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What is Mediation?

Described in The American Heritage Dictionary of the English Language, *Fourth Edition*, mediation is; *the act of mediating; intervention; the state of being mediated; law, An attempt to bring about a peaceful settlement or compromise between disputants through the objective intervention of a neutral party.*

That's not much of an explanation for something that purports to deal with human conflict and the trouble it causes all of us. Mediation is seen on the World stage settling disputes between compatriots, preventing wars, and saving lives. In addition, it serves us quietly; resolving conflict between neighbors over a barking dog, saving someone's job with workplace mediation, and providing a more humane approach to divorce. Mediation has many forms and applications, but it is often misunderstood as being a "touchy-feely" sort of process without the muscle of litigation.

Nothing could be further from the truth.

Frank Hanna, a Belfast lawyer and mediator for over 30 years, explains this widely held misnomer, *"The public perception of mediation today is not an accurate one. It seems to carry the implication of someone constantly wishing to split everything fifty-fifty, coupled with the assertion that the whole process is somewhat touchy-feely and not entirely professional. Nothing could be further from the truth...."* Frank then describes the limitations of the legal system in comparison with the process of mediation, *"...the reality of litigation. Invariably, someone emerges victorious. The system can do no better than that. This is a powerful distinction in the scope of results that cannot readily be brushed aside. Any mediator can tell you stories galore of the remarkable fulfillment not just in resolving conflict, but in putting good relationships back together again."* [Ref. Conflict Resolution and Mediation in the Real World, by Frank Hanna]

Mediation allows the owners of the dispute to retain control of the outcome, and perhaps the most beneficial component of all, as Mr. Hanna explained above; it restores relationships.

To briefly define mediation, it is a confidential process using the intervention and guidance of a neutral third party to help the owners of a dispute, commonly referred to as "the parties", come to a mutually agreed to resolution. The basic elements of mediation are:

- **The neutrality and ability of the mediator**
- **The protection of confidentiality in the form of a signed agreement**
- **Confidence in the process and the ability of the mediator by all parties**
- **Good faith by the parties involved in the mediation**

In this book, we will deal with the components and principles of mediation, the variations of techniques used by mediators, explore the human emotions behind conflict, and explore the process of conflict resolution using mediation.

Why Does Mediation Work?

To understand the principles of mediation, one must first explore the complexities of human emotion, and how it interacts with conflict. Fear, anger, regret, sorrow – even love, plays a role in the structure of dispute. When presented with a situation that affronts our sense of fairplay, we react. That reaction takes a well-trod path, and we all know it well; our skin becomes heated and flushed, our heart rate increases, and we react – often too quickly for our brain to compose a civil verbal response - so what happens? Strong language, threats, sometimes physical violence, or as in the cases of most, we make a hasty retreat to lick our psychological wounds.

What follows, without too much exception is regret and "what ifs". Regret for the way we handled ourselves, or for words we wished we'd said or didn't say. What if I'd said or done *this*, would he have said or done *that*? - Our feelings flood us with recriminations and self-doubt.

When the confrontation is allowed to germinate without solution, the escalation of the dispute grows within us. Sometimes it overwhelms us and even intrudes on the well being and action of our daily lives. We take a righteous position and often seek approval from others (enablers) to overcome our self-doubt and justify our position, *"Do you think I did something wrong? I just don't know what I could've done differently*…" Followed by our enablers heartfelt, *"No, you didn't deserve to be treated that way, you didn't do anything wrong. I think you should…"* That is the "drug" of approval that we seek and receive from friends, loved ones, and colleagues.

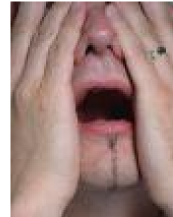
This validation of our position and principle pushes us and encourages a self- protective response. We act on the injustice done to us by writing threatening or accusatory letters, making angry phone calls, and in the worst scenario, violence. When the opposing party does not comply with our "justifiable" wishes, we take it to the next step by taking action. This may be in the form of a phone call or letter to someone in a position of control or power; writing to Human Resources, calling our Home Owners Association, filing a complaint with the police – we take our position to a higher authority for justice.

Understanding the Emotion of Conflict

What happens when the authority figure to which we have pleaded our case doesn't provide a remedy or solution? Alternatively, what if we perceive their response as either taking "the other side" or taking no action? Our reaction may be:

Meek compliance:

- This is acceptance without joy or any real resolution of our emotional connection to our original position. (Our wounds may be hidden but are still present and may cause a breakdown in productivity or relationships with those involved.)



Sadness or disappointment:

- The "Higher Authority" doesn't care, or favors the other party. (Our hurt feelings or anger may now extend to both the other party and the authority figure.)

Indignant Anger:

- *"I am right and will take this matter to court!"* (This removes the parties control of the conflict, and awards it to lawyers and ultimately to a judge or jury.)

With the breakdown of communication between disputants complete, and when the higher authority does not provide a satisfactory solution, the human reaction is to provide their own balance of justice in the form of retaliation. The person may now feel justified in taking action of various kinds, including performing:

- *Emotionally damaging action against the other party; exclusion, gossip, etc.*
- *Physical violence to the party or their possessions.*
- *Court solutions, hiring an attorney*
- *Alternative Dispute Resolution*

Our Choices for Dispute Resolution

Dispute has played a part in every stage of human existence. Living in the Information Age of 2007, we constantly bombarded with news and events that have a solid relationship to a dispute of some kind. War to divorce and all that is in between - dispute ranks high on the list of human trauma. The evolution of ways to handle dispute legally brought about the invention of ADR, or alternative dispute resolution, to offer choices to people beyond or instead of litigation. There are hybrids or variations of the three main ADR devices but those you will most often encounter are:

Litigation:

This is undoubtedly the best-known form of dispute resolution and the traditional way of allowing disputing parties to resolve their conflict. Traditionally, the vehicle for litigation is a lawsuit and its impact is known the world over.

The most significant drawbacks of litigation include the considerable time and expense involved and the uncertainty of the outcome, which ultimately produces a winner and a loser. It has built-in disadvantages for the underprivileged and disproportionate advantages for the wealthy. Were it not for these cumulative disadvantages, alternative dispute resolution would probably never have evolved. In the public's eyes, litigation is largely discredited and has probably been the single greatest impetus to the lawyer joke.

Arbitration:

Arbitration is a stripped down version of litigation. It is evidentiary and judicial, in that a neutral third party sits in judgment and can make decisions with some discretion. The process is similar to that of litigation and very often, a case can be won or lost depending on how well an individual performs under oath or while presenting evidence to an arbitrator. Again, the outcome of the process is uncertain and the tendency is to produce a winner or a loser, or alternatively, some compromise between the two. It is worth noting that a compromise may be imposed by the arbitrator, and not necessarily agreeable to either/all parties. Arbitration is a more expeditious and less expensive process than litigation.

Until the advent of mediation in the past 20 years, arbitration would have been the only serious competitor to litigation as an alternative method to dispute resolution.

