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MEDIATION PRIMER

A Training Guide for Mediators in the Criminal Justice System

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Dean E. Peachey
Brian Snyder
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Community Justice Initiatives of Waterloo Region

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I. INTRODUCTION: Using This Manual

CHAPTER 1: Courts and the Resolution of Interpersonal Conflict

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INTRODUCTION: USING THIS MANUAL

Mediation is the practice of doing the impossible.

In recent years face-to-face mediation has come to play an increasingly important role in the justice systems of Canada and the United States. Pre-trial programs for settling minor disputes and post-trial programs geared toward restitution or victim-offender reconciliation both rely heavily upon personal meetings between the parties of the dispute. While mediation and bargaining have long been an informal but essential part of the judicial process, these efforts to create programs which promote mediation represent a new emphasis. How to mediate effectively has become a major concern for those involved in programs which deal with conflict resolution.

This manual is written largely for training volunteers or lay persons as mediators, although it may also be of value to professionals working in the area. This is not, however, a do-it-yourself manual designed to produce instant mediators. It is intended only as a supplementary aid for use by the trainer who already has sound experience in conflict management. A major purpose of the manual is to present background and theoretical material in written form, thereby freeing up training time for more specific discussions, role plays, etc.

This manual has developed out of the experience of two programs in Kitchener, Ontario: The Community Mediation Service (CMS), and the Victim Offender Reconciliation Program (VORP)[1]. CMS deals with minor disputes on a pre-trial basis; VORP is a post-trial program concerned with restitution and reconciliation. While there are notable differences in the dynamics present in pre-trial and post-trial mediation, there are also essential similarities which warrant combining training materials for both programs into one manual. The goal of this manual is therefore to present guidelines and concepts that are broad enough to encompass both pre-trial and post-trial interventions in criminal and civil complaints.

Goals:

1. Conceptual guidelines

2. Practical suggestions

At the same time, the preparation of this manual has been guided by a concern that the contents would be practical and useful to the practitioner. It is written with the realization that there is no single "recipe" for effective mediation, and that attempts to write a "cookbook" would be inappropriate. Like cooking, dealing with conflict is based on sound principles which can be taught and learned. Yet effective mediation, like fine cooking, requires flexibility and an unending capacity to improvise. The good cook doesn't throw away the batter for lack of baking powder, but rather uses a substitute process which performs the same function. Likewise, the effective mediator doesn't approach a case with an inflexible list of

steps to follow and things to do. Instead, an understanding of the concepts behind mediation techniques will help the person to develop approaches that are appropriate for the given situation.

Thus, the manual begins with a broad understanding of mediation and gradually narrows to more specific techniques. After an introduction to the way the legal system handles conflict in Chapter One, Chapter Two presents an overview of the nature of conflict and other forums for handling it. Chapter Three focuses more particularly on the concept of mediation, and Chapter Four illustrates how specific strategies can be developed for particular circumstances. When discussing the different strategies available to the mediator the approach taken is to outline the advantages and disadvantages of various options before endorsing any particular orientation.

A module format was chosen for the manual so that it can be customized to fit the needs of a particular project. Sections can be added or deleted and trainees can insert their own notes into the material. The format also allows for low cost revisions or updates to a particular section without reprinting the entire manual.

Like any other set of skills, mediation occasionally takes on the status of an art in the hands of an exceptionally gifted person. That such individuals are rare should not be a cause for great concern, however. There are many people from all walks of life who can function well in this role. This manual is written in the belief that while a gourmet chef is rarely required, there is a daily need for a great many good cooks.

We hope that by sharing our ideas and experiences we can contribute to the growing number of good practitioners, as well as receive feedback and learn from the experiences of others. These are tentative ideas, subject to revision and replacement. Your comments are invited.

Are good mediators born or made? They are born once and made many times.

- Douglas Cameron

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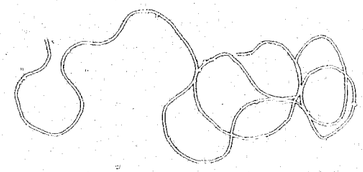

Chapter 1

COURTS AND THE RESOLUTION OF INTERPERSONAL CONFLICT

1.1 INTRODUCTION

Courts in Canada and the United States have often been criticized for the ways in which they operate. Court procedures are known to be slow and costly. More recently, however, dissatisfaction has arisen from concerns about the effectiveness of the court process itself, quite apart from questions of time and money.

Court process:

1. Deals only with legal issues

First, the court process has been criticized for being poorly equipped to settle minor civil and criminal disputes between people involved in on-going relationships, such as neighbors, friends, and relatives. The legal issue or charge that is raised in these cases may be only the "tip of the iceberg." While the court is restricted to addressing the specific legal issue, the people in fact need help in dealing with the whole range of issues, both legal and interpersonal, that have brought them to court.

