambers and may hold it against parents and their attorneys.

There are appropriate times when a mediator meets with the children. A mediator may wish to get specific input from the children about how Mom and Dad can best help them through this time. Some common complaints are: "Make them stop fighting." "We're tired of tuna noodle casseroles." "Dad keeps asking me what's going on between Mom and her boyfriend." "Mom sends messages to Dad through me."

Another appropriate discussion may be to discover their specific holiday desires

("We want to have Christmas eve with Mom at Grandma's and Christmas day with Dad." "We want to have two turkey dinners on Thanksgiving." "I want my birthday at the pizza parlor so Mom and Dad can both come.").

A mediator may meet with the family after the agreement is in its final form to help explain it to the children.

In general, a child who is 12 years old should have input into his/her residential schedule. A child 15 years old or more should have very strong input. The mediator should make it clear to the child, or preferably to the parents, that we need input from the child, not decisions. If the mediator does not want to talk with the child, and if the parents cannot gather input from the child without compromising him or her, a child's counselor, or a mutually acceptable child development specialist can often speak to what is in that child's best interests.

Before talking with children in mediation, the mediator should get an agreement from the parents regarding the purpose of gathering information from the child. Ensure the parents understand the child's need for safety and comfort. Help them be sensitive to divided loyalty and dependency issues. Spend some time finding out from both parents what each child is like so you can use this information to build rapport when you talk with the child.

Before proceeding, get agreement regarding what the children are told ahead of time about why they are coming to mediation. The information must be clear (input only) and preferably presented by both parents together. Arrange for neutral transportation (both parents, or trusted family friend).

At the appointment, meet with parents and children together to explain what a mediator does, go over ground rules (we need their input not their decision) and explain the need for and limits of confidentiality. Get permission from the parents in front of the children for the children to talk candidly with the mediator.

Meet with the children together to make sure they understand why they are meeting with you and let them know how you're going to proceed. I find it helpful to meet with all the children together, then with each child separately, then reconvene with all the children again, then meet with the parents separately or together with the children, depending on the information gathered from the children. When meeting with each child separately, arrange their coming and going so they are not influenced by each other or their parents.

When meeting with a child under 9-10, you may find it helpful to have some art supplies handy. Children usually can express themselves more comfortably when they are playing. After some rapport building, a typical children's interview might proceed as follows:

1. Tell the child what Mom and Dad told you about him/her (their favorite activities, school subjects, friends, etc.), include what the parents said they liked most about the child (affectionate, creative, helpful, etc.).
2. Ask what they like about Mom/Dad (do for each parent in turn).
3. Ask if there is anything they do that Mom/Dad don't like.
4. Ask if there is anything Mom/Dad do that they don't like (again, do for each parent in turn).
5. Ask what Dad/Mom can do to make his/her life easier right now (again, do for each parent in turn and consider reversing order).
6. Let them know you are working with Mom and Dad on parenting issues and that you need their help to make good decisions. Make it clear that Dad and Mom are deciding and their role is give information (not decisions).
7. Ask about a child's holiday preferences.
8. Ask if there's anything they want you to tell Mom/Dad.
9. Ask if there's anything that you talked about that they don't want you to tell Mom and Dad.
10. Make sure they understand what you are going to do with the information they've shared. Make arrangements for a follow-up visit, or phone call.

Section 10

Written Materials for Financial Introduction with Clare Fowler

Mediating Support Issues

Support arrangements allow the participants to ensure that their children's financial needs are reasonably and fairly met, and also that their own financial needs are equitably addressed.

The federal government now requires that each state have child support guidelines which are presumed to be the correct child support in a state (based upon number of children, income levels, and residency of child). While these child support guideline standards can be legally rebutted, judges do not generally like to modify the child support guideline amount except for manifest injustice.

What is also true is that these child support guidelines, while they must be considered by divorcing participants, do not need to be controlling. It is quite common that participants come up with more robust and fine-tuned support arrangements than the simple payment of a monthly amount.

The parties also need to consider whether their situation is one that is appropriate for some measure of spousal support. As spousal support is often the least predictable issue from a legal perspective, it can also be challenging for participants.

Written Materials for Financial (division of assets, child support, tax implications, etc.) by Chip Rose

10.1 Child Support

In every state, there are two basic ways of calculating child support:

- (1) calculating child support under the existing state child support guidelines (relying on state averages); and
- (2) performing a customized calculation of child support based upon the parties actual predicted net income and respective expenses

Some parties will simply want to go with the state's presumed child support amount. Typically, divorcing parties will be required to perform these calculations and to demonstrate consideration of the results, even if they choose to go with some other arrangement. Even if mediating parties intend to go with state child support guidelines, they may also want to do a customized calculation of child support to see how "fair" the guideline amount is.

If the mediator assists the parties to calculate child support in both of these ways, there will almost certainly be two different resulting figures. The mediator and the parties will then need to be creative in reducing this dissonance.

It is important to remember that the child support guidelines are not set in stone. In fact, they seem to be changed by either the state legislature or designated administrative bodies annually, if not more often. Despite this changeability, the guidelines do provide a backdrop as to how a court, at least at the present time, would likely approach the situation. It is important for the mediator to emphasize, however, that participants can enter into an agreement on child support other than that indicated by the state child support guidelines, so long as they do that in an informed manner. In most

states, the parties will need to attach a copy of the state's child support guideline worksheet or comparable calculations even if they choose some child support amount other than the guideline amount to show that they are making an informed decision.

10.2 California Guideline Model

Principles Underlying the Child Support Guidelines in California (*do not rely on this as a statement of the current law*)

In California, the current support calculation is based on a statutorily approved algebraic equation, the end product of which is the appropriate amount of court-ordered support for the child or children of a divorcing couple. Included as components of the equation are three elements which most directly affect the outcome award.

The first of the elements is the net income of the parties. Net income consists of income from any and all sources from which is deducted all mandatory withholding (e.g. state/federal taxes, FICA, Medicare tax, retirement contributions etc.) and guideline approved deductions (eg. health insurance premiums, union dues, court-ordered support paid to other relationships). None of the approved deductions is discretionary so a voluntary contribution to a tax-deferred savings plan or a credit union payment made through payroll deductions, are not deemed deductions for net income purposes.

The second of the elements is the number of children. The equation utilizes what is referred to as a "k factor" in the calculation. This is the amount of support from both parents that is deemed necessary to meet the needs of the children based on the total net income of both parents. For one child, this sum is 20% of the combined net income of the parents when that income is \$800.00 per month or less and 25% when that income is between \$800.00 and \$6,666.00 per month. There are extended calculations for income figures above that level. The level of support for one child is reduced per capita for two or more children to adjust for the economy of numbers.

The third element is the percentage of parenting time each party has with the child or children. The equation attributes to each parent the costs associated with time spent with the children. For support calculation purposes credit for a day with the child usually includes the responsibility for having the child overnight. Notwithstanding the perceived revolution in coparenting, statistics have established that in approximately 80% of divorces in California where there is joint custody, mothers have the children 80% of the time and fathers have the children 20% of the time. Thus, 20% is the default setting of the support calculation software programs although the actual time will be adjusted for appropriate circumstances in any given case.

There are three elements to any court order for child support. The child support award, itself, as results from applying the state guideline equation to the status of the parties' net incomes, number of children and parenting time. Additionally, the court will typically divide employment related child care costs incurred by either parent and although the law allows this expense to be apportioned between the parties in light of their income differences, it is frequently ordered shared equally. The last component of most child support awards is the sharing of health care costs not reimbursed by insurance. As with the child care costs, this expense is most often divided equally between the parents. The category includes major expenses, such as orthodontic expenses, as well as all routine unreimbursed health care expenses.

Computing Guideline Support in California

After determining the monthly net disposable income available to both parties, apply the formula for statewide uniform guidelines for determining child support (FC 4055). (Virtually all mediators, attorneys and judges use Dissomaster or some other computer program to perform this calculation)

Support May Vary from Guidelines

Support may vary from that set forth in the California guidelines where:

- parties have stipulated to a different amount;

- the sale of the family residence is deferred and the rental value of the residence exceeds the mortgage payments, homeowner's insurance and property taxes;
- the parent being ordered to pay support has an extraordinarily high income and the formula would exceed the needs of the children; • both parents have substantially equal time-sharing of the children; or
- children have special medical or other needs. **Additional Child Support**

Additional child support may be ordered to cover the following costs:

- child care costs related to employment, education or training;
- uninsured health care costs for the children;
- educational or other special needs of the children;
- travel expense for visitation (FC 4062)

Health Insurance Coverage

Support orders must include a provision requiring that health insurance coverage for a supported child be maintained by either or both parents if that insurance is available at no cost or at reasonable cost to the parent. If none available, order shall specify that health insurance coverage shall be obtained if it becomes available at no or reasonable cost (FC 3751). Each party must keep the other informed regarding health insurance information (FC 3752.5). The insured must provide the appropriate information and forms to enable a party incurring the health care service costs for a dependent to seek reimbursement (FC 3782).