Mediation:

A guided process where an impartial or neutral third party helps the participants of mediation to negotiate solutions. The process is not binding unless or until the parties reach agreement, after which the final agreement can be enforced as a contract if need be. An element of mediation that sets it apart from all other forms of dispute resolution is the power to restore relationships and recover from the often emotionally crippling affects of conflict. It is for this last reason that mediation is quickly becoming the vehicle of choice for disputants worldwide. In many States, attorneys must advise clients of alternative dispute resolution choices and in a few, mediation has even become mandatory.

We Are All "Natural" Mediators

You are a natural mediator as is your mother, father, siblings, friends, neighbors, co-workers - everyone has a lifetime of experience in dealing with conflict from childhood onwards. What makes you different from a professional mediator is learning to deal dispassionately and with neutrality in handling the disputes of others.

Good mediation training encourages self-confidence by empowerment of each person's innate problem solving skills.

In an except from, Conflict Resolution and Mediation in the Real World, [1]Frank Hanna explains how he does this by giving credit to their natural mediation abilities; "*On the first day of class of the mediation training that I teach, I face a new group of students, having introduced myself and explained to them what lies in store, I ask the assembled students a simple question. "With a show of hands, let me see how many people here believe they have done okay in life to date?" In every class, 100% of those present raise their hands. Hardly surprising because we all believe that our life's experience has been of great value to us and, quite simply, has us to where we are today. In getting to where you are today, irrespective of whether you are of school age or pensionable age, your natural intelligence, guile and experience has equipped you already with a set of tools that has enabled you to handle every conceivable human emotion that life has thrown in you path. Those skills are invaluable and almost certainly are appropriate to the practice of mediation. That is why I stress in my teaching that those life experiences should be your foundation and that the acquisition of new skill sets in mediation should be built on that foundation and not structured either along side of it or instead of it."*

Empowering yourself with credit for a lifetime of experience is fundamental if your intention is to make mediation a career. Imposing an artificial or insincere demeanor is a mistake many novice mediators make. Mediating professionally does not mean you must become stiff and formal taking on a persona that is not yourself. Successful mediators use all their natural people pleasing personality skills to gain trust and exude confidence in a positive outcome.

[1] Purchase Dr. Hanna's book on this web page: http://www.mediationagency.com/faq.html

Styles of Mediation

Much has been written about the various styles of mediation. You will hear one mediator state that he or she is defined as a 'transformative' mediator, another will lay claim to being 'facilitative' in concept but 'evaluative' in certain circumstances. Still others staunchly say they are always 'facilitative.' Labels for a mediator's style are rules that are, quite literally, made to be broken. Let me explain; every good mediator has a cache of tools that he or she uses as the need arises - the 'styles' of mediation are just *names* for some of those tools. For instance, say during a caucus a party seems to be confused or unsure about what he or she should do – a mediator might become 'evaluative' for that instance. Alternatively, if the relationship between the parties needs to be repaired or improved, a mediator may use 'transformative' techniques to help them better understand each other's perspective. A mediator who is also an attorney may find a circumstance where it is necessary to 'evaluate' a situation for a party legally. The important thing to remember is the target is *always* resolution for the parties.

Mediators are simply there to guide the process and pave a way to agreement. Limiting the methodology to exclude useful and successful techniques is a needless loss of resource and jeopardizes a successful outcome for the parties involved. To understand these styles or tools is important for mediators so that he or she may utilize them effectively:

Facilitative:

In the 1960s and 1970s, there was only one type of mediation being taught and practiced, which is now known as "facilitative mediation."

In facilitative mediation:

- *The mediator structures a process to assist the parties in reaching a mutually agreeable resolution.*
- *The mediator asks questions, validates parties' points of view, searches for interests underneath the positions taken by parties and assists the parties in finding and analyzing options for resolution.*
- *The facilitative mediator does not make recommendations to the parties, give his or her own advice or opinion regarding the outcome of the case, or predict what decision a court might render in the case.*
- *The mediator is in charge of the process, while the parties are in charge of the outcome.*
- *Facilitative mediators want to ensure that parties come to agreements based on information and understanding.*
- *They predominantly hold joint sessions with all parties present so that the parties can hear each other's points of view, but may hold caucuses regularly.*
- *They want the parties to have the major influence on decisions made, rather than the parties' attorneys.*

Facilitative mediation came along during the era of volunteer dispute resolution centers. The volunteer mediators were not required to have substantive expertise concerning the area of the dispute and, most often, there were no attorneys present. The volunteer mediators came from all backgrounds. This is still true today but in addition, many professional mediators, with and without substantive expertise, also practice facilitative mediation.

Evaluative:

Is a process modeled on settlement conferences held by judges.

An evaluative mediator:

- *Assists the parties in reaching resolution by pointing out the weaknesses of their case and predicting what a judge or jury would be most likely to decide.*
- *Might make formal or informal recommendations to the parties regarding the resolution of the issues.*
- *Is concerned with the legal rights of the parties rather than needs and interests, and evaluates based on legal concepts of fairness.*
- *Most often meets in separate meetings with the parties and their attorneys, practicing "shuttle diplomacy." They help the parties and attorneys evaluate their legal position and the costs vs. the benefits of pursuing a legal resolution rather than settling in mediation.*
- *Structures the process, and directly influences the outcome of mediation.*

Evaluative mediation emerged from court mandated or court referred mediation. Attorneys normally work with the court to select the mediator and are active participants in the mediation. The parties are most often present in the mediation, but the mediator may meet with the attorneys alone as well as with the parties and their attorneys. There is an assumption in evaluative mediation that the mediator has substantial expertise or legal expertise in the area of the dispute. Due to the connection between evaluative mediation and the courts, and because of their comfort level with settlement conferences, the majority of evaluative mediators are attorneys.

Transformative:

Is the newest concept of the three, named by Folger and Bush in their book, *The Promise of Mediation.*

- *Transformative mediation is based on the values of empowerment of each of the parties as much as possible, and recognition by each of the parties of the other parties' needs, interests, values and points of view.*
- *The goal in transformative mediation is to transform the relationship that exists between any or all parties during the mediation.*
- *Transformative mediators meet with parties together, since only they can give each other recognition.*

In some ways, the values of transformative mediation mirror those of early facilitative mediation, in its interest in empowering the parties and striving for transformation. Early facilitative mediators fully expected to transform society with these techniques. Moreover, they did. Modern transformative mediators want to continue that process by allowing and supporting the parties in mediation to determine the direction of their own process. In transformative mediation, the parties structure both the process and the outcome of mediation and the mediator follows their lead.

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The Foundation of Mediation

Understanding the Role of Misperception in Conflict:

If you want to get to the route of most conflicts or disputes, you will need a clear understanding of perception and misperception. It is possible for different people to look at the same set of circumstances and see two completely different realities. You will be familiar with the person who looks at a glass and sees that it is half-empty whereas someone else can see it as half full. It's a matter of perception. Frank Hanna having lived through the worst of the terrorist activity during the troubled years of Northern Ireland over the last thirty years, states, *"There have been terrorists without doubt, and a section of the community brand them as such; however, there is another section of the community who see them as heroes and freedom fighters."* Thus, different perceptions can dominate conflict and effect resolution.

There are many instances of where perception or misperception plays a part. One that happens quite often is a situation where a more senior colleague is sexually harassing a female. She reports it to Human Resources and then nothing happens. She waits for weeks, maybe months, and gets no satisfaction. She therefore concludes that nobody cares about her and that the employers simply did nothing.

