

**NEGOTIATION, MEDIATION
AND COMMUNICATION
SKILLS
FOR THE PROFESSIONAL**
Basic Civil Mediation Skills Training

*Certified by the Minnesota Supreme Court Office of Alternative Dispute
Resolution under Rule 114 of the Minnesota General Rules of Practice.*

Table of Contents

Manual Cover	1
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Table of Contents	3,4
Conflict Overview	
Understanding Conflict	5,6
Sources of Conflict	7
Positive Outcomes of Conflict	8
A Continuum of Conflict Resolution	9
Definition of Mediation from MNNC	10
Mediation Jargon	11
Mediation Skills and Process	
A Process of Mediation - Overview	12
What is the Role of the Mediator?	13
Role Play Guidelines	14
Intake	15
Pre-Mediation Concerns	16
Stage 1: Setting the Stage – The Opening Statement	17
Confidentiality – Laws and Benefits	18
Teamwork in Co-Mediation	19
Stage 2: Uninterrupted Time	20
Note-taking	21
Handling Interruptions	22
Listening	23
Emotions First	24
Active Listening for Mediators	25-26
Positive Communication	27-28
Stage 3: Focusing the Issues	29
Positions versus Interests	30
Reframing	31
Questioning	32
Stage 4: The Exchange	33
Questions to Guide Discussion	34
Stage 5: Generating Potential Solutions	35
Problem-Solving	36
The Caucus	37
Tips about Caucusing	38
More on Caucusing	39
Stage 6: Agreement Building and Writing	40

Table of Contents, continued

Additional Skills of the Mediator

Openness to Differences and Diversity	41
Mediator Tools for Differences and Diversity	42
Working Through Impasse	43
Other Process Concerns	44
Termination of Mediation	45

Appendix

Statute 595 and 604A Excerpts	46
Listenfirstproject.com – Conversation Tips	47-49

Introduction - Understanding Conflict

To gain an understanding of "conflict", it is valuable to find out what it means to those of us who have experienced it. Each of us has a different perspective or view of "conflict" based on our experiences and how it was handled in our family of origin.

Review the following exercise which might assist you in exploring conflict in your life:

Take a minute to think about the words that come to mind when you think of the word "conflict". Jot them down. Now look at the words you have written. Are your words generally positive or negative? Could some ideas be both negative or positive depending on the situation or your perspective? Note your choices and imagine that you are having a conflict with someone. Can you begin to see the other's point of view? This is the first step toward resolving conflict effectively.

For many of us, the words will be mostly negative. People tend to think of "conflict" as negative and prefer to avoid it in everyday life. If we have not learned very effective ways of handling conflict, we have no frame of reference for the good that might come of it. We see examples of conflict everywhere--in our workplaces, on the news, in our neighborhoods, within our relationships--and it is worthwhile to note that there are many ways we work with it.

Conflict is inevitable within every relationship, as no group of people will share identical values, wants, needs, and ideas. Therefore it is useful to handle conflict constructively to bring about positive results in these relationships. Often, however, conflict is not handled constructively, and this has led to the negative connotations that probably came to mind above.

When conflict arises, with the other person(s), and on whether it seems worth it to deal with the conflict at all. Certainly, past experience guides us at every step, and each conflict may teach us something new.

This manual will present information regarding the foundations of conflict and present one of many options for resolving it, *mediation*. Through the use of constructive processes such as mediation, conflict may be used to accomplish positive results instead of only negative ones, and may come to be seen in a different light as an:

Opportunity

It is important to regard resolving conflict as both a choice and an opportunity for change:

Conflict is normal and happens to everyone

We can't always choose when it will occur

We can choose how we will deal with conflict

We can choose to view conflict as an opportunity

Sources of Conflict

Conflicts can arise from a variety of sources. Very often, a combination of the following causes brings about a potential conflict, and it takes only one event to trigger the expression of that conflict. Determining the causes that underlie each conflict is valuable in deciding what process might best work to resolve it:

Human Needs

Basic human needs, such as recognition, identity, security, food, and shelter, often play into a conflict situation. These needs are typically not negotiable, and are therefore not appropriate for mediation. Some of these needs are tangible-- food and shelter, for example--while others are not.

Values and Beliefs

Each individual possesses a set of values and beliefs gained over time, and these are often held to be part of one's identity. A person's values may be handed down from generation to generation within the family, religion, or ethnic culture. Value conflicts do not lend themselves to negotiation, for most people are unwilling to compromise or change their values.

Limited Resources

A competition for resources is a frequent component and cause of conflict. Resources such as money, jobs, land, and time for visitation motivate people to stake their claims, often in tension with others' claims. Resource conflicts lend themselves to mediation quite logically provided the parties wish to maintain future relationship.

Behavior

Conflicts over specific behaviors, such as loud noise or harassment, are often easily resolved in mediation because the persons committing and responding to the behaviors are likely able to change their future patterns. The reason conflict arise from these behaviors may be traced to one of the three types as well.

Positive Outcomes of Conflict

Many of us can think of a long list of negative outcomes regarding conflict - these might include war, pain, loss of relationship, anger or job loss. For some of us, conflict was not handled well or avoided when we were growing up and we learned early on to avoid it as well. However, conflict will occur as part of our everyday lives, invited or not. In learning to handle conflict effectively, it is important that we begin to consider **conflict as an opportunity** and learn to value the positive outcomes that might occur:

Relieves tension

Sometimes we sense that something is wrong in a relationship or another person is angry or hurt. We might ask, "Is there something bothering you?" and hear from the other, "No" or have them tell us that "Nothing is wrong". Our sense continues until one day our friend or partner tells us (or yells at us) what they consider to be the problem. Only when we acknowledge a conflict can we begin to find a solution that those involved can accept as workable and begin to put the relationship back on track.

Provides access to new information

By addressing a conflict and working with the other parties involved, an individual can learn how behaviors or resources have impacted others. Very often, this is a mutual process whereby both parties share and learn. This process can be an impetus for making changes in the relationship.

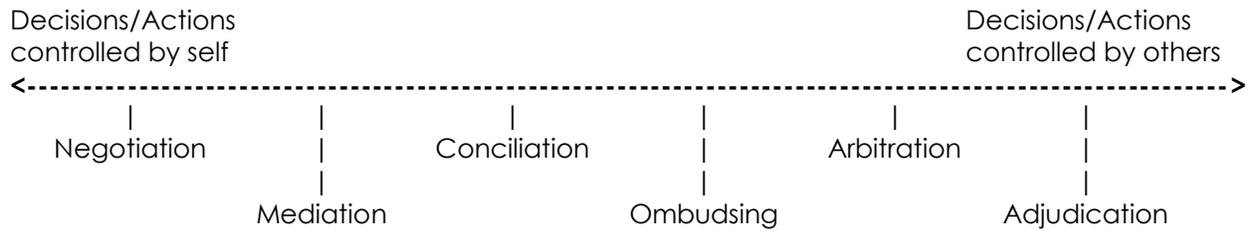
Creates a catalyst for change

An expressed conflict may demonstrate the need for change in a relationship or system. Through the resolution of a conflict, individuals can recognize the sources of the dispute and work to change relevant factors. They often arrive at new options to accomplish this.

Develops new options through problem-solving

If a group undertakes problem-solving as part of managing its conflicts, members are likely to understand past conflicts differently and create new options for resolving them. As a component of problem-solving, the group may engage in brainstorming, providing the opportunity for everyone to share ideas and resolve issues.

A Continuum of Conflict Resolution



Negotiation—the parties involved in a conflict discuss options for resolution without the help of a third party. The parties control the decision-making and meeting processes.

Mediation—the parties involved in a conflict voluntarily work with an impartial third party who controls the meeting process in an effort to reach a mutually agreeable solution. The parties control the decision-making.

Conciliation—the parties do not meet to resolve their dispute, and the conciliator acts as a go-between to help them reach a resolution. This is also known as shuttle diplomacy. The parties control the decision-making.