Stipulated Child Support Agreement

Parties may stipulate to a child support amount subject to approval of the court. Court shall not approve a stipulated agreement for child below the guideline formula amount unless the parties declare all of the following:

- They are fully informed of their rights concerning child support;
- The order is being agreed to without coercion or duress;
- The agreement is in the best interests of the children involved;

- The needs of the children will be adequately met by the stipulated amount; and
- The right to support has not been assigned to the county pursuant to Section 11477 of the Welfare and Institutions Code and no public assistance application is pending (FC 4065).

Family Support

Parties may stipulate to "family support" with an unallocated total sum for support of the spouse and any children without specifically labeling all or any portion as "child support" as long as the amount is adjusted to reflect the effect of additional deductibility. The amount of the order shall be adjusted to maximize the tax benefits for both parents (FC 4066).

Termination of Support

Support shall continue until an unmarried child has attained the age of 18 years, is a full-time high school student who is not self-supporting, until the child completes the 12th grade or attains the age of 19 years, whichever occurs first. Nothing limits a parent's ability to agree to provide additional support (FC 3901).

Wage Assignment

When support is ordered, it shall be paid by wage assignment unless otherwise agreed by the parties (FC 5230). (See copy of wage assignment attached to this section).

10.3 Custom Calculation of Child Support

The following chart and formula may be utilized to assist mediation participants to calculate their own customized child support based upon their own unique circumstances, rather than state averages. Participants may choose to perform such customized calculations either because they desire such a customized result or as a test for the reasonableness of the state's presumed child support obligation. Note that the various bases for rebutting the state calculation of child support are, essentially, based upon this type of customized calculation:

Income

H Net income: _____ %
 W Net income: _____ %
 Combined net income: _____ 100 %

Budgets

H personal needs: _____ W personal needs: _____ H
 costs for children: _____ W costs for children: _____
 total costs for children: _____ total personal needs:

H obligation for children = H % net income x total costs for children

W obligation for children = W % net income x total costs for children

CS = H total obligation - H costs for children; or W total obligation - W costs for children

10.4 Spousal Support

Written materials for Spousal Support by Julie Gentili Armbrust

A Lightening Rod Issue

One of the most challenging issues to mediate is the issue of spousal support. This issue understandably gives rise to participants' dependence issues. Under the emotional difficulties of divorce, it is easy for parties to attach feelings of anger, abandonment, exploitation, lack of trust, and other resentments to the issue of spousal support. Payors may say things like, "I'm not getting divorced to pay spousal support forever." Needy recipients may say things like, "I don't want a penny from that S.O.B." The mediator needs to assist parties to recognize that they do, in fact, at least following a long-term marriage, have financial interdependence, and that it makes sense to reach a financial agreement that allows each of them, in due time, to develop financial independent.

Legal and Equal Suffering Standards

The general standard for determination of spousal support in most states is that each party is entitled to live in a style "not overly disproportionate to that which they enjoyed during the marriage." The overall determination of spousal support, both in amount and duration, is an equitable one for the court. There are no hard and fast rules. The mediator can turn the unpredictability of spousal support determinations at the courthouse to his or her advantage by assuring participants that it is only by agreement that they can eliminate risk and control definition of support arrangements. Mediation of issues of spousal support is made challenging by the fact that spousal support, like child support and parenting arrangements, is an inherently modifiable determination. Thus, so long as spousal support exists, an existing spousal support order can be modified as to amount or duration. For there to be a modification of spousal support, there must be a "substantial change in circumstances" (either in terms of earnings or need). While parties through their agreement cannot change the legal modifiability of spousal support, they can state certain assumptions and an intent that their arrangements be as non-modifiable as legally possible. In seeking to

assist participants to reach agreement on spousal support issues, the mediator needs to assist the parties to resolve two basic issues: the amount of support and the duration of support.

Identifying Specific Purposes and Goals of Support

In working with both the amount and duration issues, it is helpful to assist mediating parties to identify the specific purposes for spousal support. For example, it may make abundant sense to pay higher level of spousal support in order to educate or train a dependent spouse in the short run, rather than maintain an elevated level of financial need for the duration. Particularly in shortfall situations, the parties may need to be reminded that there are two ways to bring a budget together. One way is to decrease expenses (which parties have typically already reduced to reasonable minimums). The other way is to assist the parties to develop additional income generating capacity.

The Amount of Support

Determining the amount of monthly (or other periodic) spousal support is, perhaps, the easier job. After taking care of their children's expenses, most mediating parties will agree that, at least for some time, they should have comparable standards of living. This may either mean that they will provide comparable income to each of them to meet their personal needs for some period of time, or that, after considering their differing set expenses (for example, housing, debts, etc.) they will seek to provide comparable discretionary income to each of them. In making such determinations, it is important to remember that spousal support payments, properly described and documented, are generally tax deductible to the payor spouse and taxable income to the recipient spouse. It may be helpful to involve a financial planner in seeking to determine final spousal support levels if the parties are desiring to balance their available incomes. It is typical for divorcing parties to find themselves in a "shortfall" position, wherein, even with relatively spartan budgeting, there simply is not enough income available in the family's system to meet what they view to be their necessary expenses. Under these type of circumstances, it is common for parties to adopt an "equal suffering" arrangement wherein each of the parties agree to have the same amount (or proportion) of personal needs go unmet. If the parties agree to this type of arrangement, it will likely also be

desirable for them to have certain arrangements for notifying each other in the event of a defined increase or decrease of income, and also, possibly, appropriate for them to annually exchange tax returns and to review their support arrangements.

10.5 Custom Calculation of Spousal Support

The following chart and formula may be utilized to assist participants to perform a customized calculation of their spousal support amount.

1. Calculate any shortfall or excess:

Combined net income: _____
 Less total costs for children: _____
 Amount left for parents: _____
 Less total parents' personal needs: _____
 Amount of "shortfall" or excess: _____ x 1/2 = _____ (each party's share of shortfall or excess)

2. Calculate basic spousal support "entitlement"

W entitled to receive: W personal needs: _____
 +/- shortfall/excess: _____ total
 entitlement: _____

W has: W's net income: _____
 Less W's obligation for children: _____
 Amount W already has to meet personal needs: _____
 Wife's "entitlement" = _____
 Less amount wife has to meet = _____ Net
 spousal support needed = _____

3. Augment basic entitlement with resulting tax liability. Augment needed spousal support by anticipated tax liability.

e.g., if net spousal support needed = \$1,000, tax liability might be 15% federal, 7% state, with resulting spousal support of 22% additional or \$1,220.

4. Share net tax savings

Consider augmenting spousal support by 1/2 tax savings.

e.g., if husband's tax rate is 28% federal and 9% state, H tax rate = 37%; Wife's taxes are 15% of federal, 7% of state, W tax rate = 22%. The difference is 15%, which divided in half - 7.5%, so wife's total support = $\$1,220 + (\$1,220 \times 7.5\%) = \$1,311.57$.

10.6 Oregon Context

(do not rely on as current statement of the law)

Under ORS 107.105(1)(d), the court is empowered to award spousal support as follows:

"For the support of a party, such amount of money for such period of time as may be just and equitable for the other party to contribute, such contribution to be in gross, in installments, or both, as the court may order. The court may approve, ratify and decree voluntary agreements providing for contribution to the support of a party. In making such support order, the court shall consider the following:

1. The length of the marriage;
2. The age and physical and mental health of the parties;
3. The contribution by one spouse to the education, training, and earning power of the other spouse;
4. The earning capacity of each party, including educational background, training employment skills and work experience;
5. The need for education, training, or retraining to enable a party to become employable at suitable work or to enable a party to pursue

career objectives to become self-supporting at a standard of living not overly disproportionate to that enjoyed during the marriage to the extent that is possible;

6. The extent to which the present and future earning capacity of a party is impaired due to the party's extended absence from the job market to perform the role of homemaker, the extent to which suitable job opportunities are unavailable to a party considering the age of the party and the length of time reasonably anticipated for a party to obtain training or updating of career or job skills. In a case of a party's extended absence from the job market to perform the role of homemaker, where it is likely that the party will never substantially recover from the loss of economic position due to the extended absence, and where the other party has, during the marriage, achieved a substantially advantageous economic position through the joint efforts of the parties, the court may award the disadvantaged party support as compensation therefore, so that the standard of living for the disadvantaged party will not be overly disproportionate to that enjoyed during the marriage, to the extent that this is practicable;
7. The number, ages, health and conditions of dependents of the parties or either of them and provisions of the decree relating to custody of the children, including length of time child support obligations will be in effect;
8. The tax liabilities or benefits of each party and net spendable income available to each party after accounting for such liabilities and benefits, and the decree may state the court's findings relating to net spendable income of each party if such statement is requested by either party;
9. The amount of long-term financial obligation, including legal fees and costs;

10. Costs of health care to a party;
11. The standard of living established during the marriage;
12. Premiums paid for life insurance on the life of a party ordered to pay support; and
13. Such other matters as the court shall deem relevant in the particular case in order that each party shall have the opportunity to achieve an economic standard of living not overly disproportionate to that enjoyed during the marriage, to the extent that is possible."

10.7 California Context

(do not rely on this as a current statement of the law)

Factors to consider

The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage considering:

- the marketable skills of the supported party; the job market and the possible need for retraining or education;
- the extent to which the supported party's earning capacity is impaired by period of unemployment during marriage;
- the extent to which the supported party contributed to the attainment of an education, training, career or license by the supporting party;
- the ability of the supporting party to pay;
- the needs of each party based on the standard of living established during the marriage;
- the obligations and assets, including the separate property of each party; and
- the duration of the marriage (FC 4320). **Retention of Jurisdiction**

There is a presumption that a marriage of 10 years or more, from the date of the marriage to the date of separation, is a marriage of long duration (FC 4336).