2. Excludes victims and offenders

A second problem with the court process occurs specifically in criminal cases. Victims of crime as well as offenders are largely left out of the court proceedings. At the time of sentencing courts seldom award restitution to victims, and rarely give offenders the opportunity to face the actual consequence of their damaging actions or to take responsibility for making things right. Instead, offenders are usually treated as being "bad" (in need of punitive measures such as imprisonment) or "mad" (in need of therapy and rehabilitation).

In response to both of the above issues mediation has been advocated as an alternative way to settle disputes. Mediation can be used in a pre-trial setting to enable people to handle their problems without resorting to criminal or civil procedures.* It can also be used after a trial to allow victim and offender to meet and mutually agree on what needs to be done to set things right.

* Throughout this manual, "pre-trial" is used to refer to a wide range of disputes that have not proceeded to court. This in not intended to imply, however, that the conflict is ultimately headed for a trial. These disputes may not necessarily be tried in court, and many of them exist entirely outside the legal system.

This chapter provides background information on the operation of the legal system, pointing out some of the limitations of the law in dealing with conflict. Two major problems are identified: the use of an adversary process to handle interpersonal disputes, and role of the victim and the offender in restoring justice. The theory of the legal process will also be compared to the actual operation of the legal system.

It should be noted, however, that this is not a wholesale denunciation of the courts or an unlimited call for mediation. (Chapter Two includes some limitations of mediation.) The courts do serve certain functions well, but they are frequently called upon to perform tasks for which they are ill-equipped.

1.2 THE ADVERSARY APPROACH

1.2.1 Competitive Process

Going to law is like losing a cow for the sake of a calf.

The court systems in North America handle disputes in an adversary process. Every issue brought to court involves two sides who act as adversaries. In civil cases any two groups or individuals can be involved. In criminal court, it is the State versus an individual or party. In either type of case, these adversaries are usually represented by lawyers who aggressively advance their client's positions and try to nullify the arguments of the opposing side. The adversary process assumes that disputants are opponents with little or nothing in common.

North American courts require the judges to be relatively passive participants in the process. Judges are not allowed to investigate a dispute. Their responsibility is to see that the procedural rules are followed and then make the final decision. Due to this, the responsibility for investigating the dispute and bringing forth evidence has fallen on the disputants and their lawyers. Each side argues its case, assuming that each point it wins is a point taken away from the opposition. This active participation by each side is presumed to yield the greatest amount of information about the case and thus allow justice to emerge through the judge's decision[2].

Result: Escalating the conflict

An unintended result of the adversary process is heightened conflict between the disputants. Each side tries to present the best possible image while at the same time making the other side look as bad as possible. This process encourages the conflict to be escalated in the court, driving the people further apart.

This emphasis on their differences is especially unfortunate for disputants such as neighbors who have no choice but to deal with each other in the future. For example, two neighbors who otherwise get along well together become involved in a conflict over their property line. While their relationship with each other had been relatively amiable, they now gradually stop talking except to complain. Tensions build and suspicions deepen. Finally they take matters to court, since they are no longer able to discuss the issue without engaging in a shouting match. In court they testify against each other, each trying to discredit the other and convince the judge to see things his way.

Relationship worsens

Through the court experience the relationship deteriorates further. On the witness stand, each party has differing perceptions of what happened. Consequently each one is infuriated at the way the other party appears to "lie" deliberately in front of the judge. Lines of communication between them are not restored; they are further damaged. Following the court battle, other complaints – noisy parties and barking dogs – develop. And they have not learned any more effective ways to deal with their differences.

The court process has disputants treat each other as strangers, even if they are, or were, closely associated. In reality, the majority of cases submitted to the courts are not disputes between strangers. Most crimes occur within continuing relationships – family, friends, neighbors, business relationships, etc. The majority of all violent crimes occur within the family, or between people who know each other[3]. These acts of violence often started as petty problems that fester and grow until a "breaking point" is reached. Clearly, there are problems in dealing with these conflicts in an adversary process.

1.2.2 Fault-Finding Decisions

Either/Or decisions

Equally as important as the competitive, adversary process during the trial is the effect of the judge's decision at its conclusion. Judges face a restricted number of options and their rulings focus on who is right and who is wrong rather than attempting to solve the problem. There is little recognition of the fact that both parties may share responsibility for the dispute or its settlement.

In criminal cases a judge can only assign a verdict of "not guilty" or "guilty" or dismiss the case. In civil cases the judge has a few more options. When ruling in favor of one party or the other, the judge decides how much of the claim to award. The judge's discretion on awarding court costs at the conclusion of a trial can also partially balance the outcome.