Ombudsing—a third-party fact-finder gathers information to decide the outcome of a dispute, often without meeting with the parties. This decision is usually an advisory decision, with the parties not bound to its terms.

Arbitration—the parties each meet with the arbitrator, and sometimes all together, to provide the arbitrator information concerning the dispute. The arbitrator renders a decision by which both parties are expected to abide. Often, the parties agree to uphold the arbitrator's decision prior to the process.

Adjudication—a third party (judge or jury) listens to prepared arguments from all parties and hands down a judgement. This judgment has the force of law behind it, and the formal process is overseen by the third party.

Definition of Mediation from MNNC

The Mediation Network of North Carolina has developed the following definition of mediation, last updated in February 1998:

Mediation

Mediation is a private, usually voluntary, discussion and consensual decision-making process in which one or more impartial persons – the mediator(s) – assist people, organizations, and communities in conflict to work toward a variety of goals. Parties in the mediation process are encouraged to:

- improve communication, understanding and empathy;
- improve relationships;
- use mediation to minimize, avoid or enhance involvement in the legal/judicial system;
- work toward mutual understanding to resolve a problem or dispute;
- reach their own decisions;
- resolve underlying conflicts;
- prevent problems from recurring.

Role of the Mediator(s)

The primary responsibility for any resolution of a dispute rests with the parties. Mediators never give opinions on the issues in dispute. Mediators work to:

- facilitate communication among the parties;
- help them explore mutual understanding;
- assist in defining and clarifying issues;
- maximize the exploration of alternatives;
- assist in exploring reconciliation and settlement.

Mediation Jargon

Intake

Confidentiality

Initiating Party

Responding Party

Caucus

Voluntary

ADR

Primary parties

Secondary parties

Neutral

Impartial

Equidistant

Bias

Mediation

Collaboration

Self-Determination

A Process of Mediation--Overview

I. Setting the Stage

Mediator's Role: prepare environment, do introductions, explain ground rules and process

Participant's Role: arrive, get settled, agree to ground rules, ask questions to clarify process

II. Uninterrupted Time

Mediator's Role: listen to each party; manage process

Participant's Role: describe conflict in own terms; speak of both content and emotions in conflict

III. Focusing the Issues

Mediator's Role: summarize and clarify main issues; ask for verification that these are the issues to be discussed

Participant's Role: agree or modify summary of issues; agree on list of issues to be discussed

IV. The Exchange

Mediator's Role: encourage dialogue on issues, encouraging parties to speak to *each other*; listen for points of agreement and non-mediatable issues

Participant's Role: speak to each other about selected issue; provide questions and information to help dialogue

V. Generating Potential Solutions

Mediator's Role: summarize mediatable issues; facilitate brainstorming and problem-solving; perhaps caucus to support movement toward agreement

Participant's Role: accept responsibility for conflict; generate potential solutions; provide interests, not just positions

VI. Agreement Building and Writing

Mediator's Role: specify points of agreement; provide a "reality check" when necessary; write down terms of agreement in plain, specific language; wrap-up

Participant's Role: negotiate in good faith; work toward a mutually agreeable solution; sign agreement

FOCUS ON
THE PAST



FOCUS ON
PRESENT



FOCUS ON
FUTURE



What is the Role of the Mediator?

- ◆ The primary responsibility for any resolution rests with the parties.
- ◆ The mediator is neutral and ensures that the session is conducted in a safe and respectful manner and that everyone has a chance to be heard.

A Mediator Is . . .

- ◆ a good listener
- ◆ a fair person who does not take sides
- ◆ a person who uses neutral words and phrases
- ◆ a fact finder
- ◆ a person who helps parties to hear each other's point of view
- ◆ trustworthy
- ◆ caring and supportive
- ◆ a person who provides the safety for people to talk

A Mediator Is Not . . .

- ◆ a judge who decides who is right and wrong
- ◆ a person who gives orders or advice
- ◆ a person who talks about others
- ◆ an authority about what is best for others

Adapted from the New Mexico Center for Dispute Resolution, 1995.

Role Play Guidelines

Why Role Play?

We will be using role playing in this training because it provides you an opportunity to experience the ideas presented and integrate them as skills/behaviors. In addition, you will likely gain insight into party behavior in mediation.

Guidelines for Participants

- ◆ Participant role players should strive to be balanced in the approach to role playing – not too rigid, not too soft.
- ◆ Most role play instructions will suggest behaviors and tendencies, and improvisation is okay when the instructions are vague or brief.
- ◆ Try to incorporate the typical give-and-take mentality, and be as realistic as possible.
- ◆ That does not mean you should act like a hellion, because you should know that each trainee will get to play the roles of mediator and party.
- ◆ And as no one has to tell you, what comes around, goes around.

Processing the Role Play

At the end of each role play, we will provide feedback in both small and large groups. This feedback will follow this basic guidelines:

1. The parties will process their feelings as they experienced them in the roles.
2. The mediators will process their thoughts and feelings from the role play.
3. The group may ask specific questions about strategies, feelings, etc. These questions are not judgments, but consultations.
4. The group may then discuss the role play in terms of other possibilities.

Intake

When the mediator or case manager conducts the first contact or meeting with a party, they engage in what is broadly considered "Intake." For some, intake represents the specific time spent getting the names, addresses, and facts related to the case. For others, intake means everything that happens on the file prior to the mediation session.

Intake has several purposes:

- ◆ It enables the case manager or mediator to determine if mediation is appropriate for the particular dispute at hand. Many times calls and referrals are for cases that can be resolved better by another agency or process.
- ◆ Provides parties with information about the process.
- ◆ Provide the following factual information which is necessary for opening the case:

Name

Contact Information Age

Gender

Attorney contact information, if party has legal counsel

Available times for mediation

Employer/Income level

Referral Source

Issues to be resolved

Other avenues tried

Some points which are usually explained to the parties are:

- ◆ Mediators help people discuss the issues related to the conflict. The parties are responsible for reaching a satisfactory agreement.
- ◆ Mediation sessions typically last from three to four (3-4) hours, although multiple sessions are possible if needed.
- ◆ Mediation sessions are held in private neutral settings, at the convenience of the parties involved.
- ◆ Mediation is a voluntary process and both parties must be willing to meet in order to schedule a session

Pre-Mediation Concerns

Prior to the mediation process, it is necessary and valuable for the mediators to straighten out some information and logistics, as well as the seating arrangements in the room. Some programs prefer mediators to arrive a full hour before the scheduled starting time, while other centers work with a fifteen minute preparation period. Mediators should consider the following factors:

About the case:

- ◆ Who are the parties?--how do you spell and pronounce their names?
- ◆ What are the presenting problems (i.e., the ones identified during intake)?
- ◆ How did the case come to the mediator/mediation program?
- ◆ What do I know about the values, beliefs, and communication styles of the parties?

About the process:

- ◆ Clarify roles in co-mediation
- ◆ Review stages of mediation

About the setting:

- ◆ How should the room be arranged?
- ◆ Do you know where the bathrooms are?
- ◆ Should there be water and/or kleenex available?
- ◆ Where can parties wait during a caucus?

About yourself:

- ◆ Might there be issues raised with which you or your co-mediator are not comfortable?
- ◆ What are your biases regarding this type of matter or these parties? How will you work with those biases in the session?