Modification of Agreement

An agreement for the support of either party is subject to subsequent modification or termination by the court except;

an agreement may not be modified or terminated prior to filing date; and an agreement may not be modified if there is a written agreement specifically providing that spousal support is not subject to modification or termination (FC 3591)

Termination of Support

The Obligation for spousal support in California terminates upon death of either party or the remarriage of the supported party (FC 4337).

Section 11

Written Materials for Collaborative Practice: Work with a CDFA? by Glenn Crawford

Property and Debt

This chapter considers concepts and strategies for assisting agreement on property and debt division issues.

The first challenge here is to figure what we are talking about. Understanding the parties' assets and debts, including tax considerations, is part of the joint educational process of the mediation.

Once the mediator and participants identify that which exists, it is often best to identify the principles that make sense to the participants and the possible interrelationships between issues (e.g. tax exposure, higher ongoing costs, etc.)

A number of strategies for assisting participants to reach agreement on property and debt issues are here included. Note that it is not unusual for participants to come to complete or near complete agreement on their own once the information is clearly set out.

11.1 Community or Equity?

As with all issues in divorce mediation, parties make their decisions in mediation based, in part, upon their perception of their legal rights. In truth, one can only know one's "legal rights" based upon actually going to court, which itself holds substantial cost, delay, and uncertainty. For most mediation participants, sitting down to discuss how their property and debts

can most constructively and fairly be divided is far preferable to litigating these issues.

As an assist to mediating parties, it may be helpful for the mediator to share information about the legal standards that might be applied to the parties' situation if the case were to proceed to court. States vary in their basic approach to property and debt division. Some states, called "community property states," take the view that the fact of marriage, unless there is fraud, duress or the like, itself creates a new equal partnership entity called "community property" that is by law subject to equal division. Most community property states allow parties to modify application of the "community property" standard, either by prenuptial, nuptial, or divorce agreement.

Other states proceed to determine property and debt division according to a more sensitive evaluation of the "equities" of the parties' situation. These "equity states" are prepared to look at all aspects of the parties' asset and debt accumulation and the parties' respective equities in determining a property and debt allocation. By case law, "equity states" typically distinguish between "short term" marriages, in which the equitable goal is presumed to be that of placing the parties back in the position they were as if they never had gotten married, and "long term" marriages, in which the presumed goal is to divide the parties' property and debts in as equal and beneficial a way as possible.

Most "equity state" courts also look at the parties' support arrangements, particularly spousal support, in determining what is most equitable to property and debt division. Thus, in a long-term marriage, a court may be prepared to give a financially dependent spouse the "long-half" of the parties' property, and perhaps no debts, as a means of limiting long-term or indefinite spousal support.

11.2 Oregon Equity Standards

In equity states in particular, and also in community property states by the parties' agreement, it may make sense for the parties to distinguish between "individual" and "marital" (joint) property and debts. Property received and

debt incurred prior to marriage, if segregated and identifiable, may be treated as individual property and not subject to a concept of equal division. Property acquired during the marriage and earnings on that property are almost always treated as "marital property."

The distinction between "individual" and "marital" property is often hard to predict in court. For example, with regard to gifts and inheritance, the donor's intent and the way in which the parties dealt with the property are probative in determining the appropriate equitable division. The fact that it may be hard to predict how a court would treat property can be turned to the mediator's advantage. Any time there is substantial risk in moving forward to court, this can be utilized to develop motivation for a controlled settlement in mediation.

11.3 Community Property Standards

In community property states like California, mediators may want to think in terms of a five-step process in working with parties toward agreement on property and debt division:

1. Disclose the Property

Each party must provide a preliminary and a final declaration of disclosure setting forth all assets and all liabilities regardless of the characterization as separate or community. The final declaration of disclosure must be completed and exchanged before or at the time of entering a settlement agreement.

2. Characterize the Property

In order to divide the property, it must be identified as "separate" or "community."

Community Property:

Except as provided below, all property acquired during the marriage is community property.

Separate Property:

Separate property includes the following:

- (1) All property owned before marriage;
- (2) All property obtained by gift or inheritance during the marriage; (3) All rents and profits of separate property; and
- (4) Earnings and accumulations after separation. Debts:

Except as provided below, all debts incurred during marriage are community.

- (1) Debts incurred prior to marriage are separate;
- (2) Debts incurred after separation are separate;

(3) Debts incurred during marriage but not for benefit of the community are separate; and (4) Educational loans are separate regardless of when incurred.

3. Value the Property

Assets and liabilities must be valued as near as possible to date of trial unless court determines that date of separation is more equitable.

4. Determine the Reimbursements

A party shall be reimbursed for contribution of separate property to a community asset to the extent the contribution is traced.

5. Divide the Property

In community states like California, unless the parties agree in writing to a different division (now in a mediated agreement or previously in a prenuptial agreement), the court must divide the community property, both assets and debts, equally. This means the court may award all of one asset or debt to one party in order to equalize the division (or any readily divisible part of that asset or debt). The court may also deduct part of one party's share in order to equalize the division if assets have been misappropriated.

11.4 **Quantity and Quality**

Property and debts are often valued in divorce situations without sufficient attention to the fact that they each have "qualities" as well as a "quantity" (the determined value of the asset or debt). For example, a house is unique in its ability to offer a party a "roof over his head," and also have substantial stability and sentimental value for one or both parties. Similarly, a pension, IRA, or other retirement interest may be determined to be of a certain present value, so long as that asset is not liquidated prior to a parties' retirement or at the defined age. So long as the investment is held, there are typically substantial tax benefits, including deferred taxation on the original investment as well as deferred taxation on earnings upon the investment. If a retirement asset needs to be "invaded" prior to its maturity, there are huge tax penalties, including an overall 10% penalty, as well as present taxation of all contributed amounts and on accumulated and distributed income. If a party has a clear interest in long-term retirement assets, then a pension type of investment may be very attractive in mediation. If, however, the party might need to "invade" the investment prior to timely distribution, then the true value of the asset may be one-half or less of the assumed value if held to maturity. Similarly, automobiles, vacation homes, whole life insurance, personal property, stocks and bonds, business partnerships, trust interests, and all other assets and debts have special "qualities" that the parties should be fully informed about in making their property and debt decision decisions. With regard to debts, note that they differ in both amount (quantity) and quality, such as whether they are secured or not, interest rate, and required rate of repayment. Taking both the quantity and qualities of property and debt into account, one can see that it is difficult, if not impossible, to truly divide property and debts in divorce in an "equal way."

Identify Desired Outcomes and Standards for Division

Against the background of the parties' perceptions of their respective "legal rights" (and the costs and uncertainty of pursuing those "legal rights"), and also appreciating the various quantities and qualities of their property and debt division, mediating parties are assisted in making decisions by clarifying their respective goals and interests with regard to their property and debt division. For example, for one party staying in the marital home may be a

priority, at least while children remain at that home and in school. For another party, they may greatly favor liquidity, or, on the other hand, having as a highest priority their long-term financial well-being. Some participants will feel themselves in a position to absorb more marital debt, whereas for others minimizing debt is a primary goal. Once the mediator has assisted the parties to identify their desired results and interests, difficult property and debt division decisions can typically be resolved by identifying some principle or standard that both parties can accept. For example, if neither party wants to take retirement interests, because they each view themselves as needing immediate financial liquidity, and they do not want the risk of taxes and penalties, they may agree that, since neither of them wants those assets, they should be divided equally (on the basis of an equal suffering or some such standard) between them. If parties both desire to stay in the marital home, then it may be that they would adopt a standard such as an "auction" between them to see which of them is prepared to pay a higher price for the home. Disputed personal property items can also often be resolved based on such an "auction" approach. Other standards that can be utilized by parties are alternating choices between desired items, selling items and dividing the net proceeds, each equally or proportionately contributing to ongoing debt, and the like.

11.5 Valuation Dates

In addition to paying attention to the law and the qualities and the quantities of their property and debts, it is also commonly necessary for parties to make determinations of valuation dates in ascribing value to their assets and debts, particularly for retirement accounts, debts being assumed, home equity values, and the like. Most states hold that the presumed date of valuation for property and debts is "the date trial" unless there is some other compelling date, such as a date of the parties' physical separation or some other date that the parties effectively separated their finances.

It is common for the parties to adopt more than one valuation date for their property and debt division. For some assets and debts, the date of the parties' separation or a date of convenience, such as the last account statement or end of a year or quarter statement, may be utilized. For other assets, such as a marital home to be sold in the future, it may make sense for the parties to finesse any present determination of value, knowing that a true value will be determined when the home or other jointly held asset is sold. If parties differ in their suggested dates for valuation, they are being positional and may be assisted to identify the interests and principles that are motivating them.