The right/wrong approach to conflict resolution is particularly inadequate in situations where there is an on-going relationship between disputants. In such cases the act or issue that is debated in court is often very hard to separate from the rest of the relationship. For instance, in a criminal case the courts generally look only at the events leading up to a specific incident, while tending to ignore the longer time period, the emotions of the parties, and the broader context of the conflict. "This is not conflict resolution; it is

not problem-solving in a community nor is it intended to be. The tip of the iceberg has been viewed but the underlying problem mass remains unseen and potentially as destructive as ever...."[4]

1.3 THE DECREASING POWER OF VICTIMS AND OFFENDERS

A second area of concern is the limited role individuals have in resolving their own conflicts. Our present system of criminal law is the result of a complex historical process which has seen the gradual disappearance of both victim and offender as major participants in the resolution of their disputes. With the expansion of the courts, conflicts have been removed from the disputing parties and given over to professionals (such as lawyers, judges and court administrators).

This approach developed slowly through several centuries of British civilization and is rooted in two sources: tort law and religious law. Under the Anglo-Saxons, most of our modern crimes (public wrongs) were considered to be private wrongs or torts against individuals. Under this system of tort law, emphasis was placed on redressing the harm done and "restoring the balance" that had existed in the community before the events occurred. A monetary or equivalent value was placed on everything; something would be exchanged between the two parties involved to repay the harm done. The objective was to ensure that the aggrieved party received the exact amount due to him – no more and no less.

This early criminal law system emphasized the fact that the conflict was indeed between two parties. The victim was responsible (as in present-day civil suits) for initiating procedures for the restitution of the property that was stolen or damaged. The "problem" was his, and the community gave him the power to determine, within certain limits, what the consequences of an offender's crime would be. The offender was also vitally involved in the dispute. He had the responsibility for "making it right" with the person harmed.

This disputant-centered criminal system had the double advantage of allowing the victim to personally feel that justice had been done, and the offender to be treated as a responsible moral agent rather than as a sick person in need of rehabilitation. He could admit his guilt and make restitution to his victim, and "thereby retain all the advantages and obligations of community membership."[5] Third party involvement by community members was minimal in this system, arising only to ensure that the conflict between the disputants was justly resolved according to certain agreed upon rules.

With the coming of the Normans to England in 1066 and the growing power of the King and the nation-state in the following centuries, criminal law expanded and changed its orientation. Crimi-

It is what men do at their best with good intentions, and what normal men and women find they must and will do in spite of their intentions that really concenrns us.

- Shaw, *St. Joan*

centuries, criminal law expanded and changed its orientation. Criminal law came to define the criminal as an enemy of the whole nation (that is, the King) rather than the victim. This was a radical change in outlook. The criminal came to be viewed as one who broke "the King's peace" and posed a threat to social order, rather than as one who violated an individual. Therefore, the right to accuse and punish was given over to the State from the victim.

As a result of these developments, criminal cases now involve "Regina" versus Smith in Canadian courts, or "the People" versus Smith in American courts. The desire of the victim for compensation or restitution has been replaced by the interests of the State in establishing and maintaining social order through punishing the offender. At most the victim may be called as a witness in the State's evidence. The value for the offender of admitting his responsibility to the victim and repaying the damages has been removed. Now he must pay his debt to "society." While the victim still has recourse to the civil courts to receive compensation for harm done, this route often becomes ineffective, especially if the offender is in jail.

The solution is not for our criminal justice system to go back to a day when the victim had to totally initiate proceedings on his own against an offender. In today's urban society, without the coercive power and resources of the state, offenders might never be required to face up to their deeds except through vigilante activities. Rather the point is that victims and offenders should more often be included in the mainstream of the justice process and have a greater voice in its outcome.

1.4 MYTH AND REALITY IN THE ADVERSARY PROCESS

The classical stereotype of the legal system as described earlier is based upon the ideals of the adversary process – two lawyers representing the interests of their clients (one of which may be the State). Within the limits of their duties, these lawyers who are hired to be advocates vigorously assert the claims of their clients. The approach assumes that if each side argues its case forcefully and aggressively a proper outcome will emerge.

This description of the courts is, however, something of a myth, an exaggeration of the actual situation. While the adversary process is used in the courtroom, lawyers act in a multitude of roles as mediators, bargainers, and negotiators outside the courtroom. In fact, their activities in these less formal roles may take up much more of their time than their actions as trial lawyers. This is true in both civil and criminal law. Thus to study the courts and the resolution of interpersonal conflict, it is important to also understand what happens outside the courtroom.