That is her perception because invariably you will find that the employers are taking active action possibly to the extent of compelling the offending employee to undergo sensitivity training but keeping his punishment confidential from the woman who complained.

This is more common than you might think and on many occasions in mediations, we have heard of plaintiffs who accuse HR of doing absolutely nothing, whereas they had done a considerable amount along the lines mentioned above.

A significant step on the road to becoming a successful mediator is to understand the part that perception plays in mediation. The question is—how do you discover if there is misperception on the part of one of the parties? The answer is quite simple. You ask them. You don't ask the blunt question, *"Is there a misperception*?" but, rather, you challenge each of them to say what he believes the other person is thinking. You'll get a clear indication that the parties are moving in opposite directions through some misperception and experience will help you with that.

Frank Hanna has a method in which he seats the parties, looks straight at one of them and says, *"I don't care what you are thinking"*; then, looking at the second person he says, *"and I don't care what you are thinking, but I do care what you think he is thinking."* Through that little piece of speedy verbal maneuvering, Frank lets them realize that now is the time to air their views of the other party. That is the time when misperceptions begin coming to the fore. A mediator could go further and say that it is the only time that you are likely to hear the misperceptions because they will not easily arise unless both parties are there to listen to them. It is when they are together and under the circumstance of mediation that misperceptions tend to get flushed out. This is imperative skill for mediators to master because at the heart of every conflict, almost inevitably, there will be a misperception.

Positions and Interests:

Throughout any mediation, mediators will be constantly working on identifying each party's interests, as opposed to the position they take in the beginning. Although it seems simple, in reality, it is probably the one task that initially presents the greatest difficulty to new mediators. Understand the ability to accurately identify and separate positions and interests is the key to a successful mediation and the mark of a great mediator.

There are certain questions that get parties to disclose their interests such as, *"Tell me what you want?"* or *"Tell me what would resolve this issue for you?"* These questions work and will, invariably, lead into a discussion with each of the parties enabling a good understanding of their interests to emerge.

If it were so simple, why then do many students of mediation find difficulty with the premise?

The answer is reasonably straightforward and may be somewhat surprising. Sometimes even the parties do not fully understand actual interests or portray them as important. Mediators need to be able to assist participants in fully articulating their real needs as they are identified, and help to illuminate the effect of decisions on their future once made and formed in an agreement.

To help understand positions and interests, consider an example in which Frank Hanna mediated a case where the plaintiff attempted to portray himself as being the ultimate in reasonableness. This was an employment discrimination case in which the employee alleged that he had been discriminated against because of his disability. The employee was in the mediation to get his problem resolved and the resolution seemed centered on an amount of money settled on by the employer. However, the employee adopted a very peculiar attitude that is not at all uncommon in mediation.

He started by saying that the money was unimportant to him, that it was an issue of principle, and that he wanted to take a stand so that his employer would never again treat anyone in the way that he had been treated. Theoretically, that could be entirely correct but, in reality, very few people would take their principles to the point where they would actually say that money is unimportant to them. In reality, money was important to him but Frank had to uncover his actual interest. No matter what Frank said, he kept coming back to his original position, which was to ensure that this would never again happen to another person and he was anxious to convey that this was his only interest. The conversation seemed to be going in circles, Frank metaphorically stepped to his side while in private caucus and said to him, *"Well, John, I am very impressed by your dedication to your principle and it seems to me you're saying the financial aspect of this case is really unimportant. If I were able to persuade the respondents to give you a solemn declaration that they would never again treat anyone as they had treated you, would that bring this case to an end?"* This, in effect, amounted to Frank calling his bluff saying, *"Okay, if that's the most important thing to you, and I am able to get it for you, is the mediation over?"* Needless to say, he hastily looked at his situation and realized that, if that were the case, he wouldn't get any money. He then immediately focused on the financial aspect and realized that while his principle was still important to him, it wasn't as critical to the resolution as he had previously suggested.

Sometimes there are cases in which the parties' interests seem obvious and a mediator decides that they can proceed towards a likely resolution. Be very careful. Mediators must still go through the process of probing to make absolutely sure all participants <u>exact</u> interests have been identified.

In this way, a mediator can ensure they are completely, and correctly, separating positions and interests. In the case mentioned above, the plaintiff's statements about his principles turned out to be his position, not his interest. If Frank hadn't investigated tenaciously, the point might easily have been missed, his interests would have gone undetected, and the mediation would have resulted in failure. As it was, the mediation was resolved reasonably quickly when he fully understood what was important.

Understanding Positions:

People who are involved in a dispute really believe that they know what the problem is and, even better, know what the solution is. Taking a position is the way that people instinctively connect the problem to the solution. You will be familiar with the person who says, *"You owe me $1000 and if you don't pay me I will take you to court!"* That is a typical example of someone taking a position. The problem is simple to identify. He is owed $1,000 and his solution amounts to a demand to pay up--or else. In this example, his interest is securing repayment of his debt but, ironically, that is being clouded by his position. If you think about this example, it becomes apparent that by taking this position he is actually limiting the full consideration of his interest.

In caucus with the other party, you might discover that he is prepared to pay the debt but that he needs some time to gather the money together. Therefore, you could return to the other party and explain that the position he is adopting is getting in the way of what he really wants the repayment of his money. As the mediator, how might you tackle that? You could go into the room and say, for example, *"Listen pal, you are being a bit stupid here! If you'll just hang on for awhile you'll get your money."* Not the brightest idea! There is a world of difference between that approach and this one*: "I had a conversation with the other party and he is willing to come to terms with this debt and would like to deal with it as quickly as possible. I have a sense that he could probably get the money together within five or six weeks, which is a lot faster than it would take you to go to court."* Here we have focused on his interest but have a bypassed his position. The solution is irresistible, all that should be needed is a good agreement signed by the parties, and you can take the rest of the day off!

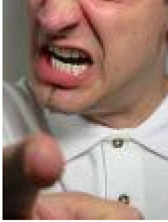
Understanding Interests:

The essence of good mediation is to identify and fully understand the parties' interests. As we have illustrated, they are usually, but not always, apparent.

Very often with close questioning and careful discussion of a problem, it emerges that the parties have similar, if not identical, interests. For example, imagine an office where there are three or more staff members working in close proximity and embroiled in interpersonal problems. Undoubtedly, those problems will be magnified by the positions that the parties take. It might be that self-righteousness dictates the attitudes. Failure to accept responsibility by the various parties often adds to their positional problems, yet their interests probably don't ever change.

Let us say, for example, that the co-workers are arguing about various aspects of their job and workload. Small points can become large, stubborn streaks can very often override common sense, and a good working environment can suddenly be replaced by an air of tension and stress. Most people have seen this in their workplace in some form. Although one might expect the co-workers' individual interests to be different, ironically, they are probably the same or very similar. They all want to wake up in the morning, look forward to going to work and enjoy the company of their colleagues in a tension-free atmosphere. This could otherwise be known as a peaceful existence and it is what we all seek in one form or another.