Stage 1: Setting the Stage--The Opening Statement

INTRODUCTION/WELCOME

Mediator/Co-mediators
Parties (allow them to introduce themselves)
Observer (if present)

ROLE OF THE MEDIATORS

Short bio sketch
Unknown to either party
Unbiased as to the issues -- hear to understand each perspective
Not a judge or jury -- will not decide right or wrong
Not here in the role of a counselor
Not here to give legal advice or assistance
Here to help you work out a solution

CONFIDENTIALITY

Any communication with the mediators is considered confidential under Rule 114/statute, except regarding disclosures of child abuse or abuse of vulnerable adults
Cannot be subpoenaed/no information to Court later
Applies to observer as well

NOTE TAKING

Each can take notes (provide paper and pens)
Mediators' notes will be destroyed at the end of the session

GROUND RULES

Informal, so the rules of court don't apply, rules of common courtesy do
Speak one at a time, without interrupting the speaker
Treat all participants respectfully
Respect for the process
Time
We have planned for about three hours today, can take a break
If we need more than three hours, we can hold a subsequent session

PROCESS

Each will have an opportunity to explain what has brought them here We will explore options for resolution that satisfy all parties
***CAUCUS: The mediators may speak with each party privately Mediators may speak with each other privately
Discussions in caucus are confidential unless otherwise agreed to

WRITTEN AGREEMENT

Usually signed by all parties; not mediators
Provides later record of parties agreements

ANY QUESTIONS?

Confidentiality--Laws and Benefits

Confidentiality is essential in mediation because it allows people to be comfortable working on tough issues. Mediation creates an environment where you can honestly and openly address the issues to reach a mutually agreeable resolution.

Only those people present at the mediation know the content of the session, and the mediators are bound by law not to share any information relating to the content of the session outside of the mediation.

Minnesota Statute 494*, which provides the guidelines for Community Dispute Resolution Programs, provides for the confidentiality of communications:

494.02 Confidentiality of communications.

Any communication relating to the subject matter of the dispute by any participant during dispute resolution shall not be used as evidence against a participant in a judicial or administrative proceeding. This shall not preclude the use of evidence obtained by other independent investigation.

[In mediation settings outside of the state-certified programs, enforcement of the confidentiality restriction is essentially voluntary. In all cases, the mediation program cannot ensure that parties maintain confidentiality, only that the mediators and staff uphold the confidentiality.]

Mediators are “not competent to testify” based on statutory confidentiality for those presiding over dispute resolution processes:

595.02 Testimony of witnesses.

Subdivision 1. Competency of witnesses. Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as provided in this subdivision:

Subd. 1a. Alternative dispute resolution privilege. No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could:

- (1) constitute a crime;
- (2) give rise to disqualification proceedings under the rules of professional conduct for attorneys; or
- (3) constitute professional misconduct.

Teamwork in Co-Mediation

Related to pre-mediation concerns, it's useful to do some planning with your co-mediator, especially if you have not mediated together before. When this is the case, it is recommended that you allow an extra five or ten minutes on top of your usual preparation time. Some matters to cover include:

1. **Check in** with each other to see how she or he is doing today.
2. Will you have **distinct roles** in the mediation? For example, *lead and assistant* or *process and content* or *listener and recorder*? Many teams prefer to designate which mediator will listen to which party in Uninterrupted Time. This is done to encourage or develop communication in various directions, e.g. across the table, to one another.
3. Determine how you will **divide up specific tasks**:
 - ◆ The opening statement
 - ◆ Which party will begin? How will that be introduced?
 - ◆ Who will write up the agreement?
4. **How will you signal** to one another to call for caucus? To pass the lead role to one another? To indicate that your co-mediator is nearing dangerous waters?
5. Speak about your **mediation style**--what you do well, not so well, prefer, dislike.
6. **Potential difficulties** in the upcoming session.
7. Make sure that both mediators have a **speaking role** early in the session to build rapport with parties.
8. Related to the preceding point, discuss **balance**—neither mediator should dominate while the other is a wall flower.

Stage 2: Uninterrupted Time

This stage of mediation provides parties an opportunity to relate their stories - in their own language, with their own feelings.

It is not an opportunity for each to interrupt and contradict one another, but instead for each to focus – without judgment – and understand how each person has experienced the conflict.

It may be the first time in quite a while (or the first time, period) that they have spoken directly to each other about this topic, and often provides new information concerning how the other has perceived actions and events in the relationship.

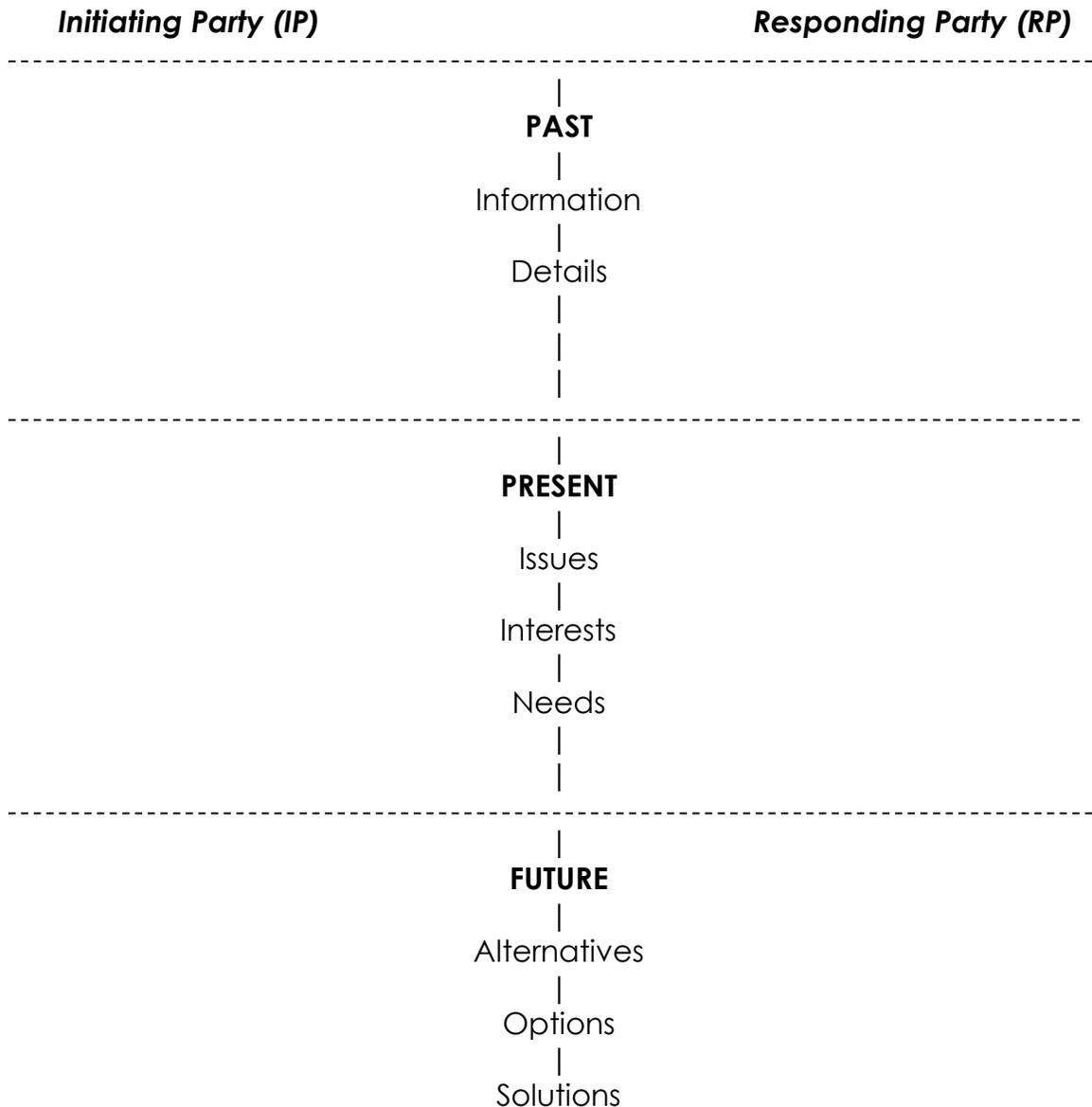
This stage is also the first time the mediators hear of the issues in dispute, and provides the mediators a first chance to build trust and rapport with the parties.