1.4.1 Civil Cases: Bargaining Lawyers

Out of all of the legitimate claims which could be pursued in Canadian courts, up to 98% are resolved without actually being taken to court[6]. Why is this figure for out-of-court settlements so high? A major factor is found in the work performed by the lawyers. Instead of pouring fuel on the fire of their client's indignation lawyers frequently attempt to act as the "voice of reality," questioning their client's exaggerated claims, defining the issues more succinctly, and appealing to the client to agree to a more moderate settlement. In other words, the lawyer often tries to negotiate a settlement rather than go to court. Many times this is a difficult task. Clients may seek moral vindication by going to the courts and being declared right. However, lawyers are also concerned about balancing costs with benefits, and with questions of value. Many lawyers consider it a failure to have to take a civil complaint all the way to trial.

If a lawsuit does reach the stage where a hearing is necessary, the judge too may become involved in problem-solving outside of formal courtroom procedures. This can occur in the form of a pre-trial conference with the disputants in the judge's chambers. Here he informally speaks to the litigants in the hope that a compromise may be reached. This discussion is often compelling enough to convince the disputants to settle their differences before the trial itself. A negotiated settlement is also in the interest of the court which generally has a long waiting list of cases. If every lawsuit had to be settled in the court, the legal system would quickly become bogged down.

1.4.2 Criminal Cases: Plea-bargaining Lawyers

Just as out-of-court settlements and informal conflict resolution dominate civil cases, plea-bargaining has replaced the traditional adversary trial process in a large number of criminal cases in recent years[7].

In plea-bargaining the defendant agrees to plead guilty and the prosecutor agrees to reduce the number or degree of charges pending. It is in the interests of both the defendant and the prosecuting lawyer to compromise. The defendant receives a lighter sentence than he might otherwise have received. The prosecutor is saved the time and trouble of proving the defendant's guilt in court, especially if he is uncertain of getting a conviction if he proceeds to trial.

Mediation, negotiation, and bargaining are not new phenomena in the legal system. Despite its adversary stereotype, the legal system has depended on such tools for a long time as a practical necessity. Mediation programs that have developed in recent years represent attempts to legitimize and expand the role of mediation and bargaining in handling conflicts.

1.5 NEW ROLES FOR MEDIATION IN THE LEGAL SYSTEM

1.5.1 Pre-trial Mediation

There are a variety of points in the legal process where mediation can be used as an alternative way to settle disputes. Mediation can happen before the criminal justice system is involved in the case at all. People in a dispute can approach the mediation center directly or be referred by a friend or social service agency.

Police referrals are a second source. The police may have been called to investigate a domestic dispute or a dispute between neighbors. Although the police may decide not to lay charges a problem may clearly exist, and the police officer (or someone working in the department) may recommend mediation to the parties as a way to resolve the matter.

A third point at which pre-trial mediation occurs is after court proceedings have been initiated by the laying of charges, but before the trial takes place. In this case one or both of the disputants have been charged, but before the case proceeds the prosecutor decides to refer the case to mediation.

1.5.2 Post-Trial Mediation

Post-trial mediation, as its name implies, occurs after a case has been processed within the criminal justice system and a conviction or finding of guilt has been established by the court.

In this case, the judge can recommend mediation either between the finding of guilt and the imposition of a sentence, or at the time of sentencing. If the offender is placed on probation, restitution in an amount to be determined by mediation can be a condition of probation.

Post-trial mediation has certain dynamics which distinguish it from other situations. One of the disputants has already been found "guilty." Thus, there is a power imbalance between the "victim" and the "offender" as they are now labelled. In the mediation the offender is under some compulsion from the court to "restore the balance" with the victim.

1.6 SUMMARY

Mediation is a viable method of dispute settlement at both the pre-trial and post-trial levels. The court system is an adversary approach which heightens conflict and rarely solves problems between individuals involved in ongoing disputes. In cases where strangers are involved, both victim and offender have been replaced by professionals in the legal system. The result has been that victims generally do not receive restitution, and offenders have no chance to responsibly make things right with the victim. Both are denied the chance to somehow "reconcile" themselves with each other.

Although the legal system is built upon the adversary process, informal negotiation and mediation play an important role in its day-to-day operation. There are numerous places in the legal system where formal mediation can also be used effectively.

Notes

1 Additional information about the development and operation of these programs can be found in the "Program Guide" available from Community Justice Initiatives.

2 Calvin Becker, "Conflict and the Uses of Adjudication." In Law Reform Commission of Canada, *Studies on Diversion.* Ottawa: Information Canada, 1975.

3 John Hogarth, "Alternatives to the Adversary System." In *Studies on Sentencing,* Law Reform Commission of Canada, 1974, p. 54. See also, Vera Institute of Justice, *Felony Arrests: Their Prosecution and Disposition in New York City's Courts.* New York: Vera Institute of Justice, 1977.

4 Willoughby Abner. Quoted in John Hogarth, p. 58.

5 Hogarth, p. 49.

6 "Canada's System of Justice." Ottawa: Department of Justice, 1978.