A mediator would strive to separate the positions from the interests and could very quickly identify that a peaceful existence was what they all wanted. The mediator would then illustrate to the parties that the dispute could be resolved by focusing on their common goals (i.e., their interests) and relegating their positions to a much less significant status.



Positions can cause people to become entrenched -- even when they don't want to. Very often, stubbornness takes over and sometimes disputants disguise their stubbornness by referring to it as, *"a matter of principle."* Quickly, this can give way to self-righteousness and very often disputes gather momentum. Once this point has been reached, disputes can become notoriously difficult to settle and a good mediator needs to stay focused on the underlying interests.

A good mediator can resolve a seemingly deadlocked dispute by helping the participants to find a way forward, or in some cases, *a way out* of their formerly immovable position.

Question asking techniques:

Ask open-ended questions:

Also known as "*Socratic"* they are questions that get the parties to expand upon their interests:

- *What is most important to you?*
- *What bothers you about this?*
- *This seems to affect you deeply; can you help me to understand why?*
- *What is your particular problem with all of this?*
- *It is important for me to understand all of this, so would you please tell me your view of it?*
- *Or even: What's really going on here?*

Confidentiality in Mediation:

The security behind the mediation process is called a "confidentiality agreement[2]". This is the cloak of protection that enables people to come together and communicate openly in mediation. This agreement restricts everyone, including the mediator, from disclosing details learned during the mediation. This is one of the cornerstones of mediation. It is imperative that the parties and the mediator exchange assurances about the confidentiality of the process. Every mediation begins with the circulation of a confidentiality statement signed by all present, including any observers. This does not mean that not every word uttered during the mediation process can ever be restated by any of the parties or the mediator. That is too strict an interpretation and would be impossible to enforce, if nothing else.

Confidentiality prohibits the use of any fact, words or information that are disclosed during mediation from being used in any other proceeding at a later date to the advantage or disadvantage of one of the parties. That confidentiality also extends to the mediator whose neutrality is protected by the confidentiality agreement. That agreement acknowledges that the mediator cannot be subpoenaed or compelled to give evidence in any future proceeding.

Without these fundamentals of confidentiality in place, mediation could not succeed. The spirit of mediation is such that people must feel comfortable discussing matters and sharing information that they may not otherwise be prepared to disclose. More often than not, disputes are fraught with emotional, and sometimes very personal, issues. Therefore, it is absolutely imperative that the parties feel free to speak openly so the mediator can understand the problem and help develop solutions.

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[2] See a standard Confidentiality Agreement: http://www.mediationagency.com/pdf/confidentiality.pdf

How do mediations begin and end?

A point that is regularly overlooked by mediators is a formal acknowledgment of the beginning and end of the mediation process.

There are compelling reasons why a mediator should clearly indicate when the mediation has begun and, more importantly, when it has been concluded. The beginning of the mediation process, in practical terms, is when the parties sign an agreement to mediate[3]. The beginning of the actual mediation is always in the control of the mediator. A good mediator will not proceed until he or she is satisfied that everyone understands the process, is prepared to proceed in good faith and everyone has signed the confidentiality agreement.

Once the mediation has begun in earnest, the termination of the mediation is usually the signing of an agreement. Occasionally a mediator will terminate the session for other reasons, such as violence or the threat of violence. Sometimes verbalized threats are followed quickly by one of the parties leaving the mediation with little or no warning, not allowing the mediator to officially conclude the session.

To illustrate the significance of this point consider case in which, during divorce mediation, a mediator recalled the following scenario: An estranged wife storms out of the mediation session and makes a serious threat of physical harm towards her husband on her way out the door. The attorney representing the husband decides to act upon the threat. A question arose as to whether or not the “threat” that was issued was covered by the confidentiality agreement.

One very obvious point is that any threat of violence is not covered by confidentiality. However, equally obvious is the fact that people leaving a mediation session in temper are apt to say things that they may subsequently regret.

Therefore, the mediator should define for the parties when the mediation is underway and when it is finished so that an issue regarding confidentiality does not arise.

[3] See a typical Agreement to Mediate: http://www.mediationagency.com/pdf/agreementmediate.pdf

Mediator or Negotiator?

Are mediator's negotiators too?

With even a basic understanding of mediation, one will immediately have difficulty trying to connect the skills of negotiation to those of the mediator. They do not sit comfortably along side each other because the mediator is never a negotiator. Why then is a detailed study of negotiation techniques and strategies important in the study of mediation? The answer, simply, is that mediators are constantly stuck in the middle of other people who are negotiating and the ability to identify someone who is negotiating is an imperative to the mediator. So, how does one go about understanding the difference between a negotiation ploy or a final decision? The answer is more complex than you might imagine.

Negotiation is a part of everyday life. We have to realize that negotiation is something that we all do all of the time. It's not just about getting a car dealer to discount the model on display or asking more for an object that you are selling than you are prepared to take. Negotiation comes in the strangest forms and, ironically, we sometimes do not even realize that we are, in fact, negotiating. Let me give you an example.

There was a case where an employer had to terminate an employee because he had a degenerative bone disease, which had gotten progressively worse over a period of time. The man's work involved some heavy lifting and whilst he believed he was perfectly fit to continue doing his job, his employers and their insurers felt that he was a danger to himself and potentially to other staff members. They terminated his contract. The man was outraged and immediately accused the employers of discriminating against him because he had a disability. In American, as many countries, there is a federal act [The Americans with Disabilities Act], which makes it unlawful to discriminate against someone who has a disability.

When the case came to mediation, the plaintiff's anger had increased and the plaintiff took up the first ten minutes of the mediation with an unruly display of temper. He slammed the table indicating that his employers had acted discriminatorily and that he was suing them as a matter of principle to ensure that they never again discriminated against a disabled person.

In an earlier element of this book, we talked about positions and interests and the mediator, in pursuing the true needs of the plaintiff, was obliged to find out what his interest really was. In a private caucus, he asked and once again got a clear outburst of anger. The mediator, who was very experienced, validated the plaintiff's feelings by saying that he "clearly understood" just how painful the experience must have been. By then asking a simple question, he propelled the plaintiff into having to confront his own interest.

[The man had been demanding a written apology and a guarantee that the employers would never again discriminate against another disabled person again. So the mediator immediately asked the following question*, "If I, as the mediator, am able to persuade the defendants to apologize to you and to put it in writing and to give you a written declaration that they will never again discriminate against another disabled person, is this case then over?"*]

By doing this, the mediator was compelling the plaintiff to examine his underlying interests*. Was that all that he really wanted?* The answer came quickly when the man indicated that he also needed a large some of money. The mediator was therefore able to conclude that the man's true interest was, in fact, a settlement on financial terms and the case moved on to a positive conclusion.

What exactly is "negotiation?"

Is negotiation really an "act" that is meant to mislead others? Was the plaintiff above trying to mislead anyone? The answer is—"no". In fact, he was so emotionally entrenched in his position that he believed by repeating it louder and louder he would achieve a good result! The problem was at the beginning he didn't know what result he was looking for. He might even have seen a possibility of getting his job back. An experienced mediator will understand this behavior and assist parties in reaching an understanding of their own interests.