11.6 Establishing Values

Parties differ greatly in their approach to establishing value as part of their asset and debt division. Some parties go, essentially, by the "feel" of the situation, and only have a very general interest in valuing their assets and debts. Other parties may be extremely interested in pinpointing their property and debt values and in doing their very best to ensure that there is an equal division. Whether parties will be assisted by formal valuation of assets depends on the amount at issue and the way the parties make decisions about value. Some parties are extremely well informed as to real property values for properties in their neighborhood. There is a saying in the law that "every homeowner is an expert on the value of his or her home." Another option is for parties to obtain one or more "market analyses," which are, essentially, informal appraisals by brokers. Market analyses have become rather sophisticated, with the help of modern computer technology. Note, however, that market analyses may be biased toward an inflated value as the broker has his or her own interest in attracting the potential sale business. The

most "scientific" assessment process available is, typically, a formal appraisal. Note, however, that even appraisals are biased. For example, an appraisal performed for bank refinancing purposes will typically be less than an appraisal performed to determine market value for sale.

Valuation issues are similar with regard to other assets. Under almost all circumstances, the parties are faced with the decision between informally valuing the asset between them, accepting some informal third party's recommended value, or hiring an expert for evaluation.

11.7 Personal Property

There are a number of reasons why the parties' discussion of personal property division can be challenging. In fact, given the number of items that most married couples have to divide, the entire mediation is at risk of becoming bogged down in discussing these issues. As with most issues, it may be best to begin the parties' discussion by asking them about property and debt division aspects they may agree on and what each of them would like to achieve. These "easy agreements" become the first pieces of the parties' property and debt division puzzle. It is helpful for the mediator to examine the goals and interests behind their "easy decisions" and also to examine whether these decisions may be made according to principles or standards that may also be applicable to other issues. The mediator may also want to help the parties understand the practical implications of their "points of agreement."

When it comes to dividing personal property, perhaps the easiest way for parties to proceed is to inventory each room, listing all significant items and, if they like, defining a value (or values) for each item. Based upon this listing, parties can make all allocation decisions that come easily. In making such "easy" decisions, it is suggested that parties receiving property take that property either at an agreed-upon value or at the highest listed value. Having made such initial allocation decisions, the parties may want to identify each party's tentative sub-total value as this is the new context for seeking to work out the remaining issues.

As to the remaining personal property issues, it may loosen things up to ask the parties to see if they can establish any "package deals" by grouping items for exchange. Finally, if nothing else works, it is suggested that the

parties either have an auction regarding the remaining items. Another option is to alternate choice.

Ultimately, the parties will need to come to a determination of what each of them is to receive and also whether there is any greater value given to one party over the other that should be recognized and balanced.

11.8 Retirement Interests

IRAs and pensions are generally divisible as part of a divorce agreement. IRA's can simply be "rolled over" from one spouse to the other. Note that the spouse taking a share of the other's IRA will also receive any and all tax liability associated with that asset. With regard to pension divisions, if a party is to receive payments from the other party's pension, this will likely need to be accomplished through something called a Qualified Dispute Resolution Order (QDRO). Under a QDRO, the "alternate payee" is designated to receive his or her described portion of their former spouse's pension by direct payment to that "alternate payee" when and as the other party is entitled to their share (if any) of the pension. In some circumstances, a completely segregated pension account will be established for the "alternate payee," including plan selection rights.

11.9 Bringing it Together

Ultimately, the mediator will want to chart the parties' property and debts, including a description of substantial items, agreed-upon value, associated debt, and who will receive each asset or debt responsibility. It is typical that the mediator will need to assist parties to "close the gap" between them. Mediating parties are often confronted with the need to "make up the difference" between them to bring their overall property and debt division together.

One common mechanism for doing this is to adjust the division of net proceeds from a planned sale of the marital home. Another handy mechanism for accomplishing balance is a "money judgement." Under this arrangement, one party is ordered by the court to pay the other a certain amount of money according to described terms, including a payment schedule. This debt obligation is enforceable as a judgement, and may also be secured by real property.

11.10 Marital Home

It is common for the marital home to be the most substantial marital asset, both in terms of value and emotional significance. This emotional significance is especially significant when the issue becomes whether the children will continue to be able to live in the same home environment.

As divorce, almost by definition, suggests that parties will no longer be living together, this does not necessarily mean that parties need to separate their ownership of the marital home immediately. For example, parties may decide to "play the market" and delay the placement of a home on sale until a better selling period or until a child reaches a certain age, a degree is completed, or simply for an agreed-upon period of time.

If parties decide to continue with co-ownership of the marital home for any significant period of time after the issuance of their decree of dissolution of marriage, it is common for them to continue on as "tenants in common, an undivided one-half interest in each party," as opposed to the marital "tenancy by the entirety," which includes joint ownership and right of survivorship. Sometimes, if only for a certain period of time, even divorcing parties will provide the other party with a survivorship interest in real property. When this is done, the form is known as "joint tenancy with right of survivorship."

In the event of a delayed sale, it is common for divorcing parties to share the net proceeds from the sale either equally or by some designed formula (as a part of their overall property and debt division). When net proceeds are allocated, this should be done with specificity, including consideration of specifically what debts will be paid from gross proceeds, what brokers and closing costs are to be deducted, how property taxes are to be considered, who has responsibility for the payment of the mortgage and property taxes prior to sale, etc. The parties may want to clarify who has maintenance responsibility for the home prior to sale and whether and how major maintenance and/or costs incurred in readying the home for sale are to be considered.

Section 12

Tax Issues

This is a brief introduction to some aspects of federal tax law related to divorce and separation. You may want to consider this information in structuring any spousal support, child support, or property settlement as part of your mediation. Please note that the mediator cannot provide individual legal advice regarding these or any other issues. If you desire individual legal advice, they should contact the attorney or tax expert of their choice. An accountant can also be jointly retained by mediating parties to calculate the tax impacts of optional arrangements and for purposes of maximizing overall tax benefits.

Collaborative Trust and Estate Issues

The Collaborative Process:

Looking at Trust and Estate Options

Written Materials for Collaborative Practice, Looking at Trust and Estates, by Kamela Love

Overview:

Options for Planning the distribution of your property and communicating your wishes

Presentation is 1.5 hours

Navigating the Legal Landscape

Estate:

All Property in which you have **Ownership Interest** –

real estate, bank accounts, investments,

business partnerships, cars, jewelry, furniture, etc.

Probate:

Court Process *transfers* assets of an estate. (\$150k +)

- Tax consequences on beneficiaries not considered
- Related Fees - *Avoid?*
- Public record

Will

Document filed (30 days after death) with Court that:

- Plans distribution of property *after* death &
- Names guardians for minor children

Living Trust:

Legal Entity you create to:

- *Avoid* Probate & Related Fees / Taxes
- Manage Assets *now* & in future

Executor > Will

Person you name in your Will to carry out your wishes for distributing your estate.

Trustee > Trust

Person you name in your Trust to carry out the terms of your trust

Developing Your Estate Plan

Option 1: Do It Yourself

Option 2: Consult a Lawyer

Option 3: Facilitated Conversation

Option 4: Interdisciplinary Team Facilitation

Section 13

Drafting the Agreement

This Chapter describes some of the issues and options associated with drafting the parties' agreement.

Written Materials for Basics of Agreement by Clare Fowler

Begin by creating a sample Marital Settlement Agreement. You can use Jay Bultz's Master Agreement, or the sample agreement included above.

The key to a successful agreement is specificity. Imagine any potential complications and try to prevent those through specific safeguards.

13.1 Infusing Legal Capacity

It may well be that the safest and most beneficial process, both for the non-lawyer mediator and for mediation participants, is for the non-lawyer mediator to "infuse" their mediation process with true legal capacity. This can be done by the mediator or mediation center employing a co-mediational or advisory attorney to provide information with regard to the legal structuring of an agreement, to assist by impartially offering established "black letter" law and to give other mutually beneficial legal advice. Once mediation participants have decided upon the solutions for their situation, this co-mediational or advisory attorney can, as the participants desire, draft their settlement agreement in legal form.

13.2 Rely on Outside Attorneys?

Another alternative is for the non-lawyer mediator to rely on the drafting skill of one mediation participant's representational attorney. While this approach can certainly work, it also may create some problems in the sense that the representational attorney's drafting may be viewed as slanted in their client's favor, and additional peripheral issues may arise. Other mediation participants may, with one representational attorney doing the drafting, feel compelled to have their own attorney provide additional review, and there is a risk that the entire matter may come to be removed from mediation to the level of attorney-to-attorney communications and negotiation.

To maintain "control" over the completion of the mediation work product, and also over the mediation process, it may, thus, be advisable for the mediator, whether an attorney or not, to work with the parties to develop a final statement of their settlement.

For the non-lawyer mediator, acting as "scrivener" and without attorney assistance, the typical work product form is that of a "memorandum of understanding." While this memorandum can be as detailed and sophisticated as a settlement agreement, it should have certain indications that it is not itself intended as the final drafting of the parties' legal settlement agreement.

13.3 The Memo of Understanding

First of all, the memorandum of understanding should, presumably, have "MEMORANDUM OF UNDERSTANDING" at the top of the drafting. Mediators may want to consider putting the date of the drafting in parentheses below this document title. The non-lawyer mediator should likely include a provision such as the following as a protection against accusations of unlawful practice of law: "This memorandum of understanding is the result of a deliberative mediation process between the parties with _____ as mediator. It is understood and acknowledged by the parties that this memorandum is not itself a legally-binding document. It is further understood and acknowledged by the parties that their signing of this memorandum indicates only that the document accurately reflects the points of agreement created by the parties in mediation. It is the parties' intention to have this memorandum become part of their legally-binding settlement."