7 Jerome H. Skolnick, *Justice Without Trial.* New York: John Wiley & Sons, 1966, p. 13; and John Hogarth, *Sentencing as a Human Process.* Toronto: University of Toronto Press, 1971, p. 270.

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II. CHAPTER 2: Understanding Conflict and Forums for Handling it

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Chapter 2

UNDERSTANDING CONFLICT AND FORUMS FOR HANDLING IT

2.1 INTRODUCTION

If we all knew and understood and accepted at the same time, that would be heaven. This is earth.
- Howe and Mesurier, *The Open Way*

Conflict is often seen as a bad thing, something that should be avoided or squelched. Friends and relatives, for example, will frequently deny they are having conflict with each other, even if it is real and pressing. Such denial, whether it is based on the hope that a conflict will eventually "go away" or the fear of personal confrontation, can often intensify the underlying anger and hostility. This makes the conflict more difficult to resolve. One writer has even gone so far as to say that "conflict avoidance is probably the greatest threat to harmonious relationships."[1]

Conflict can be productive

In this manual conflict is not viewed as being intrinsically bad. Rather we define conflict simply as "the existence of incompatible goals, either real or perceived." As such, conflict is a universal experience, occurring naturally wherever people interact. It can have both constructive and destructive results. What is important is that conflict be handled in ways that prevent or minimize destructive results. It is even possible to discover benefits of interpersonal conflict when it is properly managed:

> A moderate level of conflict is not only inevitable in interpersonal encounters, but it can actually enhance a relationship. First, it may allow new motivation and energy to be discovered by the conflicting parties. Second, the innovation of individuals may be heightened due to a perceived necessity to deal with the conflict. Third, each individual in the conflict situation can develop an increased understanding of his own perceptions by having to articulate his view in a conflicting and argumentative situation. Fourth, each person often develops a firmer sense of identity; conflict allows values and belief systems to emerge into fuller view[2].

The goal of mediation is not to end all conflict, but to manage disagreements in ways that are productive and useful. While *resolution* of a problem is often a preferred goal, *regulation* of the situation is a significant and worthwhile achievement. The conflict may not be eliminated, but the disputants can learn to handle the problem in ways that are less destructive and less likely to result in an escalation of the dispute.

In addressing this issue, it is helpful to first consider some of the processes and dynamics that usually are present in ongoing conflict. We will also discuss the various procedures that can be used to manage conflict before looking at mediation and its advantages and limitations.

2.2 CHARACTERISTICS OF ONGOING CONFLICT

The nature of a conflict depends to a large extent on the type of relationship between the people involved in it. For example, a stranger who breaks into your house is definitely in a conflict with you, but it is limited to a specific issue or a certain event. However people who live together, work together, or interact frequently have ongoing conflicts which are more complex. These conflicts also may require more skill to manage them successfully.

2.2.1 Conflicts Change

Conflict cycles

Ongoing conflict is cyclical in nature. People are not always yelling and screaming (or worse) at each other. Just as the human body needs rest following activity, so also conflicts cannot remain perpetually at a high energy level. There are times when hostilities are latent – the issues remain unsolved, but there is no expressed conflict. Then something provokes the parties and the conflict explodes into the open, after which it may recede again.

Conflicts change

As well as going in cycles, ongoing conflicts also evolve and change. What begins as an after-school fight between two boys takes on a new character as each boy's parents come to believe that the other is well on his way to becoming the school bully, and that the other parents and teachers are doing nothing to curb this tendency. When one boy's new ten-speed is vandalized the next day tempers boil and charges are laid. Then the hostilities gradually subside while the weeks pass, until the first court date when the confrontation begins anew.

2.2.2 Types of Issues

As conflicts develop they often move from one issue to another. The issues can be either concrete or symbolic. The conflict can arise from *concrete* issues such as damages, competition for the same resources, or disagreements over specific behaviours (such as playing a stereo too loud at night). In these cases, the dispute is over a specific issue or one that would easily be recognized by an outside observer.

Symbolic issues are less obvious to the outsider, but just as real to the people involved. Symbolic issues can arise from emotions such as fear, anger, distrust, or rejection. Such feelings often stem from personality clashes, racial prejudices, or personal grudges. For example, a disputant may not be satisfied with repayment for damages if the other party refuses to acknowledge making remarks that were intended to hurt him. In the same way, disputants will sometimes drop demands for money or repairs when these symbolic issues are resolved.

Another source of symbolic conflict is differing values in areas like sexual morality, religion, child-bearing practices, or personal appearance. Conflicts also develop when one person believes his rights are being threatened, or another has her sense of justice violated. (More will be said about rights and justice in Section 2.3.1 when discussing the parties' goals.)