A crucial underlying principle in mediation is that the parties come to it in good faith with a true desire to find a solution. Therefore, if we assume that the parties in the room are acting in good faith, it is possible to imagine that the differences between the parties in the conflict under review are probably negotiating stances, and the skillful mediator will recognize these and know how to treat them.

Who are "the negotiators?"

Children are master negotiators! We all know how children behave to get what they want. Using tears, anger, and in the best situations, good behavior to receive the reward they seek. You need look no further than your own life's experience to see what clever negotiation can do. Can you remember when you were younger and you wanted your parents to give you something or to do something for you and you succeeded in persuading them that they should? That was a negotiation. Sometimes, even in simple family situations negotiations can be complex with some give on the one hand and lots of take on the other hand.

The "dance" of negotiation. One of the realities of negotiation that the mediator must come to terms with is that it is ritualistic. Often called saber rattling and bartering, the truth is we all believe that we are great negotiators. We all believe that we can best represent our own best interest. Thus, you will find people stubbornly sticking to a position in the hope or expectation that everybody will cave in and give them what they want. Sometimes this creates a frustrating experience for a mediator because he sees the parties so far apart with no likely possibility of bringing them together. What he does not know for sure is whether or not they have actually reached the end of their particular negotiation stance or whether or not they are still bartering. He can, however, quite easily find out by indicating that he intends to close the mediation after a short period of time. Many mediators make the mistake of seeing two far removed and deeply entrenched parties and simply conclude that agreement is not possible and so shut down the mediation. That is a mistake because there is no way to know whether or not they had reached their final positions. However, by serving notice that the mediator is going to stop the mediation in, say, thirty minutes, can help focus them on the goal of settlement. This is also a good way of testing to see if they are acting in good faith – because with the clock ticking parties tend to make fresh and perhaps significant moves. It is a sound piece of advice to any mediator to make a practice of serving notice of the conclusion of mediation for this very reason.

The author and collaborator of this book have successfully concluded mediations in that final half-hour fully illustrating the point that negotiations sometimes do go right down to the wire and it is vital to the process of mediation that we are tenacious and optimistic about a positive outcome.

When is mediation not appropriate?

There are times, thankfully few, where something occurs during mediation that causes the mediator to stop the proceedings. It may be when one or more of the parties become too upset to carry on any useful conversation or to contribute in any productive way towards resolution. Some of the considerations a mediator might apply are whether or not, for example, the party might be more readily disposed the following day or in weeks' time. This judgment is always the mediator's and he or she will carefully examine it. It is imperative to the purity of the mediative process to end mediation if any of the examples seen below occur:

Good Faith:

We have mentioned in other parts of this book the fact that the imperative in mediation is that the parties carry it out in good faith. The parties come to it in sincere hope that some resolution can be encountered. It is extremely easy to say that you are acting in good faith but, very often, things are not as they appear. It's reasonably common for a defendant, for example, to engage in mediation with a view to finding out the strengths or weaknesses of the plaintiff's case without having any real intent to try to settle it. This is always a difficult situation and is often characterized by the parties seeming to be getting close to agreement when suddenly everything falls apart. A skillful mediator will spot such behavior using some subtle techniques and, indeed, some that are not so subtle. In any event, that clearly is a case when mediation is not appropriate.

Abuse or Aggression:

It's not uncommon for a party to come to mediation and to be so aggressive and abusive as to be destructive to the mediation process and, once again, you, as a mediator, are finding yourself where there is an issue of good faith. You could as easily examine circumstances like that and ask the question--is this behavior part of the individual's negotiating ploy? That is why it is important to keep an open mind about behavior as sometimes it is there purely for effect, but in the case in point, if someone is being destructive and determined to be unreasonable, then mediation or the continued mediation is inappropriate.

Balance of Power:

Mediators will constantly have to look at issues of balance of power to determine that the mediation process is fair and equitable. Let us say, for the sake of discussion, that a Company has fired the janitor and he comes to mediation. Consider what you might do if, as he settled down at the mediation table, you realize that the company was represented by the CEO, the Director of Human Resources, and the company attorney – but the janitor (plaintiff) is all alone. Clearly, there is an uneven balance and, to put it in the vernacular - it's not a fair fight. A mediator, however, can use some skills to reduce that imbalance but, in such a stark example, it's unlikely that the mediation could properly proceed and so it would be unsuitable for mediation.

Interested parties absent:

If during the course of mediation it becomes apparent that a party or parties that are inclusive to the dispute are not present, the mediation becomes invalid. Why? Because should agreement be reached between the parties who are present it would become null and void if an interested party had not participated and signed the agreement as well.

A party does not have authority to settle:

Occasionally you will discover that the 'decision maker' is not present at the mediation, but instead has sent his or her representative. If the representative does not have the right to settle or agree then the process becomes a mute point and the principle of *Good Faith* has been compromised.

Misuse of the Confidentiality Agreement:

Another example of where mediation would be inappropriate is if the public interest suffers a disservice by allowing one of the parties to conceal additional problems. Let me give you an example. Let us say a company making chemicals had a factory on the bank of a river and inadvertently released chemicals into the river, thus polluting it and causing damage and death to livestock on an adjoining farm. You might find the company wanting to partake in mediation so that they can use the confidentiality agreement to keep their spillage under wraps and to keep the claiming farm from telling more people about the spillage thus suppressing more legal claims. Situations like this will more readily happen in environmental cases, which, of themselves, are complex. It's unlikely in the normal run of mediation cases that you will come across these circumstances.

Resistance to participate:

Finally, if one of the main parties involved simply will not participate then the mediator has no alternative than to call a halt. This can happen quite often.

The Opening Statement

The opening statement is arguably the most important 5 minutes of the entire mediation. Why is this? The answer is as simple as the casual conversations that you have every single day – the opening statement is a chance to bring the stressors in the room, which tend to be very high, down to a more manageable level by just talking. During that talk, many things are happening. The business of mediation is dealt with in a professionally casual, but effective way – a mediator fulfills the requirement to assure confidentiality in the process by saying something such as, *"Okay, during the mediation please be sure your cell phones, pagers, recorders – or satellite dishes are all off."* The reaction may be soft smiles or outright laughter at the thought of a satellite receiver hidden away in someone's brief case. The mediator goes on to include all of the required statements - again using normal language in a relaxed tone. They explain that the mediation is a "safe place" and they may need to speak to one or both parties privately in caucus. The mediator tells them he or she is not a judge, and so is not there to hear evidence and will not decide who is right or who is wrong. The demeanor is calm and gentle; the mediator may loosen his tie or take it off – or roll up sleeves and ask if first names may be used. Every action, every word is measured and has the effect of reducing the stress of the parties. An opening statement therefore, should be yours and yours alone. Do not be led to believe it should be staged, filled with legalese or trite terminology that doesn't feel natural to you. Professional mediators have rehearsed their opening statements carefully and use body language and tone to relay a message of relaxed confidence and professionalism.

What do mediators say in an opening statement?