Points for mediators:

1. **Be respectful about not interrupting**--if it becomes necessary, remind parties about their agreement in the ground rules to not interrupt. You might also wish to acknowledge that you understand their wish to respond, and that they will have a chance to speak soon.
2. **Encourage speakers to talk about their thoughts and feelings about the dispute**--remember to use your reflective listening skills here.
3. **Ask open-ended questions; do not interrogate**--recall that the purpose of this stage is to allow each party to relate her/his perspective on the conflict. Therefore, it is important that the mediators encourage this by opening the discussion, not narrowing it.
4. **Limit speakers when necessary**--when a party explains her/his side in endless detail, you might need to refocus the discussion by asking them to summarize their points. Often, people will repeat the same points if they believe they are not being heard--here again, reflective listening will serve the mediator well. In larger groups, there may need to be a time cap on each person's uninterrupted time.

Note-taking

When parties speak during uninterrupted time, it is useful for the mediators to take notes to remember issues, key points, details, and possible solutions. It is also helpful to consider where these matters fall within the mediation overview--are they regarding the past, present, or future?



Handling Interruptions

Mediation is frequently employed to resolve issues when parties have not been able to communicate directly or effectively, and this is the source of many conflicts. Additionally, because there is often high emotional energy associated with conflict, the parties might be inclined to share that during the session through interruptions.

One key to handling interruptions is to acknowledge for parties the temptation and need to interrupt and remind parties that you will allow each a time to explain from their own perspective.

When one party interrupts another, the mediator needs to respond appropriately--which is sometimes not at all. As there are a variety of reasons for interrupting as a party, there are a number of responses geared toward working with each interruption. Below are a number of illustrations:

1. **Remind the interrupting party of the ground rules.** If necessary, reaffirm both parties' commitment to respect the process. One response might be: "Jim, you'll recall that we agreed to not interrupt anyone while s/he is speaking. Please be mindful of that, and remember that you'll have a chance to speak to this issue soon."
2. **Listen and reflect the emotion of the interruption.** Very often the high emotions in the room will not permit a party to hear what is said, especially if s/he believes it to be a lie. One response to the interrupting person might be: "Susan, I realize you're [angry, upset, frustrated, etc.]. Please take a minute to think about what you'd like to say--don't worry, we'll all have a chance to speak."
3. **Ask the interrupted party to understand the interruption.** There are times when the interruption is justified, or at least understandable, in light of what the speaker has said. The mediators should try to help the speaker appreciate the impact of his/her words and tone so that the speaker can choose another approach. For example, "Joan, can you appreciate that Frank is having a hard time with the way you've phrased this? How else might you state the problem?" Or, "Joan, we can see that when you make this type of statement Frank reacts very aggressively. Can you restate the problem so that we all can hear and understand your concerns?"

Listening

The **purposes** of reflective listening include:

- ◆ to understand what the speaker is saying
- ◆ to help the speaker clarify her/his thoughts and feelings
- ◆ to let the speaker know you have *heard and understood*
- ◆ to help others present to hear and understand the speaker

When parties talk, the mediator **models good listening** to...

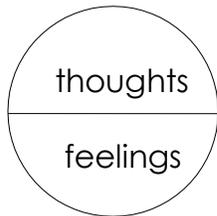
- ◆ convey respect, interest, and empathy
- ◆ model respectful listening
- ◆ learn the parties' perspectives
- ◆ discover underlying causes of conflict
- ◆ discover parties' interests

“Listening like a mediator takes a great deal of energy and concentration. At the end of a mediation simulation, you may well be exhausted. You may also feel elated because active, empathic listening works so well to help the parties let go of their anger and defensiveness and to join together to design creative and collaborative agreements.”

--Prepared by the Massachusetts District Court
Mediation Project, Albie Davis, 1985.

Emotions First

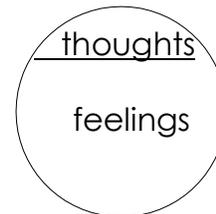
A basic principle underlying interpersonal communication is that emotions must be dealt with before other matters. When a person is experiencing strong feelings, her/his priority is not to problem-solve but rather to be heard.



When a person is in a resourceful state, there is a balance between feelings and thoughts.

When a person's feelings become prominent, her/his priority becomes expressing this emotion.

*fear, excitement, anticipation,
anger, joy, annoyance, etc.*



Emotions are part of communication. When they are not expressed or misunderstood, they can lead to *miscommunication*. When they are expressed and understood, they can lead to **effective communication**.

The key skill for the mediator during times when one or both of the parties is full of emotional energy is to use reflective listening and paraphrasing skills until the party's energy level is more balanced. When the party feels listened to and understood, she/he is more likely to be in a resourceful place to begin problem solving.

ACTIVE LISTENING FOR MEDIATORS

I. PAYING ATTENTION TO THE SPEAKER ("ATTENDING")

1. Look at the speaker. Keep the other persons in view so you can observe their reactions, but generally maintain eye contact with the speaker.
2. Show that you're interested in what he/she is saying. Encourage by unobtrusive use of "yes," "I see," "um hum." Use positive body cues at appropriate points -- nods, smiles, note-taking, furrowed brow, etc.
3. Most of the time, lean slightly toward the speaker. Keep an open, relaxed posture. Keep your physical movement to a minimum.
4. Engage the speaker by looking for opportunities to subtly mirror his/her cues. Do not mimic, but do look for ways to be CONGRUENT. For example, if he/she speaks slowly, match his/her cadence.
5. Draw the speaker out. Say something like, "I'd like to hear a little more about [subject]."
6. Try to listen for what is NOT being said -- what's missing that you might expect to hear in the circumstances?
7. Observe HOW things are said -- the emotions and attitudes behind the words may be more important than what is actually said. Look beyond the mere words the speaker uses -- remember that much information is displayed in voice intonation and body language.
8. Say little yourself! You can't listen while you're talking.
9. Show that you're listening and interested by asking QUESTIONS and FEEDING BACK, REFRAMING and SUMMARIZING. However, particularly in early stages, be careful not to interrupt the speaker's flow.

II. ASKING QUESTIONS

1. Questions serve three basic purposes:
 - ◆ To show you are listening (especially in the early, trust-building stage);
 - ◆ To gather and organize information (particularly in the problem-solving stage); and
 - ◆ To express in question form what otherwise might be an academic statement -- for example, to test reality (most often in problem-solving and closure stages).
2. Generally, questions should be open-ended, not closed-ended. Closed-ended questions can be answered "yes" or "no," or with a specific answer like "two" or "January." They may encourage the answerer to stop talking. Open-ended questions cannot be answered so simply, and encourage the speaker to talk and explain in complete sentences. Open-ended questions are good because they invite a person to open up and tell his/her story. Examples of open-ended questions: "Tell me more about [subject]," "what happened next," "how did you feel when that happened," "what would you like to see as an outcome." Use close-ended questions exceptionally -- only to increase control over the flow of information or to confirm certain important facts.