Written Materials for Documents (agreement to mediate, confidentiality, MSA) by Jay Bultz

This includes a presentation outline and sample agreement checklist.

PRESENTATION OUTLINE

{Mediation Test}

{Preface – Title}

I ISSUES SPECIFIC TO WRITING AGREEMENTS

Ethical/Legal.

Should mediators write agreements?

[Neutral 3rd party; Intimate memory discussions, concerns, nuances, etc.]

Should non-lawyer mediators write agreements?

[Agreement vs. MOU]

Goals.

For the parties – closure!

[Visual, audible mental and emotional relief; Anxious to relaxed!]

For the mediator – “end-game”!

[Dissolution becomes reality; Delicate discussions & tip-toeing!]

[“Rubber hits the road” test; Sign off!]

II TOOLS – OUTLINE/CHECKLIST & MASTER AGREEMENT

Outline/Checklist.

Everything including the kitchen sink!

[Big 4 Categories – “Marital Rights and Obligations”;
 “Parenting”;
 “Assets and Income”; and “Debts and Liabilities”; plus
 “Recitals” (background) and “Administrative” (housekeeping).]
 {Outline/Checklist – Table of Contents}

Parties think they know – mediator better know!

[Many, many issues parties don’t think of, mediator needs to
 ask!]

Master Agreement. [Why you need one!]

Options! Don’t Reinvent the Wheel!

[The whole spectrum of ...]

[Parenting – sole; joint; joint P/S; parallel; etc.]

{Examples ... }

[Scheduling – reasonable and liberal; default; standard;

long distance; incremental; developmental; etc.]

{Examples ... }

[RO’s – non-interference; basic; restrictive; Brady Bill; etc.]

{Examples ... }

How Much detail?

all in!] [Sometimes just a pinch of this and that or sometimes dump it

[Settled!]

[Spousal support.]

{MA II Covers – I use; the best; I wrote!}

III WRITING TO CAPTURE THE AGREEMENT

Don't forget the Court review and approval!

{Can't sell the kids to the gypsies}

{Alimony vs. child support; separated for more than one year;
etc.}

Vernacular of the parties?

{F that S}

{He better not be shit-faced when}

{I'll give the kids whatever they need}

The Intent of The Parties.

What were they thinking?

{Motorcycle Ad}

{Get alimony and child support but still pay for ... ?}

{She stays in the house, but I can't come over whenever I
want?}

{That's not what I thought we agreed to}

Review!

{Watermark "Draft" and date}

Clarity.

{Two types of people}

Who? What? Where? When? Why? How?

{Child support will be \$800}

Contingencies!

{Sale of marital residence – realtor, listing/sale price, time, etc.}

Careless Language Consequences!

{Mutual restraining orders – No more work police, military, security, sporting, etc. because of Brady Bill}

{Sell and pay this/that ... incident of support – modifiable
... eq. dist. – not modifiable.}

{Pay ½ of child's ed. expenses – including college?}

{Flicking candle}

{And they lived - Questions}

SETTLEMENT AGREEMENT CHECKLIST

RECITALS

MARITAL RIGHTS AND OBLIGATIONS

Living Separate and Apart

Fault Divorce Waiver

Procurement of a "Get"

Consent to "Mubarat Talaq"

Procurement of an "Annulment"

Reconciliation

Non-Interference

Restraining Order

Personal and Intimate Photographs/Videos

Spousal Support

 Periodic Alimony

 Lump Sum Alimony – Finite Total Sum – One Payment

 Lump Sum Alimony – Finite Total Sum – Periodic Payments

 Rehabilitative Alimony

 Reimbursement Alimony

Separate Support and Maintenance

Terms

Life Insurance

Security for Payment

Healthcare Insurance and Expenses

Social Security Benefits

Name Change

Estates

Revocation of Nomination

Right of Survivorship

Powers of Attorney

Beneficiary Interests

Surviving Spouse Waiver

No Economic Interference

Separate Rights and Interests

General Obligations

Release of Claims

PARENTING

Paternity

Parenting (Custody)

 Single Parenting (Sole Custody)

Co-Parenting (Primary/Secondary Custody)

Shared Parenting (Joint Custody)

Stepchildren

Parallel Parenting (Strictly Divided Custodial Roles)

Schedule (Visitation)

Scheduling

Alternating Weekends

Three Day Weekends

Weeknights

School-Summer

 School Year

 Summer Vacation

Alternating Periods

 Transition Times

Birth to One (1) Year of Age

One (1) Year of Age to Five (5) Years of Age

Five (5) Years of Age to Twelve (12) Years of Age

Twelve (12) Years and Beyond

Birth to Twelve Months

Twelve to Twenty-Four Months

Twenty-Four to Thirty-Six Months

Three to Five Years

Six to Nine Years

Ten to Thirteen Years

14 to 18 Years

For the next six months beginning May 20, 20__

Then..... 50

Holidays..... 50

 Easter/Spring Break 51

 Spring Break 51

 Easter 51

 Mother’s Day 51

 Memorial Day 52

 Father’s Day..... 52

 Fourth of July 52

 Labor Day 52

 Thanksgiving 53

 Christmas and New Year’s..... 53

Preemption 53

Religious Services 53

Summer Vacation..... 53

Children’s Birthdays..... 54

Parents' Birthdays	54
Children's Events and Activities	54
Digital Visitation	54
By Agreement.....	54
Conflicts in Schedule.....	55
Illness	55
Makeup	55
Late Notice	55
Penalties	56
Schedule Modification.....	56
Drop in Visits	57
Transportation	57
Exchange Conduct	59
Children's Clothing and Property	59
First Right to Child Care	59
Contact with the Children	59
Access to Information	61
Communication	61
Care and Control	63
Emergencies	64
Passports	65

House Rules	65
Discipline	66
Accommodations	66
Environment	66
Restrictions	67
Conditions of Visitation	71
Drug and Alcohol Testing	72
Right of Preemption	73
Counseling and Therapy	73
Affection	74
Family Ties	75
Names	75
Religion	75
Relationships	75
Relocation	76
Child Support	76
Amount.....	76
Payment	77
Support Waived	78
Change of Circumstances.....	78
Step Reduction	79

Duration	79
Security	79
Retroactive Child Support	80
Life Insurance	80
Healthcare Insurance and Expenses	82
Activities	85
Educational Expenses	86
Children’s Checkbook	87
Daycare	87
College	87
Dependency Exemption	89
Post Minority Child Support	91
Jurisdiction	91
Review	91
ASSETS AND INCOME	92
Real Property	92
Marital Residence	93
Rental Property on Hwy 90	100
Vacant Lot	100

Investment Properties	100
Inherited Properties.....	101
Leases	101
Mobile Homes	101
Household Furnishings and Personal Property.....	102
Vehicles	103
Automobile.....	103
SUV.....	103
Truck.....	104
Boat	104
Motorcycle	104
4-Wheeler	104
Golf Cart	104
Jet Ski	104
Businesses-Investments	104
Financial Accounts	106
Joint Checking	107
Joint Savings	107
Joint Household	107
Joint Mutual Funds	107
Joint Money Market	108

Joint Stock	108
Note/Mortgage.....	108
IRAs	108
QDRO	108
Jane’s Pension/Profit.....	109
Jane’s IRA	109
Boeing Stock	109
John’s IRA	109
Home Depot Stock	109
John’s Mutual Fund.....	109
John’s Pension/Profit	109
John’s Retirement	109
John’s Military Retirement	110
Joint College Fund	110
Children’s Accounts	110
Waiver.....	111
Trusts	111
Life Insurance	111
Miscellaneous	112
Keys.....	112
Frequent Flyer Miles	112

P.O. Box	112
Telephone Number	112
Cell Phones	112
Camper.....	112
Utility Trailer	112
Pets.....	112
Dogs	112
Horse	113
Engagement Ring.....	113
Lawn Mower	113
Damages Claim	113
Forfeiture Claim	113
Settlement	113
Contributions	114
Other Property	114
Factors Considered	114
Future Acquisition.....	115
Future Earnings and Acquisitions	115
Transfer of Marital Property	115
Valuation	115
Release	116

Sole Ownership	116
Asset/Debt Reconciliation	116
Fair and Equitable Division	116
Disclosure.....	117
After-Discovered Property	117
DEBTS AND LIABILITIES	117
Mortgages	117
Leases	118
Mobile Home Financing.....	118
Utilities	118
Marital Residence.....	118
Rental Property on Hwy 90.....	119
Vehicle and Property Financing.....	119
Credit Cards.....	119
Business Liabilities.....	121
Medical Bills.....	121
Student Loans.....	121
Other Debts	122
New Debts	122

Taxes	122
Bankruptcy	124
Credit History.....	125
Restraint	125
General Responsibility	125
Fair and Equitable Allocation	126
Hold Harmless	126
Obligations to Third Parties	126
Disclosure	126
After Discovered Debts	126
Legal Fees	127
Failure to Comply	127
Mediation Fees	128
Guardian <i>ad Litem</i> Fees	128
ADMINISTRATIVE	128
Mediation	128
Arbitration	129
Pending Actions	
Obligations Not Stayed	

Bankruptcy

Continuing Jurisdiction

Effect of Temporary Agreement

Execution of Necessary Instruments

Time is of the Essence

Designation of Clerk of Court

Law Enforcement

Compliance

Confidentiality

Memorandum of Agreement

Divorce

Agreement is Contract

Binding Effect of Agreement

Counterparts

Governing Law

Construction of Agreement

No Future Events Contemplated

No Bias Against Scrivener

Severability

Service of Process

Notice and Communication

Right of Survivorship

Modification of Agreement

Change of Circumstances

Certification

Declaration

Recitals

SIGNATURES

ACKNOWLEDGMENTS

CERTIFICATE OF COUNSEL

CERTIFICATE OF GUARDIAN *ad LITEM*

APPENDIX

Financial Declaration of Jane Ann Doe

Financial Declaration of John Smith Doe

Child Support Obligation Worksheet A

Apportionment of Marital Property Worksheet

John's Retirement Present Value Calculation

Declaration of Children's Rights

13.4 Issues for the Mediating Attorney

The attorney mediator should be understood to have full ability to draft mediation participants' settlement agreement, conditioned upon the mediator's encouragement that the parties obtain legal counsel and advice that they have any agreement reviewed by independent legal counsel prior to signing that agreement.