- *They explain the process of mediation in layman's terms*
- *They establishes the mediators role and his or her neutrality*
- *They ask if first names are okay with everyone (exceptions such as the CEO and Janitor wherein such informality would be uncomfortable are always considered)*
- *They remind the parties that the objective is agreement and congratulate them for choosing to mediate*
- *They explain confidentiality and get the signatures of everyone present*
- *They define "caucus" or the use of private meetings with the parties*
- *Explain that during a caucus parties may specify if a disclosure is for the 'mediators ears only' and should not be shared in the open mediation*
- *They tell the parties to turn off cell phones and pagers*
- *They tell the parties that each will be asked to speak about their position*
- *They let the parties know you, the mediator will guide the process but the solution will be formed by and belong to them*

The Mediated Agreement

Every student of mediation knows and understands that mediation, as a form of dispute resolution, has been steadily evolving over the last twenty years. We, as practitioners, continue to refine our techniques enabling us to be better at assisting people towards the resolution of their conflict.

While the techniques themselves might become more sophisticated, remember that the object of mediation, the resolution or agreement, is as old as time itself. Let us reflect on what it is that brings people to mediation in the first instance.

Traditionally, in the United States and in most civilized countries, we have a legal system, which provides remedies for disputing parties. The traditional lawsuit is the vehicle by which individuals seek the protection of the legal system, and most believe that it has stood us in good stead and continues to do so. The student of mediation knows that the unfortunate aspect of our legal system is that, in every lawsuit, it breeds a winner and a loser. As mediators, we think about win-win situations where we can cover ground not ever contemplated by the legal system.

There is a famous lecture at Harvard Law School that describes two sisters and an orange where the ownership of the fruit was challenged. Sister one wanted ownership because she had paid a dollar, and sister two wanted ownership because she had loaned her sister five dollars and had not been repaid. Litigation would have found in favor of the sister who had purchased the orange, whereas arbitration would probably have ended up with each sister getting half of the orange. The story takes a twist when it is discovered that one sister wanted to eat the fruit while the other sister wanted to keep the peel so that she could bake a cake. Therein lays the flaw in our legal system because such a simple resolution is not achievable through any normal, legal process. Thus, the Supreme Court in Washington, DC, could sit from now until the end of the decade and still not find any way of arriving at what seems like a very obvious and equitable solution.

That is where mediation shows its remarkable strength. By pursuing an individual's interests, a mediator can often accommodate both parties' needs without the confrontation of litigation.

Mediation is exciting and, apparently, limitless. It is one of those processes that everyone believes they understand because they know the meaning of the word mediation. In reality, the public at large do not fully understand the scope of the process. Daily on television and radio, we hear of politicians mediating in places like Northern Ireland, the Middle East, and Afghanistan. We know that mediators work in volunteer programs for various courts and community based programs to assist people through mediation. The thing that most people don't actually grasp is that the process is the same whether it involves heads of state or one of us assisting neighbors with a barking dog.

Either way, mediators are all trying to achieve the same thing. Mediators are bringing people together, helping to air problems, pursue their interests, and seek lasting resolution.

What exactly is a "Mediated Agreement?"

To properly understand this, we need to look to the law of contract and the constituent elements that go to make up a contract. Before doing that, it might be interesting to reflect on how contract law evolved. Frank Hanna explains, *"Like all aspects of common law, the evolution and refinement of the law of contract took place from the 15th and 16th centuries onwards in England. The Kings of England needed to protect their territories and, much like today, needed an army to give them that protection. The cost was prohibitive so they leased large chunks of land to noblemen in return for armed support. It was thus that the Shire system emerged in England. For example, a title was bestowed on someone who, for example, became the Duke of York. The land that was leased to him was known as Yorkshire and a regiment of the army became known as the Duke of York's regiment. To offset the cost of providing this army, the Duke of York (or whatever Shire was involved) sublet pieces of land to others and the entire leasehold system of property ownership came into being and exists to this day."*

So, from that period onward, you had the evolution of property ownership and the law of contract evolving simultaneously. Hundreds of books have been written on the law of contract because it is, indeed, a complex area of law. However, what is simple to understand is that for a contract to exist there needs to be three elements. There needs to be an offer, there needs to be an acceptance, and there needs to be some form of consideration.

If you apply this to what we do day and daily, you would see that we deal in contracts just about every day of our lives.

What is a contract?

Contracts can be daunting and a labor-intensive task just to read, but did you know that going to the grocery store is in effect engaging in the construction of a contract? The goods stacked on the shelves are what are on offer. A customer taking them to the checkout desk is an acceptance of that offer, and the payment of the bill is the consideration; thus, it is a contract. It is the same in mediation. You have a dispute, the resolution of which may mean that one party makes an offer, the second party accepts the offer, and the consideration is the action that needs to be taken to bring the matter to a conclusion, usually the payment of money. If the law of contract were as simple as that, most lawyers would be out of work. Mediators do not need to be more complex than that, but as you will see the scope for being innovative while working as a mediator is much more exciting than one would normally expect to find when trying to construct a contract.

The opportunities for creativity and versatility are extremely interesting. In many respects, the scope for the mediator is governed by whether or not the contract or agreement needs to be legally binding. This is a critical question and one, which, sadly, is not properly addressed in many organizations or training courses. Some mediators believe mediated agreements are not legally binding and there are those who believe that they are. In some respects, both are true.

Are mediated agreements legally binding?

The simple answer is that a mediated agreement is legally binding if it needs to be, but needs to be constructed accordingly. The legal enforceability of a document is an issue that is determined by understanding the intention of the signed agreement and identifying whether or not a particular case needs a mediated agreement that is also legally binding. This determination is made on a case-by-case basis. The short answer is; if they need to be they are, otherwise an agreement is simply a written expression of good will and good faith signed by all parties. [ref. 'Can Non-attorney Mediators write legally binding contracts?']

Let us consider two different situations. In the first example, imagine a community mediation similar to the one referred to earlier concerning the trees. The dispute arose out of misperceptions, which led to one party taking a position, which was responded to, by the other party taking a different position; thereafter, their relationship deteriorated. However, when the misperception was unearthed and the parties realized that the whole thing was a horrible mistake, the act of recognition was probably all that particular mediation needed to bring about a peaceful and lasting resolution. You could, if necessary, construct an agreement that somehow acknowledged that a difficulty had arisen, that the difficulty had been resolved, and that in the future both parties would agree to talk rather than jump to conclusions. If you incorporated that into a written document, it would be efficient and effective for the parties because it would stand as a declaration of their goodwill; however, legally and by that, I mean as a legally binding document, it simply isn't worth the paper it's written on--nor, should it be.

Contrast that with an example of a discrimination case, which is referred to the Equal Employment Opportunities Commission. One party makes an allegation of discrimination under some heading—for example, age or disability—and the respondents take the opportunity of mediation to see if the issue can be resolved.

In those circumstances, the EEOC is a party to the dispute in that it is seeking the resolution of what essentially is a complaint, which amounts to a breach of federal law. Assuming a mediator can bring about a resolution of these issues he would then prepare an agreement which would be a tripartite agreement involving the charging party, the respondent, and the EEOC. That agreement must be a legally binding agreement because each of the parties needs to have the right to seek the protection of a court if the agreement is breached. Thus, you have two separate mediations, both successfully resolved but two entirely different outcomes in terms of the legality of the paperwork that the mediator would produce.

Are mediated agreements different from other ADR agreements?