III. FEEDING BACK, REFRAMING, AND SUMMARIZING

1. When the speaker pauses, there's an opportunity to confirm that you've been listening and that you understand by **FEEDING BACK** what you've heard/observed to the speaker. It also is a way to check that your perception of what you think you heard/observed is accurate, as well as a way to validate for the speaker what he/she is feeling.
2. To feedback, repeat or paraphrase what the speaker has said (or displayed as unspoken feelings). Examples: "so, when that incident happened, you felt like . . .", "it sounds like an important issue for you is how to deal with . . .", "what I think I'm hearing is that you really need to . . .", "I can see that you have strong feelings about that." Pause expectantly to let the speaker react. Common signs that you've done it right: the speaker will nod vigorously and/or respond, "yes, and "
3. Sometimes, repeating the last couple of words of a speaker will encourage him/her to go on, but you generally do not want to repeat verbatim what the speaker said -- you may sound like a mimic! Paraphrase instead. However, DO be conscious of particular words that seem important to the speaker and use them, if appropriate, in your paraphrasing.
4. **REFRAMING** is a special way of feeding back, and is one of the Mediator's most important tools. It is restating what a party has said to capture the essence, remove negative overtones, and move the process forward. Reframing also is a way to translate a positional statement into a statement of interests or needs. Example: a separated spouse says angrily, "He's so irresponsible that I never can depend on him to pick our child up on schedule." Simple feedback might be, "so it really bothers you if he isn't on time to pick up Johnny" -- while a reframed response might be, "so a regular schedule is important for you and Johnny." Either response may be appropriate, and the difference is subtle; the first might be better at an early point in trust-building, while the second might be better later, during problem-solving.
5. Summaries are part of most feedback, but sometimes you want to focus particularly on a summary. At major transitions, such as after one Party has told his/her story and before you turn to the other Party, do an overall summary of major points, and ask for confirmation.
6. Generally use neutral language. Example: one Party says the other was "hysterical." In feeding back, you might say the Party was "crying." A "liar" becomes a person who "disagreed" or "sees differently." Be careful not to get so pretentious that the Party feels you've misrepresented their point of view.

IV. MANAGING THE FLOW OF COMMUNICATION

1. Stick to the speaker's subject. You may want to go to something else, but give the speaker time to finish.
2. Don't be too quick to try to move on when the speaker repeats things. Remember, repetition may indicate: (a) the subject is very important to the speaker, (b) the speaker needs to feel that you've really heard him/her on the subject.
3. If repetition does go on too long you can try saying something like, "Well, it's clear to me that [subject] is very important to you. Is there anything else that's also important for us to understand?"
4. Be comfortable with silence. Usually, one of the Parties will speak up soon enough. Use silent cues -- pauses, turning to another Party expectantly.

POSITIVE COMMUNICATION

Positive, direct communication helps solve problems and builds honest, respectful relationships between people. The following suggestions may help in promoting better communication when talking to others about differences or trying to resolve conflict:

- 1. TALK DIRECTLY.** Assuming that there is no threat of violence, talk directly to the person with whom you have the problem. Direct conversation is much more effective than sending a letter, banging on the wall, throwing a rock, or complaining to everyone else.
- 2. CHOOSE A GOOD TIME.** Plan a time when the other party is available and there is enough time to talk without interruption. Do not try to talk about a conflict just as the other is leaving for work, after you have had a terrible day or in front of other people. Try to talk in a quiet place where both are comfortable and you can be undisturbed for as long as the discussion takes.
- 3. PLAN AHEAD.** Think ahead about what you want to say and what you would like to have happen. State clearly what the problem is and how it affects you. Have an open mind about the outcome, but be clear about your thoughts and feelings.
- 4. DON'T BLAME OR CALL NAMES.** Try not to put blame for the problem on the other person. Keep the discussion respectful and work toward each taking responsibility for their part in the problem.
- 5. GIVE INFORMATION.** Talk from your viewpoint rather than interpreting the other's behavior. "You are making noise on purpose to get back at me!" is not as effective as "When you make noise late at night, I can't sleep".
- 6. LISTEN.** Relax and do your best to listen to the other. Try to focus on what is being said rather than on what you will say next. Both people should have a chance to be heard. Talk one at a time and give the other a chance to tell his/her story completely. Listen to what the other person *thinks* and *feels* about the situation.
- 7. LET THE OTHER KNOW YOU ARE LISTENING.** Although you may not agree with what is being said, it is important to show respect for others' opinions, ideas and feelings. If you do not understand what they are saying, ask questions. Repeat the main points back to them to make sure you are hearing them correctly.
- 8. TALK IT ALL THROUGH.** Once you begin to discuss the issues, try to get all the information and feelings out in the open. Include even the most "difficult" issues and those that might seem "insignificant." Agreements between people work best when all issues are discussed openly so that any solution resolves the matter completely.

9. **FIX THE PROBLEM, NOT THE BLAME.** After each person has had a chance to talk about their concerns, work on a solution that best meets everyone's needs. Two or more people cooperating on a solution is more effective than one person asking the other to change. Be as specific as possible. "I will turn my music off at midnight" is better than a vague "I won't play loud music anymore."
10. **FOLLOW THROUGH.** Talk about what it means to keep the agreement and what will happen if one person does not follow through with the decision. Agree to check with each other about whether the agreement is working to resolve the matter. *Change does not occur overnight.* Show the other person that you are willing to keep your end of the bargain and give them a chance to do the same. Agree on a realistic timeframe and talk in the future to see if any changes to the agreement are necessary.

Adapted from "How to Resolve Conflicts" from Community Boards of San Francisco, CA. by Janeen Massaros, Southern Metropolitan Mediation Services

Stage 3: Focusing the Issues

Focusing the issues serves a number of purposes in the mediation process:

- It encourages the parties to bring forth any issues not yet identified.
- It provides a summary of what work has been done and what matters will be addressed in the remainder of the process.
- It demonstrates that the mediators have heard and understood the parties' concerns.
- It provides a transition from the past focus of Uninterrupted Time to the present and future focus of the Exchange and Problem Solving.

Points for mediators:

1. **List the issues you have heard, visibly if possible**--Share with the parties the list you have constructed based on their stories during Uninterrupted Time. If available, make use of newsprint or a chalkboard. This sets a clear road map for the rest of the session.
2. **Keep the list short and manageable**--Encapsulate issues where possible, stacking one onto another or nesting them within one another. Too long a list leads to a sense of hopelessness.
3. **State the issues generally**--Try to recast issues in a workable, interest-level way. This avoids framing matters in the favor of one side or the other.
4. **Focus on negotiable issues only**--Those that are not mediatable should be left off, and the reason for doing so explained when necessary.
5. **Ask if the list is acceptable and complete**--Checking in with the parties also ensures/reinforces commitment to work on the issues identified.

Positions versus Interests

When the mediators reflect the issues they have heard, and while they are gathering them in Uninterrupted Time, it is useful to speak in terms of interests. Since a position is essentially a preferred solution, interests are more valuable in mediation, as they may lead to several possible solutions.

POSITIONS are what a person says that s/he WANTS.

**INTERESTS underlie a position and are WHY
s/he wants the position.**

As an exercise, think of how a mediator might elicit interests when a party says the following statements. Afterward, try to picture some of the possible interests behind the positions.

Example: "He has to turn the volume down on that terrible rock music!" *Mediator:* "Can you tell us what turning the music down would do for you?"
Interests: Peace and quiet, able to sleep, need to concentrate ...

"I want \$50 for the book he borrowed by the end of the week."

"She should address me as 'Mr. Davis' when we meet."

"I think it's fair that Mary moves to a different floor."

"My daughter won't come visit me if she doesn't feel safe."

"The rule says she needs to dress right if she wants to eat with the rest of us."

Reframing

It is often useful in mediation to *reframe* what has been said. Reframing is valuable for several reasons:

- It responds to a speaker in a way that both **validates** the speaker's statement AND provides a **positive basis** to address the issues.
- Reframing is valuable to **move parties** from generalities, attacks, contradictions, and blaming in mediation.
- Reframing **provides an opportunity** for parties to see conflict situations in a very different light, and involves a great deal of creativity and insight.
- Reframing might be thought of as **putting a "spin"** on what's been said to bring about a positive outcome.

Try to **reframe** the following statements to bring about a positive tone.

"I'd like to solve this, but it seems like everyone is against me - it's hopeless."

"She's the most uncooperative person I've ever met."

"I do the best I can to follow the rules, but I have the right to live how I want!"

"If he would just return what he borrows from me, we wouldn't have this problem."

Questioning

An important skill of the mediator is questioning. With the ability to ask appropriate questions in an appropriate manner, a mediator may re-route discussion, de-escalate conflict, or create a viable solution.