A challenging issue exists in whether the attorney mediator is also capable of developing documentation for processing the parties' agreement at court as a stipulated order, judgment or decree. Recognizing that the attorney mediator could, almost certainly, attach any such court filing form as an exhibit to the settlement agreement, and that the mediating attorney is presumably as capable of drafting such documentation as representational counsel, it would seem that there is no logical reason to prohibit the mediating attorney from developing any and all documentation that the mediation participants want developed.

This does not necessarily mean that the attorney can appear in court on behalf of one or both parties. Rather, as a part of the mediation work product, it is suggested that the mediating attorney can develop court documents for the parties to file as they desire.

Another challenging issue for the attorney mediator is whether he or she can draft additional documentation associated with a marital settlement, divorce decree, or other legal resolution. For example, can a divorce mediator develop real property transfer documentation or wills which are described to be developed by the parties in their marital settlement agreement? Here, it is likely best for the mediating attorney to rely on a concept of "informed consent" with regard to his or her ability to develop such additional indicated documentation. The mediating attorney is advised to obtain the informed consent of all involved mediating parties prior to serving and representing one of those parties with regard to an issue which may be viewed as a part of the subject matter of their mediation.

13.5 Sample Settlement Agreement

View the Sample Settlement Agreement here:

<https://www.mediate.com/divorce/docs/MSA.pdf>

13.6 Sample California Agreement

View a Sample Agreement for California here:

<https://www.mediate.com/divorce/docs/CaliforniaMSA.pdf>

Section 14

Ethics

This Chapter presents a number of leading resources in the considering of ethics in the areas of family and divorce mediation and mediation generally.

Written Materials for Ethics by Michael Lang, parts 1 and 2

14.1 Family Mediation Standards

Overview and Definitions

Family and divorce mediation ("family mediation" or "mediation") is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants' voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements.

Family mediation is not a substitute for the need for family members to obtain independent legal advice or counseling or therapy. Nor is it appropriate for all families. However, experience has established that family mediation is a valuable option for many families because it can:

1. increase the self-determination of participants and their ability to communicate;
2. promote the best interests of children; and
3. reduce the economic and emotional costs associated with the resolution of family disputes.

Effective mediation requires that the family mediator be qualified by training, experience

and temperament; that the mediator be impartial; that the participants reach their decisions voluntarily; that their decisions be based on sufficient factual data; that the mediator be aware of the impact of culture and diversity; and that the best interests of children be taken into account. Further, the mediator should also be prepared to identify families whose history includes domestic abuse or child abuse.

These *Model Standards of Practice for Family and Divorce Mediation* ("*Model Standards*") aim to perform three major functions:

1. to serve as a guide for the conduct of family mediators;
2. to inform the mediating participants of what they can expect; and

3. to promote public confidence in mediation as a process for resolving family disputes.

The *Model Standards* are aspirational in character. They describe good practices for family mediators. They are not intended to create legal rules or standards of liability.

The *Model Standards* include different levels of guidance:

1. Use of the term "may" in a *Standard* is the lowest strength of guidance and indicates a practice that the family mediator should consider adopting but which can be deviated from in the exercise of good professional judgment.
2. Most of the *Standards* employ the term "should" which indicates that the practice described in the *Standard* is highly desirable and should be departed from only with very strong reason.
3. The rarer use of the term "shall" in a *Standard* is a higher level of guidance to the family mediator, indicating that the mediator should not have discretion to depart from the practice described.

Standard I

A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.

- A. Self-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions.
- B. The primary role of a family mediator is to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others and to facilitate agreement among the participants.
- C. A family mediator should inform the participants that they may seek information and advice from a variety of sources during the mediation process.
- D. A family mediator shall inform the participants that they may withdraw from family mediation at any time and are not required to reach an agreement in mediation.

- E. The family mediator's commitment shall be to the participants and the process. Pressure from outside of the mediation process shall never influence the mediator to coerce participants to settle.

Standard II

A family mediator shall be qualified by education and training to undertake the mediation.

- A. To perform the family mediator's role, a mediator should:
1. have knowledge of family law;
 2. have knowledge of and training in the impact of family conflict on parents, children and other participants, including knowledge of child development, domestic abuse and child abuse and neglect;
 3. have education and training specific to the process of mediation;
 4. be able to recognize the impact of culture and diversity.
- B. Family mediators should provide information to the participants about the mediator's relevant training, education and expertise.

Standard III

A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.

- A. Before family mediation begins a mediator should provide the participants with an overview of the process and its purposes, including:
1. informing the participants that reaching an agreement in family mediation is consensual in nature, that a mediator is an impartial facilitator, and that a mediator may not impose or force any settlement on the parties;
 2. distinguishing family mediation from other processes designed to address family issues and disputes;

- 3.informing the participants that any agreements reached will be reviewed by the court when court approval is required;
 - 4.informing the participants that they may obtain independent advice from attorneys, counsel, advocates, accountants, therapists or other professionals during the mediation process;
 - 5.advising the participants, in appropriate cases, that they can seek the advice of religious figures, elders or other significant persons in their community whose opinions they value;
 - 6.discussing, if applicable, the issue of separate sessions with the participants, a description of the circumstances in which the mediator may meet alone with any of the participants, or with any third party and the conditions of confidentiality concerning these separate sessions;
 - 7.informing the participants that the presence or absence of other persons at a mediation, including attorneys, counselors or advocates, depends on the agreement of the participants and the mediator, unless a statute or regulation otherwise requires or the mediator believes that the presence of another person is required or may be beneficial because of a history or threat of violence or other serious coercive activity by a participant.
 - 8.describing the obligations of the mediator to maintain the confidentiality of the mediation process and its results as well as any exceptions to confidentiality;
 - 9.advising the participants of the circumstances under which the mediator may suspend or terminate the mediation process and that a participant has a right to suspend or terminate mediation at any time.
- B. The participants should sign a written agreement to mediate their dispute and the terms and conditions thereof within a reasonable time after first consulting the family mediator.
- C. The family mediator should be alert to the capacity and willingness of the participants to mediate before proceeding with the mediation and throughout the process. A mediator should not agree to conduct the

mediation if the mediator reasonably believes one or more of the participants is unable or unwilling to participate.

- D. Family mediators should not accept a dispute for mediation if they cannot satisfy the expectations of the participants concerning the timing of the process. **Standard IV**

A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator. The participants shall be free to retain the mediator by an informed, written waiver of the conflict of interest. However, if a bias or conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the participants.

- A. Impartiality means freedom from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual.
- B. Conflict of interest means any relationship between the mediator, any participant or the subject matter of the dispute, that compromises or appears to compromise the mediator's impartiality.
- C. A family mediator should not accept a dispute for mediation if the family mediator cannot be impartial.
- D. A family mediator should identify and disclose potential grounds of bias or conflict of interest upon which a mediator's impartiality might reasonably be questioned. Such disclosure should be made prior to the start of a mediation and in time to allow the participants to select an alternate mediator.
- E. A family mediator should resolve all doubts in favor of disclosure. All disclosures should be made as soon as practical after the mediator becomes aware of the bias or potential conflict of interest. The duty to disclose is a continuing duty.
- F. A family mediator should guard against bias or partiality based on the participants' personal characteristics, background or performance at the mediation.

- G. A family mediator should avoid conflicts of interest in recommending the services of other professionals.
- H. A family mediator shall not use information about participants obtained in a mediation for personal gain or advantage
- I. A family mediator should withdraw pursuant to *Standard IX* if the mediator believes the mediator's impartiality has been compromised or a conflict of interest has been identified and has not been waived by the participants.

Standard V

A family mediator shall fully disclose and explain the basis of any compensation, fees and charges to the participants.

- A. The participants should be provided with sufficient information about fees at the outset of mediation to determine if they wish to retain the services of the mediator.
- B. The participants' written agreement to mediate their dispute should include a description of their fee arrangement with the mediator.
- C. A mediator should not enter into a fee agreement which is contingent upon the results of the mediation or the amount of the settlement.
- D. A mediator should not accept a fee for referral of a matter to another mediator or to any other person.
- E. Upon termination of mediation a mediator should return any unearned fee to the participants.