The answer to this is emphatically *"YES!"* The reason is that mediation can consider areas of resolution, which the normal legal process cannot. Remember the example of the two sisters and the orange. Mediated agreements can easily show versatility beyond the scope of the normal legal process.

Litigation or arbitration is structured in a way, which makes it quite inflexible when it comes to accommodating what people really need. The story of the two sisters and the orange illustrates the point perfectly. If that case had gone to litigation, there would have been a winner and a loser. One of the sisters would have been adjudicated as the owner of the orange and that would have been the end of it. Arbitration may have produced a more equitable result because of the arbitrator's discretion, but the true interests of the parties would not have been accommodated in either case. That is where mediation excels over everything else. Because not only would each party successfully achieve what they really wanted, but the scope is also there to enable the relationship between the parties to be restored or perhaps even transformed. That can never be the case in litigation where the entire process would, effectively, institutionalize bitterness.

Expanding the agreement:

A skillful mediator will look for ways to assist the parties with esoteric side benefits that will enhance both the agreement and the relationship between the parties. However, for the moment, we need to be sure that we fully understand that the potential for this additional element is very much alive and an active part of the mediator's approach to dispute resolution. For instance, there once was community mediation where the issue concerned a homeowner who had an unruly son. She was a single parent and had to work very hard just to keep going. Her situation was particularly tragic as, approximately 18 months prior, her husband had, in fact, committed suicide. Through emotional stress, pressure of work, and a sense that her life was collapsing around her, she had little time to look after the appearance of her house. Her garden became overgrown, there was trash scattered around it, and, as a result, she had a Homeowner's association applying pressure to her. Add to that the fact that their next-door neighbor was trying to sell his property and potential purchasers were being put off by the appearance of the untidy neighbor's home. This case found its way to mediation.

The issues were clear. She had to deal with all of these pressures including the deteriorating relationship with her neighbor. The situation was additionally complicated by the fact that her teenage son was almost out of control. If these issues had gone to court, she would probably have been punished in some way—possibly with a monetary fine. As it turned out the mediation, through focusing on her true interests, simultaneously allowed her to empathize with the interests of her neighbor. This assisted them in resolving their difficulties. It also helped them to create a better relationship, allowed the neighbor to become a mentor to the teenager and restored peace and harmony within the neighborhood. That outcome simply wasn't possible with any other form of dispute resolution than mediation. An important side note is that this dispute had been referred by the *court* to mediation - they, undoubtedly, recognized the lack of flexibility in their own system and sought a more fulsome solution.

So, in mediated agreements the mediator will consider the additional elements that go to enhance the relationship that exists between the parties and not simply address the problem that they are trying to resolve. If that were the only scope of mediation, it would almost be worth it but it goes far beyond that. If, as a mediator you conceive of some method of resolution with which the parties are at ease, then anything is possible. It is a cliché to say "you are only limited by the scope of your own imagination" but the reality, in mediation, is that is true. Added to that, a mediator also has the ability to expand the agreement to include things not otherwise considered before the mediation started. This is a perfect illustration of one of the most important differences between a mediated agreement and any other type of process for dispute resolution. Which brings us to ask the question, does "*expanding the agreement*" mean? Let me explain, one of the

advantages of litigation is it focuses the parties on the single issue that divides them. That focus determines whether the courts will find one party right and the other wrong, who should win and who should lose, or how much one person should pay to the other. Some people would see that as an advantage but, as we have discussed, the advantages of mediation outweighs the consequences of litigation by far. Take, for example, a case where two friends are in dispute over the ownership of some property. There is no doubt that litigation will clarify the issue of ownership but at what price? The likelihood is that whatever relationship existed between the two parties prior to the litigation will flounder and the sad part is that nothing in litigation encourages them to believe that that will not be a by- product of the decision.

Once again, mediation has the potential to accommodate every aspect of the problem because it is not solely focused on determining who is right and who is wrong. We already know that right and wrong does not necessarily coincide with each party's individual needs and interests so the skillful mediator can very possibly construct an agreement, which accommodates every element of the dispute including the ongoing relationship between the parties. If you recall the example we gave earlier about the neighbors and the trees, you have a perfect example. Had that case gone to litigation, a lot of time and a lot of money would have been spent making a spurious points about yardages, heights, and entitlements to arrive at a decision, which would have institutionalized the dispute and made certain that their relationship would be lost and gone forever. As it was, mediation spotted the difficulty and resolved the problem. Litigation simply couldn't have done that. Because of this added scope that mediation has, it means that you can constantly look for ways to enhance agreements to the benefit of all of the parties. So how does a mediator expand an agreement?

Example of an expanded agreement:

Over the next few paragraphs, we will look at a sample, which is drawn from an actual case:

> Fred was a teacher and had been for thirty years. Sadly, he became seriously ill and took sick leave from school. His illness was such that one year later, he was still unfit for work and there was no optimistic prognosis. The school had no alternative after the expiration of one year but to terminate his contract and they did so by writing to him, telling him exactly that. When he received the letter, Fred was outraged and he immediately felt mistreated, disrespected and discriminated against. After all, hadn't he given thirty years of his life to this particular school district and all he got was a letter of termination? He felt affronted and believed that his employers were discriminating against him by reason of his disability and he filed a charge with the Equal Employment Opportunities Commission alleging discrimination contrary to the Americans with Disabilities Act.
>
> When the mediation came around, the hurt was obvious and the School District realized that they could have handled the matter a lot more sensitively. But, did they discriminate against him? The answer to that was clearly no. They had a duty to terminate his employment after one year's sick leave so, what else were they to do?

That was the situation, which the mediator faced. The issue was fairly simple. The plaintiff did not have a case that could possibly succeed and the respondents clearly did not discriminate. If the mediator had simply determined that and pointed it out to both parties, the plaintiff would have gone home more dissatisfied and the respondents would have had to prepare for an investigation by the EEOC. Mediation would have failed or, perhaps more appropriately, and the mediator would have failed in his or her duty as a mediator.

By closely examining the plaintiff's interests, the mediator discovered that the plaintiff felt as though he had been mistreated, disrespected, but most importantly, forgotten about. He saw nothing in his future that gave him any hope. The mediator asked him if he felt the day would come when he might be fit and able to teach again and he said that he certainly hoped so.

With that small piece of information in mind, the mediator caucused with the respondents and asked whether or not they would welcome an application from him at a future date if he were fit and well again. Their answer was very encouraging because they explained that they had many vacancies in their school district and they simply could not get enough teachers; therefore, they would welcome him with open arms. He was, after all, they said, a much-respected teacher.

Armed with that information, the mediator was able to return to the plaintiff and convey to him that he did, indeed, have a bright future with the respondents if he was able to get fit enough to return to work. His demeanor visibly improved. When the mediator added to that that his employers regarded him highly as a teacher, the change in his attitude was quite remarkable. The mediator then suggested to him that the obligation was upon him to satisfy the employers at a future date that he was fit enough to teach and he readily accepted that.

At this point, the mediator could have structured a simple agreement, which was that in return for withdrawing his complaint to the EEOC. The respondents were prepared to give him a first opportunity to apply for a job if he became sufficiently fit to teach again. In exchange, he would accept the responsibility of having to satisfy the respondents by medical evidence that he was in fact fit. Both parties would have gone home very happy but the mediator saw the opportunity to expand the agreement further.