In actual practice it is often difficult to separate the two types of issues. When someone breaks into a house and steals some money, the issues would appear to be clearly concrete. Yet for the homeowner, even a sizeable amount of money can be less important than the sense of "violation" that arises when someone leaves graffiti on the living room wall or rummages through drawers containing lingerie, financial records, or personal mementos. The trauma may lead to persistent fears and a lingering inability to sleep peacefully.

In the mediation session new issues are sometimes introduced into the argument for tactical reasons. If one party is on the defensive, the easiest response is to raise a new issue to gain the offensive and put the other party on the defensive. Attack breeds counterattack. While issues raised in this way may be quite unrelated to the key concerns, they can be particularly damaging. Disputants will aim at each other's most vulnerable spots in order to gain the greatest advantage.

A mediator must analyze this growth of issues to find out which ones are most important to the conflict. Also, if the mediator can make the disputants aware of the ways in which issues increase in a conflict, he or she may be able to encourage them to focus their attention more constructively on the key issues.

2.3 CONSTRUCTIVE AND DESTRUCTIVE CONFLICT

It takes two to make an agreement, but either one can create a dispute.
- Roger Fisher

The introduction to this chapter stressed that conflict can have either constructive or destructive results. People can approach conflict as a *win/lose* situation. That is, the disputing parties act as though only one person can "win" and the other must therefore "lose." They leave no room for the possibility that both might win by agreeing on a solution that is mutually acceptable. Often winning becomes more important than the original goal. The problem with win/lose approaches is that they frequently lead to lose/lose results. The familiar example is that of two children who struggle over a toy and break it so that neither can play. Similar results can occur in most conflicts when people are out to win at all costs.

An alternative is to take a *win/win* approach to conflict. Rather than trying to defeat the other person, each party engages in problem-solving. Thus the other party is not the opposition; rather both parties realize that they have a common goal (such as making their neighborhood a more pleasant place to live) which requires cooperative work.

Whether conflicts become constructive or destructive depends on a variety of factors. For instance, suppose you've just finished telling another mediator about how you handled a particularly difficult case. In reply the other person criticizes most of what you did. How do you respond? You could interpret the criticism as a personal attack – and attack back. On the other hand, you could take the criticism to mean that this person is concerned about the quality of your work and wishes to make constructive suggestions. How you react depends to a great extent on you, the situation you are in, and how you are feeling at the time.

It would be nice if people came to you as a mediator saying, "We have a problem we can't handle ourselves, but neither of us wants to take advantage of the other. Please help us work this out." But such cases are few and far between. It is more likely that one or both parties will come with a win/lose orientation. The job of the mediator is seldom easy, but it can be less difficult when you understand some of the factors that distinguish constructive from destructive conflicts.

2.3.1 Cooperative vs. Competitive Orientation

Attitudes

The chances for a constructive outcome are enhanced when both parties approach the conflict with a spirit of cooperation and a willingness to be open about intentions. Communication can be more direct and open, defensiveness is lessened, and the chances of misunderstanding are reduced although not eliminated.

In contrast, when competition becomes the primary focus of the parties in conflict, communication becomes more difficult and misunderstandings increase in frequency. Parties are suspicious of each other even when they sound conciliatory. Opportunities to talk to each other become fewer and give rise to further destructive encounters.

The parties' perceptions of each other will be influenced by the attitude that dominates the conflict process. For example, if there is a high motivation to cooperate there is an increased chance that the parties will also look for good, positive qualities in the other person. There may also be a keen awareness of differences, but the commitment to reaching a shared goal encourages positive perceptions of each other.

Goals

In a cooperative process the task is seen as a shared problem that requires mutual activity to solve. Thus each person's participation is essential to insure peace and quiet, figure out what is best for the children, or arrive at the fairest division of the goods.

In a competitive process, the goal becomes beating the opposition, rather than working together to solve a problem. In competition one tries to increase one's own power and interests at the expense of the other. Coercion or the threat of it is often used rather than persuasion.

An important goal that is often misunderstood is the parties' desire for *justice*. Regardless of whether one views justice as revenge, restitution, rights, obligation, or fair procedure, the concern for justice can lead a disputant to attach ultimate values to the outcome or process. The individual persists in the dispute as an effort to restore justice to his or her life or the life of the community.

This is readily apparent from listening to persons in conflict. Statements such as "It's not so much the money as it is the principle of the matter" or "How can I ever get my children to believe in justice if they see him get away with this?" are commonly heard. The symbolic values that lead to conflict escalation are often values of justice – concern for rights, obligations, and "just common decency." What would otherwise be a minor dispute over a few inches of grass is quickly interpreted as "he's not respecting my *right* to property." A noise problem between neighbors becomes more critical when one party asserts that he has a *right* to peace and quiet in his own home, and the neighbor counters that she has a *right* to listen to whatever type of music she likes. Both feel threatened and personally abused because their rights are not being respected, and demand that something be done to correct the situation.