Standard VI

A family mediator shall structure the mediation process so that the participants make decisions based on sufficient information and knowledge.

- A. The mediator should facilitate full and accurate disclosure and the acquisition and development of information during mediation so that the participants can make informed decisions. This may be accomplished by encouraging participants to consult appropriate experts.

- B. Consistent with standards of impartiality and preserving participant self-determination, a mediator may provide the participants with information that the mediator is qualified by training or experience to provide. The mediator shall not provide therapy or legal advice.
- C. The mediator should recommend that the participants obtain independent legal representation before concluding an agreement.
- D. If the participants so desire, the mediator should allow attorneys, counsel or advocates for the participants to be present at the mediation sessions.
- E. With the agreement of the participants, the mediator may document the participants' resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed.

Standard VII

A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants.

- A. The mediator should discuss the participants' expectations of confidentiality with them prior to undertaking the mediation. The written agreement to mediate should include provisions concerning confidentiality.
- B. Prior to undertaking the mediation, the mediator should inform the participants of the limitations of confidentiality such as statutory, judicially or ethically mandated reporting.
- C. The mediator shall disclose a participant's threat of suicide or violence against any person to the threatened person and the appropriate authorities if the mediator believes such threat is likely to be acted upon as permitted by law.
- D. If the mediator holds private sessions with a participant, the obligations of confidentiality concerning those sessions should be discussed and agreed upon prior to the sessions.

E. If subpoenaed or otherwise noticed to testify or to produce documents the mediator should inform the participants immediately. The

mediator should not testify or provide documents in response to a subpoena without an order of the court if the mediator reasonably believes doing so would violate an obligation of confidentiality to the participants.

Standard VIII

A family mediator shall assist participants in determining how to promote the best interests of children.

- A. The mediator should encourage the participants to explore the range of options available for separation or post-divorce parenting arrangements and their respective costs and benefits. Referral to a specialist in child development may be appropriate for these purposes. The topics for discussion may include, among others:
- 1.information about community resources and programs that can help the participants and their children cope with the consequences of family reorganization and family violence;
 - 2.problems that continuing conflict creates for children's development and what steps might be taken to ameliorate the effects of conflict on the children;
 - 3.development of a parenting plan that covers the children's physical residence and decision-making responsibilities for the children, with appropriate levels of detail as agreed to by the participants;
 - 4.the possible need to revise parenting plans as the developmental needs of the children evolve over time; and
 - 5.encouragement to the participants to develop appropriate dispute resolution mechanisms to facilitate future revisions of the parenting plan
- B. The mediator should be sensitive to the impact of culture and religion on parenting philosophy and other decisions.
- C. The mediator shall inform any court-appointed representative for the children of the mediation. If a representative for the children

participates, the mediator should, at the outset, discuss the effect of that participation on the mediation process and the confidentiality of the mediation with the participants. Whether the representative of the children participates or not, the mediator shall provide the representative with the resulting agreements insofar as they relate to the children.

- D. Except in extraordinary circumstances, the children should not participate in the mediation process without the consent of both parents and the children's court-appointed representative.
- E. Prior to including the children in the mediation process, the mediator should consult with the parents and the children's court-appointed representative about whether the children should participate in the mediation process and the form of that participation.
- F. The mediator should inform all concerned about the available options for the children's participation (which may include personal participation, an interview with a mental health professional, or the mediator reporting to the parents, or a videotape statement) and discuss the costs and benefits of each with the participants.

Standard IX

A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly.

- A. As used in these Standards, child abuse or neglect is defined by applicable state law.
- B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve child abuse or neglect without appropriate and adequate training.
- C. If the mediator has reasonable grounds to believe that a child of the participants is abused or neglected within the meaning of the jurisdiction's child abuse and neglect laws, the mediator shall comply with applicable child protection laws.
 - 1. The mediator should encourage the participants to explore appropriate services for the family.

2. The mediator should consider the appropriateness of suspending or terminating the mediation process in light of the allegations.

Standard X

A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly.

- A. As used in these Standards, domestic abuse includes domestic violence as defined by applicable state law and issues of control and intimidation.
- B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve domestic abuse without appropriate and adequate training.
- C. Some cases are not suitable for mediation because of safety, control or intimidation issues. A mediator should make a reasonable effort to screen for the existence of domestic abuse prior to entering into an agreement to mediate. The mediator should continue to assess for domestic abuse throughout the mediation process.
- D. If domestic abuse appears to be present the mediator shall consider taking measures to insure the safety of participants and the mediator including, among others:
 1. establishing appropriate security arrangements;
 2. holding separate sessions with the participants even without the agreement of all participants;
 3. allowing a friend, representative, advocate, counsel or attorney to attend the mediation sessions;
 4. encouraging the participants to be represented by an attorney, counsel or an advocate throughout the mediation process;
 5. referring the participants to appropriate community resources;
 6. suspending or terminating the mediation sessions, with appropriate steps to protect the safety of the participants.
- E. The mediator should facilitate the participants' formulation of parenting plans that protect the physical safety and psychological wellbeing of themselves and their children.

Standard XI

A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons.

- A. Circumstances under which a mediator should consider suspending or terminating the mediation, may include, among others:
 - 1. the safety of a participant or well-being of a child is threatened;
 - 2. a participant has or is threatening to abduct a child;
 - 3. a participant is unable to participate due to the influence of drugs, alcohol, or physical or mental condition;
 - 4. the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable;
 - 5. a participant is using the mediation to further illegal conduct;
 - 6. a participant is using the mediation process to gain an unfair advantage;
 - 7. if the mediator believes the mediator's impartiality has been compromised in accordance with *Standard IV*.
- B. If the mediator does suspend or terminate the mediation, the mediator should take all reasonable steps to minimize prejudice or inconvenience to the participants which may result.

Standard XII

A family mediator shall be truthful in the advertisement and solicitation for mediation.

- A. Mediators should refrain from promises and guarantees of results. A mediator should not advertise statistical settlement data or settlement rates.
- B. Mediators should accurately represent their qualifications. In an advertisement or other communication, a mediator may make reference to meeting state, national, or private organizational qualifications only if the entity referred to has a procedure for

qualifying mediators and the mediator has been duly granted the requisite status.

Standard XIII

A family mediator shall acquire and maintain professional competence in mediation.

- A. Mediators should continuously improve their professional skills and abilities by, among other activities, participating in relevant continuing education programs and should regularly engage in selfassessment.
- B. Mediators should participate in programs of peer consultation and should help train and mentor the work of less experienced mediators.
- C. Mediators should continuously strive to understand the impact of culture and diversity on the mediator's practice.

The *Model Standards* recognize the *National Standards for Court Connected Dispute Resolution Programs* (1992). There are also state and local regulations governing such programs and family mediators. The following principles of organization and practice, however, are especially important for regulation of mediators and court-connected family mediation programs. They are worthy of separate mention.

- A. Individual states or local courts should set standards and qualifications for family mediators including procedures for evaluations and handling grievances against mediators. In developing these standards and qualifications, regulators should consult with appropriate professional groups, including professional associations of family mediators.
- B. When family mediators are appointed by a court or other institution, the appointing agency should make reasonable efforts to ensure that each mediator is qualified for the appointment. If a list of family mediators qualified for court appointment exists, the requirements for being included on the list should be made public and available to all interested persons.
- C. Confidentiality should not be construed to limit or prohibit the effective monitoring, research, evaluation or monitoring of mediation programs by responsible individuals or academic institutions provided that no identifying information about any person involved in the mediation is

disclosed without their prior written consent. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the participants, to individual case files, observations of live mediations, and interviews with participants.

14.2 Model Standards of Practice

Review the Model Standards of Practice here:

<https://www.mediate.com/divorce/pg40.cfm>

14.3 OMA Standards of Practice

Review the Oregon Mediation Association Standards of Practice here:

<https://www.mediate.com/divorce/pg41.cfm>

14.4 Ethics Section

Review the Mediate.com Ethic's Section Page here:

<https://www.mediate.com/ethics/index.cfm>

Section 15

Career Development

This Section is to assist you with your mediation career development.

15.1 **Building a Successful Mediation Practice**

Written Materials for Next steps (marketing, biz dev), Getting Started and marketing video by Clare Fowler

The purpose of this article is to provide some suggestions with regard to building a successful mediation practice from a business perspective.

Be Realistic

The odds are that you will not be an overnight mediation sensation, although such cases are reported. Ultimately, clients will come to you because of your well-earned reputation. This reputation will likely be earned in part by your professional efforts prior to becoming a mediator and in part by the reputation you develop as a mediator. Most commonly, for those who are committed to the development, it will take between one and two years to firmly establish a mediation practice and to be able to make a reasonable living.

While one can argue that you will develop yourself as a successful mediator most quickly by devoting yourself full-time, a more moderate and sustaining approach may be to "keep your day job" and complement those efforts by developing a mediation practice as an augmentation of your other professional work. Perhaps the ideal would be to work half-time or so in your traditional professional work, preserving about half-time for your mediation business development.