The mediator returned to the respondents with this news and they were pleased, and the mediator said to them that he wanted to explore the possibility of other things that would assist the resolution of the mediation, he asked, *"Is there anything that you, as the respondents, can do for him to give him an even greater sense of hope?* It transpired that there was something additional they could do. By reason of his long service, they were able to give him a status that meant that he would get forty-eight hours advance warning of any jobs that were to become available. This meant that he would get an early opportunity to apply for jobs before they became public knowledge. It did not cost the respondents anything to make this offer, but it enabled the mediator to go to the plaintiff and explain that he was now going to be given a preferred status. Needless to say, he was delighted.

The mediator rounded off the agreement by ensuring that the plaintiff had a direct line of communication to the school principal and vice versa. We then brought the parties together and constructed the agreement. During the ten or fifteen minutes that it took to physically produce the agreement, the relationship between the plaintiff and the school representatives visibly transformed and they both left the mediation having achieved more than they could have hoped for when they came in. The interesting reality is that it did not cost either party a single cent.

Here are the terms of agreement that followed:

- *The Plaintiff acknowledges that he is required to maintain his current teaching certification for as long as he remains eligible to teach. That certification is vocational and covers grade 7 to grade 12.*
- *The Plaintiff acknowledges that the onus is upon him to satisfy his medical examiners of his fitness to return to work.*
- *The Respondents guarantee to the Plaintiff that they will interview him for any and every job he chooses to pursue if and when he satisfies the medical requirement mentioned at number 2 above.*
- *The Respondents will maintain the Plaintiff's status as a Member of the Bargaining Unit with the advantages such status implies for the purposes of the hiring process.*
- *The Respondents wish it to be recorded in this agreement that they are appreciative of the Plaintiff' years of service and look forward to him re applying to their District if and when his medical position allows.*
- *The Respondents agree that the plaintiff should have direct access to the school principal should he require any clarification of his position or need to obtain any additional information. The Plaintiff will welcome ongoing contact with the principal.*

Thus, the mediator achieved a successful conclusion at no additional cost to anybody by seeking, simply, to expand the agreement. However, mediators need to exercise caution, and recognize when to stop. Usually these types of negotiations will be carried out during caucus so that mediators will be able to see just how far one particular party can be persuaded to go. This is important. There is no magic formula to tell mediators when to stop. A good sense of judgment should be the yardstick upon which to determine when enough is enough.

There are few mediations where there isn't an opportunity to expand the agreement and most mediators find it both challenging and stimulating to find ways of enhancing resolutions to everybody's benefit. How do you find out whether or not one party has anything more to give? The way to do it is to ask. Questions such as, *"Can you think of anything else that you can add to this agreement that will help the plaintiff to find it more acceptable?"* will work perfectly well. Similarly, to a plaintiff you might say, "*I sense that the respondents are going to give you what you are asking for here; let us see if there is something that you can give them to show your good faith."*

By constantly probing, you will be pleasantly surprised at the good ideas that people will come up with because, psychologically they are in a reconciliatory as they near a successful conclusion to the mediation and are prepared to be magnanimous.

Reciprocal Agreements:

By now, you are aware that the nature of mediation requires open-mindedness and flexibility on the part of all of those involved. One of the dangers in formulating written agreements is that they can look almost punitive to one or other of the parties and very often seem to be almost checklists of what each party has to do or tasks they have to perform.

The problem with this is that, although all issues have been carefully dealt with in the mediation, when it comes to seeing them in black and white in an agreement one party can very often feel as though he or she has literally given much more than the other party has. Many agreement formats include separate sections to outline what each party has to do. These can be very divisive because it graphically illustrates the amount that one party gives relative to the other. A very useful way of trying to avoid the impact of one party feeling

that s/he has given more than the other is to create reciprocal agreements. That is, agreements in which both parties have some element of involvement in the same issue.

Apologies in Mediation:

What happens when a party's true interest demands an apology from the other party? Sometimes such an interest can become a point of contention by requiring an apology of the other in writing. It is very difficult, or impossible to require someone to utter those selfless words, *"I am sorry."* Equally, to require someone to sign his or her name to an apology on the agreement can be a problem. It can be embarrassing or a point of principle that some people cannot or will not confront.

Reframing an apology:

Experienced mediators often use a technique called 'reframing' to make an apology, or any word or phrase, more palatable. By persuading the *I-need-an-apology-in-writing* party to contribute to the occasion by agreeing to accept in advance, an apology in good faith and good will from the other party, and by reframing the '*I'm sorry'* with *regret,* the apologetic party does not feel as judged as he or she may have otherwise felt. Thus, such an agreement might read as follows:

- *James Smith (the Respondent) hereby wishes to express his sincere regret for any upset caused to the Plaintiff and wishes the Plaintiff to understand that such distress was unintentional and will not be repeated in the future.*
- *The Plaintiff wishes to gratefully acknowledge the Respondent's expression of regret and wishes the Respondent to know that he accepts that apology in good faith.*
- *The parties agree to work together and to use their best endeavors to avoid any ill will in their future relationship.*

The mediator's responsibility in composing the final agreement is, as illustrated above, carefully worded to gain the maximum benefit for all the parties without assigning blame, or embarrassment, and always structuring the document to avoid an apparent imbalance of power.

Contract writing:

Can Non-attorney Mediators write legally binding contracts? Whereas many mediated agreements – perhaps most, do not need to be legally binding and the subsequent agreement is merely a written expression of good will and intention, those that are legal contracts may fall under State Laws prohibiting non-attorney mediator practitioners to draft a legally binding agreement. In [4]Arizona, the above restriction applies to non-attorney mediators in writing binding agreements and is a law.
However, in Arizona, non-attorney mediators can apply to become a 'Licensed Document Preparer' and if they qualify under this category, they can safely construct a legally binding contract in the State of Arizona. Many State laws have similar restrictions making it crucial for new mediators to research and define the rule of law that applies to them. The one exception to this rule, in most States, is mediations that are conducted for and by municipal court programs.

The best advice is to err on the side of good conduct and explore the laws that apply in your State before beginning a practice of mediation.

[4] [ref. http://www.mediationagency.com/pdf/azrule31.pdf .]

Appendices

Suggested Reading:

“Getting to Yes”
Roger Fisher and William Ury ISBN: 0-14-01.5735 2
Popularly regarded as the "bible" for aspiring mediators. Easily read and available on audiocassette.

“The Mediators Handbook”
Jennifer E Beer with Eileen Stief ISBN: 0-86571-359-6
A very basic guide to mediation systems. Well worth having on your shelf.

The Mediation Dictionary, an on-line resource

An on-line resource for ADR terminology, http://www.mediationdictionary.com

Additional reference and source material:

Provided with the consent of Frank Hanna, D. Med., Author of

“Conflict Resolution and Mediation in the Real World” and Co-founder of The Mediation Agency.

Excerpts taken from **The Mediation Agency 40-hour Mediation Training Course**

For details on this course, or information on training programs in your area, contact Nancy Peterson: nancy@mediationagency.com