In these examples the persons involved might very well act in ways that would appear irrational or even ridiculous to the outside

observer. They may spend far more money taking a boundary claim to court than the disputed property is actually worth. When this happens the behavior is often interpreted as a preoccupation with achieving a symbolic goal such as winning or avoiding loss of face[3]. However, it is important to keep in mind that this interpretation has generally been made by an outside observer to the conflict, rather than by the participants. The disputants are much more likely to see their goal as achieving "justice." It is wise for a mediator to understand the perceptions and goals of the parties, rather than imposing the interpretation of an outsider on the situation[4].

Threat

A final factor influencing cooperative and competitive orientations is the element of threat. When one feels secure, it is much easier to act cooperatively in a conflict. However, when one is greatly threatened, it is hard not to respond competitively and defensively. What is threatening to one person may not be threatening to the next, and much depends on how secure the person is.

In addition to obvious things like harrassment and verbal or physical intimidation, there are a number of reasons why a person may feel threatened. The issues involved in the conflict can be extremely important to the person – matters of principle which must be upheld at all cost. They may threaten one's religious or moral principles. The person may also be suffering from other kinds of stress (such as problems at home or work) that temporarily weaken the individual's confidence and increase the feelings of fear and insecurity. When the conflict threatens the loss of one's job. position, possessions, or other concrete commodities, feelings of insecurity are further heightened.

Note that the elernents described in this section – perceptions and attitudes toward the other person, goals, and the sense of threat – are interlocking. Each feeds on the other. Competitive attitudes lead to distorted perceptions and poor communication patterns. If you feel hostile towards people you will perceive that they are different from you. You'll stop talking to them or else speak to them as little as possible. You'll view them as being out to get you, and perhaps feel that your principles are being threatened. Each process is self-confirming. Cooperation breeds cooperation; competition breeds competition[5].

A third party can play a crucial role in changing communication patterns, drawing out information that might alter perceptions, shaping goals of the parties, and decreasing the amount of threat that everyone is experiencing. Various third party approaches will, however, have dramatically different impacts.

It's always easier to see both sides of an issue we are not particularly concerned about.

2.4 WAYS OF DEALING WITH CONFLICT

Let the forum fit the fuss.

In our society there are a variety of ways used to deal with conflict. (See Figure 2.1). Some approaches make use of third parties, others do not. Some are less coercive, and use cooperative means to regulate conflict; others are notably more coercive and become more competitive. No single approach is best for all conflict. Frequently a combination of several approaches is used in the process of settling a dispute. After describing some of the ways commonly used, we will focus on mediation and some of its strengths and limitations.

2.4.1 Two-Party Forums

Negotiation

Negotiation is a common form of conflict regulation. The people communicate directly with each other; no third party is required. They take a problem-solving approach by attempting to find a solution that is mutually acceptable rather than trying to defeat the other person. This is probably most likely to occur when the conflict is primarily limited to concrete issues rather than symbolic ones.

Hard Bargaining

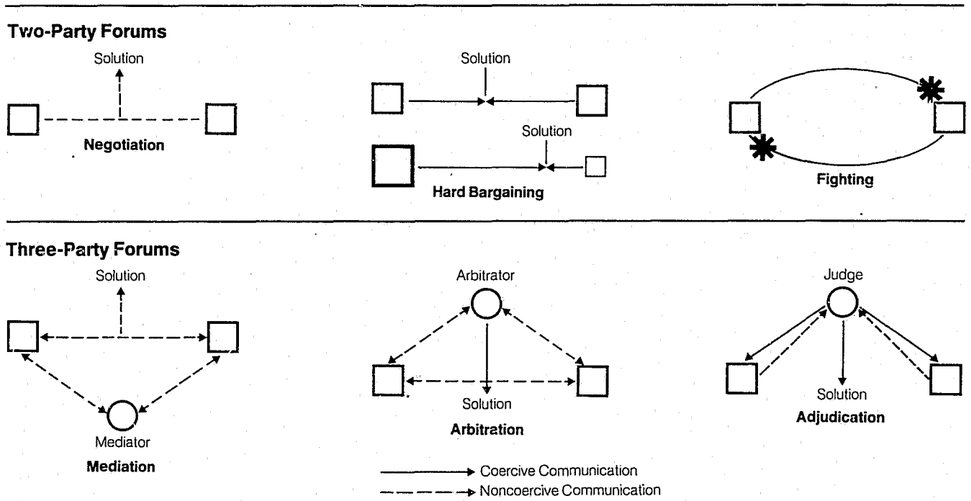
"Hard bargaining" is actually a style of negotiation, but the term is used to describe a more competitive approach. Hard bargaining is negotiation with a win-lose orientation. Examples of this are often seen in North American labor-management bargaining and in the work of bargaining lawyers. While there is some concern for the "other side," they are frequently seen as the opposition. Intensely competitive bargaining can easily give rise to threats and counter-threats. One side, sensing its greater power, may try to coerce the other side into accepting its offer. It may "impose terms" on the opponent. Thus although a "solution" is reached, it is not necessarily mutually satisfactory.