Plan

You are wise to plan your mediation business development, including, ideally, a strategic plan, financial plan and marketing plan. There will be plenty of opportunity to be insecure as you develop your mediation business and, during such times of insecurity, it is nice to be able to look back on a well-thought through plans.

One of the nice things about mediation is that the business can be run on a relatively low overhead. For example, it is not unusual to utilize a home office as a practice base. You will need to arrange for quality meeting environments. These can often be secured at low or no cost. Minimally, the mediator will need a computer with quality word processing capacity, a quality printer, a flip chart and, increasingly, a modem connection to the internet.

Getting Started

I often suggest to developing mediators that they print their stationary and cards early and begin distributing them because it is unlikely that they will get a first quality case for six months and they had might as well get the time clock moving. There is some truth to this. It will take some measure of time to spread the word as to your existence as a capable and available mediator.

Perhaps the first thing to do as a developing mediator is to develop a good understanding of the surrounding mediation community, including any state and local associations and standards. One will want to be sure to identify any generally accepted qualifications requirements, for example training and experience requirements that might exist to receive mediation cases by referral from the court, administrative agencies and other public entities. It would also be a good idea to look in the yellow pages to understand the apparent number of practicing mediators and how they are representing themselves. It would be wise to interview established mediators as to their impressions for the best way to develop oneself within a particular community.

Niche, Niche, Niche

It would be a mistake for a developing mediator to market themselves as a "mediator for all occasions." The reason for this is practical, not necessarily philosophical. Even if mediators might generally be able to capably assist in a wide area of disputes, which is likely true, the reality is that, to successfully market one's mediation services, the mediator needs to develop a limited number of marketing targets. It will benefit you to come to be viewed as somewhat of a specialist. It is impossible to market to every one

(although the internet may change this). Even if one could market to everyone, the American professional mentality is one of going to specialists. If one wants to be a divorce mediator, you should market yourself exactly as that, and not a general mediator.

It is recommended that the developing mediator identify somewhere between two and four primary areas of practice development. It is then suggested that one of two approaches then be taken:

- (1) The developing mediator pour a relatively small amount of resources and energy equally into each of the identified niche areas of practice and measure the relative response rate of the preferred niches (presumably next focusing marketing efforts on the most responsive niche).
- (2) The developing mediator focus their practice development efforts on their first preferred niche, with a goal of creating this most favored work area, only moving on to secondary niche areas of practice as time permits and financial needs require.

What Does One Do Following the Identification of One's Niches

It is critical that you seek to inform as many decision-makers and opinion leaders as possible within your chosen niche(es) if you are to become successful as a mediator. You want to establish in these people's minds that you are a mediator; that you are available; and that you are capable and committed to practicing in the situations they encounter.

Get on the Internet

I am amazed at how quickly the internet is coming to complement mediators' work. Emailing and electronic forums are becoming a preferred medium for many mediating groups to communicate. One of the advantages of so working with mediation participants is that, following the mediation intervention, participants, if they desire, can continue so effectively communicating in the established effective way. There is no doubt that mediators will increasingly utilize the internet as an electronic extension of their office, commonly continuing participant discussions between meetings, including on-line facilitation, and, in due time, audio and video capability,

which will ultimately create an on-going "asynchronous" meeting environment.

In terms of promoting oneself, the internet is also rapidly becoming the new electronic yellow pages. One would be wise to carefully select an internet mail address that conveys one's commitment to mediation and also consider the development of a quality web-site. In these regards, it is recommended that developing mediators consult with www.mediate.com on the world wide web and register in their "[Locate A Mediator](#)" database. [Quality websites](#) are now available for as little as \$200/year!

Do a First-Class Mailing

Notwithstanding the tremendous development of the internet, it still will likely make sense for the developing mediator to send out somewhere between five hundred and five thousand "first class" mailings. The "first class" refers both to the postal rate and the quality of the contents. It is first recommended that the mediator invest in good looking stationary, on a heavy weight paper, preferably custom designed and, quite possibly, with two or three colors. To a meaningful degree, the mediator's greatest resource for marketing their business is quality letterhead.

In terms of what should be enclosed in this mailing, clearly a short cover letter, with perhaps two or three paragraphs, briefly introducing oneself is a good idea. One should also enclose a more substantial piece of client information or a brochure (either personally developed or from a national organization) is a good idea. Finally, it is recommended that the mediator provide some opportunity for participants to easily identify themselves as a person interested in receiving continuing information about mediation.

For example, the mediator might include a postcard return for those who would like to stay, at no cost, on the mediator's mailing list. Or, the mediator might include a postcard return for those who would like to attend a free professional seminar. Or, the mediator might include a questionnaire for other professionals who would complete the questionnaire so as to be in the mediator's referral book. Essentially, any technique that is able to identify those within the broad mailing group who are most interested in mediation will pay rich dividends down the line.

Perhaps the best target marketing group for mediators would be barbers and beauticians! While I say this, obviously, somewhat tongue-in-cheek, there is truth in the concept of marketing to those members of our society who learn early about the existence of a conflict. For example, one may want to consider marketing to the clergy, therapists, accountants and others who hear early (perhaps even before attorneys) of disputes.

One also wants to make one's services known to the relevant sections of the state bar organization, but do not expect lots of referrals from attorneys, many of whom still understandably view mediation as "loss of business." Still, it is wise to provide quality information to many members of the bar, knowing that one will very likely someday have a mediation with that attorney or a client will ask the attorney if they know of a certain mediator (you). Personnel and human resource professionals, school counselors, ombudspeople and all kinds of governmental agencies may be contacted to inform them of your services.

Work with your Responders

Those twenty to one hundred people who show responsiveness to your marketing efforts should be labeled "responders" or "cream of the crop" or the like. Once such a responsive group has been established, it can be further developed by a follow-up mailing and/or phone call, quite possibly even inviting the responder to lunch.

Make Lunch-time Presentations

It is also recommended that you make yourself available to the various community groups including Rotarians, Lions, Kiwanis, Parents without Partners, environmental groups, business groups and the like, to see if they have any interest in sponsoring you to make a twenty or so minute presentation at one of their up-coming luncheons. When one makes such a presentation, it is recommended that you focus upon the essentials, for example comparing negotiation, mediation and arbitration; helping people to understand how mediators assist participants to move from positions interests; and explaining the interface between mediation and lawyers and

the law. It is also recommended that some short exercise, video or demonstration be utilized as a discussion centering device.

Display Advertising

I recommend against your running a full-page ad in the New York Times. On the other hand, you may want to consider a two or three-inch small ad that would run weekly or so for ten to twenty weeks in a newspaper of local distribution. The mediator wants to spread their subliminal presence out over time. Many newspapers have "business builder" rates for small ads running on a weekly basis. Note that in this ad, if you have a quality website, you would want to feature that web-site address.

The Yellow Pages

While one almost certainly wants to be in the yellow pages as a convenience to clients and potential clients, it is recommended against investing substantial amounts in yellow page ads. Through the Yellow Pages, one mostly gets "shoppers." It is wise, however, to simply include a line or two to establish credibility and to identify your niche areas of practice. Again, it is recommended that you include your email and website address right in the Yellow Pages.

The Splash Effect

One of the more impressive and effective marketing efforts that I have heard of was by a colleague, Chip Rose, of Santa Cruz, California, who recorded a fifteen-minute description of mediation and his services and sent that audio tape to all of the mental health professionals in Santa Cruz County. Chip had a very nice label on the tape promoting his practice and, essentially serving as a large plastic card. It is doubtful that many people (immediately) threw those cassettes away (I still have mine). They are a steady visual reminder of Chip's practice, in addition to the quality audio content. With traffic ever worsening and audio duplication costs very reasonable, the audio medium for spreading information about your work is worth considering. Other techniques along these lines might include refrigerator magnets, post-it notes printed with your name address and phone, and the like. You definitely

want to get the word out. No one will be bringing you your mediation business on a silver platter.

Setting Fees

Mediators differ in how they set fees. Some mediators have participants pay as they go. Others request a deposit to be applied against earned fees. In any case, it is highly recommended that fee agreements be clarified in a signed writing. It is desirable that mediator fees bear upon participants and encourage them to make progress. The temptation maybe to reduce your fees as a budding mediator, yet you will quickly realize that you will be working much harder as a mediator than in virtually any other professional capacity and that these fees are very much earned. Further, remember that you will have at least two and often more participants paying the mediation fee. This being said, mediators' fees range from free (volunteer programs) to a "bottom" rate of \$50 an hour or so all the way up to \$400 per hour. Obviously, you will increase your fees with your success. In the short term, however, it is recommended that you do not under sell yourself. People generally expect to get what they pay for. If you underprice yourself, they will wonder why you are working for so little and may actually come to question your competency on this basis!

In Sum

While noble work, mediation is also, at least for the private practitioner, a business. Unless one can make a reasonable profit, one will not be practicing as a mediator for very long. There are exceptions, for example those who do not really need money and are able to volunteer on an unlimited basis at community mediation programs and the like. However, for the rest of us, being able to get a successful mediation practice going as a target that can only exist for a limited amount of time. My hope is that the suggestions in this article are helpful in thinking not only about how you will start offering quality mediation services, but also in terms of how you will continue being able to afford to offer those services.

[15.2 Careers Section](#)

Please review the Mediate.com Careers section here:

<https://www.mediate.com/careers/index.cfm>