We often think of questions as being one of two primary types: open-ended and closed-ended. A closed-ended question is one that expects a "yes" or "no" response, while an open-ended question leads to a broader explanation or discussion. Open-ended questions serve to:

- allow the parties to speak from their experience
- leave room for emotional responses
- help others to hear the speaker's point of view and context
- generate a range of options, not just one or two
- provide a reality check when discussing options

Additionally, there are different types of open-ended questions, and some statements that function as questions. Some questions are intended to:

- * **probe** for more information: "What happened then?" "Tell us more about that." "How did that affect you?"
- * **clarify** a point or detail: "So was it the broken fence or the stolen bike that first angered you?" "Give us an example of how that might happen"
- * **link** various points of discussion: "Please help me understand how Joe's dog and your broken window are connected"
- * **test viability**: "Dan, how will it affect your monthly budget if you pay \$400 a week to Terry?"
- * **check reality**: "I appreciate that you'd like to leave, Cathy, but what will things look like the next time this problem comes up?"

Stage 4: The Exchange

The Exchange is designed to promote dialogue about the identified issues and interests from Stage 3. It allows parties to ask questions of each other for greater understanding, to fill in parts of their perspectives they may have left out in Uninterrupted Time, and to begin negotiating and problem-solving.

Points for mediators:

1. **Ask someone to begin**—Once the mediators have selected which issue to start with (usually an easy but meaningful one), they need to open the Exchange by asking one of the parties to begin by speaking directly to the other person about an issue.
2. **Use reflective listening skills**—Listening will help to clarify the speaker's points, to ensure the mediators' understanding, and to promote understanding by other participants.
3. **Moderate the discussion**—Refer to the ground rules when necessary, especially when the parties make derogatory remarks or do not allow the other finish speaking.
4. **Validate feelings and encourage progress**—Many emotions will be present as the parties work through difficult issues: sadness, excitement, fear, grief, embarrassment, joy, discomfort. Mediators should validate these, and guide the parties toward agreements where possible. Recall that mediation is not therapy, however.
5. **Identify points of agreement**—When parties seem to be saying the same thing, the mediators should highlight this as a point of possible agreement, and therefore a potential solution.

Questions to Guide Discussion

To invite parties to speak about the issue at hand, mediators will often need to prompt the parties with appropriate open-ended questions.

“John, please tell us more about ... ?”

“Susan, what more do you want to say on that issue?”

“Bill, can you tell Phil a little more about your concerns about the use of the driveway?”

“Michelle has spoken about the financial concerns here; what would you like to add about that?”

“What are some ways that might be accomplished?”

“How did you come to that conclusion?”

“Say more about how that point addresses this issue.”

Perhaps the most savvy questioning I've heard to bring someone back on track comes from family mediator John Haynes:

“I'm sorry, I think I asked you the wrong question. What I meant to ask was ...”

Stage 5: Generating Potential Solutions

It is this stage, above all others, that demands creativity and flexibility of the mediators and parties. Much hard work has been done to reach this point, and now is the time for the specific agreements to be constructed based on concerns and ideas raised earlier in the mediation. The mediators may have to facilitate more directly in this stage than at other times, especially when the parties get stuck.

Generally, a mediator should **not** suggest possible solutions, use leading questions, or give advice during the mediation process, although Stage 5 provides ample opportunity to do all of these. Below are some tips and skills that might help the parties to gain momentum toward a resolution.

1. Identifying the specific issue, ask if one of the parties has any ideas for solving it.
2. Urge parties to talk through the consequences and ramifications of a proposed solution.
3. Ask each party about their interests and where these might dovetail with the other interests that have been mentioned.
4. Refocus the discussion by stating the problem clearly. For example, "The hours John keeps" could mean "The time he comes home," "The time he goes to bed," or "The time he returns the car keys to his parents."
5. If parties are reluctant to work on an agreement, the mediators might want to remind the parties why they came to mediation in the first place: "What will matters look like if we leave here without a solution?"
6. When parties are stuck, the mediators should be patient. If the parties cannot move forward, the mediator may wish to ask questions to elicit ideas or even (seldom) share examples of solutions-- "Some people have found that trading off days helps to alleviate confusion around scheduling, and others prefer to have a calendar posted on a wall in the office as a reminder." *Offering two or three options is usually most helpful*, but only when the mediator absolutely needs to offer anything at all.
7. Meet separately (caucus) with each party to discuss options and ideas.

Problem-Solving

Problem-solving is designed to let parties use their *interests* to generate solutions. By doing so, each party has an opportunity to develop possible solutions, to evaluate the options they've presented, and to work through the steps to implement the solution.

Mediators should employ this basic process in Stage 5, when the parties are unable to move forward with their own discussion. It is useful to have a chalkboard to record ideas generated in brainstorming, as well as the interests to be met.

Problem Solving

1. **Define problem** or issue in terms of interests. This might be done in a "How to..." statement.
2. **Generate options** that meet the problem definition/"How to..." statement. This is known as *Brainstorming*, and does not include evaluation. Mediators should encourage a variety of solutions, regardless of their practicality.
3. **Evaluate options** brought forth in the preceding brainstorm.
4. **Decide on an appropriate option**, or combination of options, again making sure it meets the interests outlined in the "How to..." statement.
5. **Develop a plan for implementation**, with specific names and dates for actions to be completed.
6. When necessary, design **a process for evaluating** the results.

Process adapted from Katz and Lawyer, *Communication and Conflict Resolution Skills*, 1987.

The Caucus

There are times when the mediators might wish to meet separately with each party or with each other; for example, to discuss a matter which may be sensitive or might best be addressed when parties are not together. If mediators need to check in with each other, it is usually to discuss process (strategy, direction of discussion, styles) or content (allegations of abuse, potential conflicts of interest). The term used to identify these meetings is caucus.

To maintain good practice as mediators and encourage a productive flow of the process, mediators should consider the following when using a caucus:

- ◆ The mediators should meet with each disputing party individually. Meeting with one and not the other will surely compromise the idea of impartiality or equidistance. Additionally, they should meet with each party for roughly the same length of time.
- ◆ The mediators should be together throughout the caucus. If one mediator talks with Joe while the other talks with Dave, there will result gaps in understanding and expectations of favoritism when all parties reconvene.
- ◆ Everything related in the caucus meetings is confidential to those meetings. If a mediator wishes to introduce a point from the caucus, s/he should ask during the caucus if that can be shared later.

The caucus can be used for a variety of purposes:

- ◆ To separate the parties if they are too tense, hostile, or intimidated.
- ◆ To allow the private opportunity to work on sensitive issues, motives, or alternatives. Also, to work through strong emotions when appropriate.
- ◆ To change the speed or tone of the discussion.
- ◆ To provide a reality check (What will this option look like and how will it work?).
- ◆ To clarify misperceptions and uncover resistance to movement.
- ◆ To remind parties of BATNA and WATNA.

Tips about Caucusing

Mediators should follow these guidelines when employing a caucus:

- 1) Have a specific purpose in mind when calling a caucus.
- 2) Make clear to both parties that all things discussed in the caucus will be kept confidential by the mediators unless the mediators are given explicit permission to share information within the larger group.
- 3) *The mediators should confer before meeting with either party and between caucus meetings to coordinate questions and goals of the caucus.*
- 4) Do not criticize or joke about one party to the other.
- 5) When a party takes a stand that makes agreement impossible, demonstrate the ramifications of such a choice.
- 6) If a party would like the mediators to take a proposal to the other side, the mediators should offer it as a "suggestion" in the joint session. If the parties cannot negotiate face-to-face, the mediator can be a go-between for settling the dispute in caucus.
- 7) Before you split up the group to meet with a party, ask the other party to work on a specific task. Tasks might include an examination of her/his interests, development of some ideas for solution, or reflection on new information gained during the mediation.
- 8) If a multi-person party with whom you are meeting wishes to caucus amongst themselves, encourage it to do so and set a time (five minutes, perhaps) to rejoin them.
- 9) At the end of caucusing with a party, remind her/him of the mediator's duty to keep confidential all matters discussed there. Encourage the party to bring the topic back to the joint session. Do not share caucus communications unless the party has given you permission to do so.

More on Caucusing

There are various times when the caucus is an appropriate tool, and you may wish to consider caucusing for the following reasons:

- ◆ Early in the process to educate the parties, vent or work with strong emotions, invite parties to disclose interests, encourage flexibility, or clarify the agenda.
- ◆ In the middle of the process to clarify information, generate potential solutions, provide reality checks, remind or explore parties' BATNA or WATNA, or discuss options.
- ◆ Late in the process to cover "what ifs," develop realistic implementation plan, explore options for agreement or alternatives to agreement.

Mediators should also keep in mind the potential downsides of caucusing:

- ◆ Harms parties' trust in each other or the process; creates suspicion.
- ◆ Misses opportunity for relationship building.
- ◆ Slows down the process or stifles productive dialogue.
- ◆ Removes responsibility from the parties to work directly on resolution.
- ◆ Risks neutrality/impartiality/equidistance.

In exploring the limitations of the caucus, Ron Kraybill of the Mennonite Conciliation Service has written,

The caucus is often indispensable, but use it with caution. Some mediators, indeed, feel that it should not be used at all because it perpetuates indirect communication. The major cause of many disputes, these mediators argue, is lack of direct communication between the parties. A mediator who relies heavily on caucuses and shuttle diplomacy thus fails to lay the groundwork for improved direct communication in the future.

Stage 6: Agreement Building and Writing

The mediators need to keep the discussion focused to ensure the construction of a good, viable agreement. Some suggestions for building the parties' will to settle include:

- ◆ Highlight points of agreement.
- ◆ Help eliminate or tone down extreme positions by helping the parties focus on the consequences of such positions.
- ◆ Maintain optimism; and when you can't, maintain optimistic tone and expression.
- ◆ Provide reality checks to promote realistic solutions.
- ◆ Use hypotheticals to test proposed agreements.
- ◆ When necessary, encourage parties to acknowledge others' points and feelings.

An effective mediation agreement should do all of the following:

1. **Use clear, simple language.**
2. **Be specific** as to names, places, dates, times, amounts, and actions. Ambiguity can easily lead to further conflicts.
3. Address actions and behaviors by **only those present** at the mediation.
4. **Have a balance** between the parties. Each should give, and each should gain.
5. **Actions by one should not be contingent on actions by others:** "Jane agrees to do the laundry on Wednesday. Bill agrees to clean the room," instead of "Bill agrees to clean the room if Jane has done the laundry."
6. Frame actions as **what parties WILL do**, not what they WON'T do. Stating behaviors as a specific action to be completed will leave little room for ambiguity and does not sound limiting or punishing. "Jack will bring the dog inside before 10:00," instead of "Jack won't let the dog out after 10:00."
7. **Use impartial, non-judgmental language.** Write "Sally agrees to..." instead of "Sally should..." or "Sally must..."
8. **Provide for the future.** Encourage parties to develop a means to revisit the agreement or work through unforeseen problems.

Openness to Differences and Diversity

Conflict may arise from any number of factors, and very often these include cultural differences. Cultural differences may exist along the lines of ethnicity, gender, social status, language, age, nationality, sexual orientation, and many others. Because mediators strive to facilitate communication, understanding, and action in the mediation session, their task requires that they work *with* differences to help parties, not *around* them.

Among the skills necessary to do so are support, empathy, tolerance for ambiguity, and awareness of personal boundaries. Mediators are not expected to know the cultural histories and practices of every party who may be involved in a case, but they are expected to be sensitive to issues relating to diversity.

In her article "Beyond Prejudice Reduction," Dale Susan Edmonds believes the following four items are required "if we are to be advocates of equality and seek just methods of effective multicultural conflict resolution."

1. **Critical self-understanding:** Effective mediators in multicultural and multiracial settings must understand the dynamics at work in their own assumptions and attitudes. They have to be willing to understand their own cultural perspectives and social situations, and the strengths or limitations of their openness to others.
2. **Willingness to allow persons to define their own realities:** The primary ingredient here is the ability to truly "listen." Listening, in this respect, is not simply a "tool" to enable another person to "feel heard;" it must include opening ourselves to the possibility of learning and being changed, as well.
3. **Social analysis and historical perspective:** How do people's personal and social history give shape to their access to and perceptions of power? Can this information help me to understand another's distrust or wariness of a given situation?
4. **Development of appropriate methods:** We must analyze the cultural premises inherent in the professional conflict resolution models developed in the U.S. While such methods may be perceived as "objective" by members of the dominant culture, they are inherently biased against people who function according to other cultural realities. ... [T]he mediator must make every effort to equalize the footing, by learning the processes and requirements necessary to make the person from the non-dominant culture feel comfortable and confident enough to work toward appropriate resolution of the conflict.

From Duryea, *Conflict and Culture*, 1992, and Edmonds, "Beyond Prejudice Reduction," *Conciliation Quarterly*, Spring 1990.

Mediator Tools for Differences and Diversity

Very often, our thinking about differences and diversity is limited to racial and ethnic differences. A broader view of culture might include all the differences - both visible and invisible - that make up each of us as individuals. Gender, age, religion, sexual orientation, class, working backgrounds, philosophical and political, and lifestyles are all differences which we carry with us into mediation. How can a mediator work with and make the most of these many differences?

It is important for the mediator to remember: **We can reach agreement about behaviors, but we cannot expect to change attitudes in a session.**

Here are some mediator tools that might assist parties in moving past differences:

- **Reframe a statement:** "You are the biggest racist I know!" using:
 - Neutral language:** "So you believe that _____ is seeing you as a Black woman and that is making the problem worse."
 - As an issue:** "How you are treated as a Black woman is an important issue here."
 - As an interest:** "It is important that you are treated with respect."
- **Identify the behavior:** "What is _____ doing that makes you believe s/he feels that way?"
- **Identify assumptions/miscommunications:** Often, feelings that are unexpressed are under the surface and keep parties from agreeing about an issue: You might ask: "What else is going on between you?" or "Do you think something else is going on here?" to determine how each views the situation.
- **Identify values:** Oftentimes, values are at the heart of a conflict, especially if there are cross-cultural differences. Help parties to identify their values about the situation.
- **Reframe as an interest:** Ask parties: "What behaviors do you want to see from each other?" and translate differences into interests.

Working Through Impasse

Often parties in mediation will come to an impasse—this generally occurs when they do not see any reason or room to change their positions.

- ⇒ A useful tool for mediators in such situations is to explore with the parties, perhaps in caucus, what are the consequences of not arriving at a resolution—these may include financial costs, emotional drain, the frustration of ongoing hostility and soured relations.
- ⇒ Another helpful perspective that the mediator might bring is that of the long-term view. It is often the case that parties find it beneficial to yield a little now in order to realize greater gains in the future.
- ⇒ Impasse may also occur because the matter is inappropriate for mediation. Or it may be that mediation is only one of a number of resources that can help move a relationship or an individual forward. Either way, mediators should be aware of other agencies that can help parties in a dispute—a counseling service, a consumer credit bureau, a legal aid resource might provide necessary assistance to the parties.
- ⇒ Many mediators will ask the parties to help them understand how they have come to impasse. This examination can produce the needed information to backtrack or re-route the discussion.
- ⇒ It is sometimes useful to take a break. This may interrupt (and hopefully change) the dynamic in the room. It is likely not a good idea to end a session at a point of impasse—the parties' willingness to return may not be very high.
- ⇒ Agree on a means by which the parties can gain some additional information (attorneys, counselors, other resources) or a way to work through this impasse. Move on to the next topic in the mediation.
- ⇒ Ask parties to consider what they would need to move forward AND what they believe the other party would need to do the same. This might take the form of an invitation to have each party restate the other's concerns, but this technique is quite manipulative and should be presented as an option.

Other Process Concerns

There are times when the mediator needs to employ special skills:

To keep control

1. If necessary, be directive, tell the parties to stop what they're doing, stand up and walk out of the room, wait for the parties to calm down.
2. When the session is going well, let it roll.
3. Ride out short periods of disorganization or chaotic communication.
4. Ask each person, "Would you like us to continue?"
5. Call for a caucus.
6. End the mediation. This is a tough call to make, but sometimes the right one.

To handle discussions of "the truth" or blame

1. Remind the parties that mediation is not a search for "facts," but is designed to focus on a solution for the future.
2. Acknowledge the desire to "Get even," but let the parties know this is not something mediation can do.
3. If a person brings evidence, ask them to show it to the other party during Uninterrupted Time. Frame "evidence" as information that can increase understanding among all involved.
4. When parties accuse another of lying, explain that mediation is about both parties working honestly to resolve the situation.

To work with extreme emotion

1. Use your reflective listening skills, and remember to choose an appropriate tone, volume, and posture.
2. Caucus with each party, thereby giving attention and time alone to both parties.
3. Model a calm, focused demeanor to address the issues at hand.

Termination of Mediation

Mediation is a **voluntary** process and may be terminated without cause, at any stage of the process, by any party or the mediator. This information is included in the agreement to mediate form and should be stated clearly to parties at the start of every session. A mediator might consider the following factors when deciding whether to terminate a session:

- Parties willingness to continue
- Parties ability to make a good faith effort to resolve the issues
- Issues are inappropriate for mediation
- Parties lack capacity to reach a fair resolution of the issues
- Another ADR process might result in a better outcome for parties
- Power imbalance between parties
- Past or present history of abuse between parties
- Parties lack authority to reach an agreement in session
- Inability to work through impasse
- Harm v. benefit to parties in continuing the process
- The need for additional information before any agreement can be reached.

If a decision is made to terminate, consider the following approaches to presenting this information to parties:

- It is not necessary to inform parties of the reasons for termination. A simple statement of the decision to terminate is often the best practice approach. This may feel awkward, and may evoke negative reactions in parties, so this decision should be stated clearly and information imparted to parties at that same time to avoid the look of bias on the part of the mediator.
- If the decision to terminate is made as the result of information received in caucus, the mediator should meet with both parties in caucus before terminating and share the decision to terminate jointly.
- Be clear with parties about whether the intention is to terminate the *session* or the *process*.
- When termination results from information regarding a threat of violence against a party, the mediator should take steps to ensure the safety of all present following termination of the session. If this is the case, it may be necessary to have one party leave before telling the other that the session or process is terminated.
- Try not to make the termination feel like a “punishment” to one or both parties. Mediation is not a process that works for all people and all issues. If parties are not moving forward productively, end the session with respect and praise the efforts they made toward a resolution.

Minnesota Statute 595, excerpt

595.02 Testimony of witnesses.

Subdivision 1. Competency of witnesses. Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as provided in this subdivision:

Subd. 1a. Alternative dispute resolution privilege. No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could:

- (1) constitute a crime;
- (2) give rise to disqualification proceedings under the rules of professional conduct for attorneys; or
- (3) constitute professional misconduct.

Minnesota Statute 604A, excerpt

604A.32 Alternative Dispute Resolution Immunity.

Section 1. A person presiding at an alternative dispute resolution proceeding is not subject to civil liability for the person's conduct in presiding over the proceeding, except for injury caused by malice, bad faith, or reckless conduct. This section does not restrict or affect immunity from liability that may be available under other law.

Sec. 2. Section 1 applies to claims arising from incidents occurring on or after the effective date of this act.

Presented to the governor April 10, 1997

Signed by the governor April 11, 1997, 10:00 a.m.

Conversation Tips

A #ListenFirst conversation is any conversation that helps us see each other across differences and discover human connection. It might be between two friends or among many strangers. It might be on a park bench, in a classroom, in the workplace, at home, or online. Regardless of where you are or who you're with, here are our favorite principles and tips!

4 Key Principles of a Listen First Conversation

1. Listen first to understand
2. Be curious and open to learning
3. Suspend judgment and extend grace
4. Maximize diversity of perspectives

Top 10 Tips for a Listen First Conversation

[Printable version here](#)

1. Allow others the courtesy of silence while they are speaking.

When we are cut off while driving we get road rage; when we are cut off while speaking, we get conversation rage. One of the quickest ways to raise negative emotions in conversation is to interrupt someone. Whenever you feel the urge to express your opinion, replace that with an “mhm” or “yeah, right” to show you are listening.

2. Maintain a calm and respectful tone when you are speaking.

If you are passionate about something it is only natural to become animated and energetic. What seems like expressed passion to you, however, can become intimidating for your conversational partner, especially if you operate with a raised voice and hand gestures that border on pointing.

3. Come with an open mind, ready to learn and grow.

Part of the beauty of meeting new people and having conversations is to expand our horizons. We visit new places to gain new experiences, and we read new books to spark learning. Think of conversations as a bit of both, and come with the mindset expressed by Bill Nye, “Everyone you will ever meet knows something you don’t.”

4. Listen to others as you want them to listen to you.

Our first three guidelines can really be summarized by this iteration of the Golden Rule. Think about how you want to be treated in conversation - with dignity and respect - and vow to treat your partner in that way.

5. Listen to and consider others' views before sharing your own.

It is natural to want to share your opinions and give your two cents. For many listening situations, however, your opinion does not matter. People don't always talk to you to hear your side of the story. More often, people want to tell their own side of the story and for you to listen to it without interruption.

6. Be present and curious rather than thinking of how to respond.

Steven Covey is often quoted as saying, "Most people do not listen with the intent to understand; they listen with the intent to reply. They're either speaking or preparing to speak." Being present means being focused on the other person, genuinely curious about them and their story. When you are present and curious, the conversation will be more meaningful for both you and your partner.

7. Fully engage, free of distractions.

One of the main distractions today is our cell phone, and research shows that even its presence can influence our ability to remain present. Cell phones have an off button for a reason, and if this conversation is important enough to garner your attention then it is important enough to use that button. Stay focused on your conversational partner, maintaining eye contact with them and not your surroundings.

8. Restate what you heard to clarify understanding, using "I" statements ("What I heard you say was" or "The way I understand your position is").

Although you can show you are engaged by freeing yourself of distractions and maintaining eye contact, studies have revealed that what you say as a listener is crucial. When you use restatements to illustrate how you have understood the speaker, you allow them to either agree ("Yes, that is what I meant!") or to clarify their position ("Actually, what I meant was ..."). Importantly, restatements are not repetitions, meaning you should not merely repeat exactly what they said. Instead, put it in your own words, and signal that this is your understanding by starting your statement with "I."

9. Ask thoughtful and respectful questions, free from judgement, assumption, or bias.

A sure fire way to get someone talking is to ask them a question – the way that our language is structured, questions demand answers. But be careful! Don't frame your

questions as a form of judgment (e.g., “Don’t you think that your opinion is old fashioned?”). We are judged enough in the course of our day; do your best not to add to that.

10. Seek to discover common interests and areas of agreement by focusing more on why than what, more on personal experiences than positions.

There is no quicker way to end a conversation or escalate to conflict than to start spouting facts. In general, facts should not be your first line of defense, even if they are your initial go-to. Research shows people are much more likely to consider other points of view when there is an emotional connection, a relationship. Rather than start with “how are we different” start with “what are our shared core values.” Get your partner to tell personal stories, and listen for areas of shared experience, ways to connect on a personal level. Avoid talking positions until you get to know each other and can figure out what makes your partner tick. This is as true in conversations about mundane topics as it is in conversations about controversial ones.

Adapted from www.listenfirstproject.com