Fighting

Hard bargaining and use of threats can often escalate into open fighting. While the line between hard bargaining and fighting sometimes blurs, fighting refers to an exchange of hostilities that often results in physical, psychological or financial harm to one's opponent. It is important to remember that fighting merely refers to the exchange of hostilities. It may or may not be related to the real issues in a conflict.

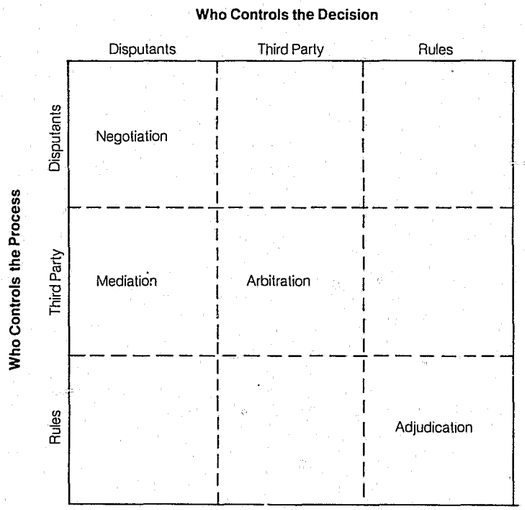
There are times when after a period of fighting hard bargaining or negotiation can be resumed, perhaps when the parties realize the costs of fighting.

FIGURE 2.1
Forums for Conflict Regulation



Adapted from Conrad G. Brunk

FIGURE 2.2
Conflict Regulation Forums Characterized by Location of Power



2.4.2 Third-Party Forums

There are various means of using a third party to settle a dispute that cannot be resolved by the disputants themselves. These approaches differ in relative amounts of power held by the disputants, the third parties, or other factors such as rules or tradition. (See Figure 2.2.)

Mediation

In mediation the third party has the power to regulate the *process* through which a settlement is achieved. However the mediator has no power or authority to make a final decision about the outcome. While the mediator structures the procedure, and may even offer suggestions, the settlement is up to the disputants.

In effect, the mediator attempts to create conditions under which negotiation can occur. Participation is voluntary, with the mediator being there to "help the parties negotiate their differences and reach an agreement."[6] Since the mediator has no power to enforce the decision, it is important that the disputing parties work out their agreement. Their participation helps to ensure that they will be satisfied with the outcome and live up to its terms.

Arbitration

In arbitration a third party is used to decide on the *outcome,* in addition to structuring the process. The parties do not bargain with each other. Instead they plead their case to the third party, hoping for a favorable decision.

The most familiar use of arbitration is probably in labor-management disputes when negotiation and mediation have failed to produce a settlement or when arbitration is stipulated in a contract. The two sides agree (or are forced) to present their cases to an arbitrator who will then decide on an outcome. Arbitration is also becoming increasingly common in handling consumer disputes.

Adjudication

Adjudication is the system used by the courts. It is different in that *both the process and the outcome* rest upon a set of rules or laws. The process is governed by procedural requirements, and the judge's decision is dictated to a great extent, although not entirely, by the rules and legal precedent.

Adjudication is also different in that the court can compel individuals to be present and participate. Because of this power adjudication is a more coercive approach.

2.5 FINDING THE APPROPRIATE FORUM

2.5.1 Strengths of Mediation

One or both of the disputants may seek the aid of a third party such as a friend, police officer, judge, or mediator. While this generally indicates that the problem isn't being handled satisfactorily by the two parties, the form of outside help that is needed is not always obvious.

The case for using alternatives to adjudication has already been made in Chapter 1, and those arguments will not be repeated here. Mediation and arbitration are the two major alternatives, and there are programs which use both to resolve interpersonal disputes out of court.* When mediation is possible, it enjoys certain advantages over arbitration. Mediated agreements can often be more satisfactory to both parties than arbitrated settlements. In an arbitrated settlement, the parties have given up their right to work out the conflict. The outcome is dictated by an authority, and the arbitrator's decision may be unsatisfactory to both sides.

Compared to arbitration, mediation tends to be a more cooperative process. A settlement or agreement can only be reached through a process in which the disputing parties together work out the problems that separate them. This experience can sometimes have long-term constructive effects on the relationship. Mediation has the potential to break a cycle of destructive conflict. It provides a situation where disputants are expected to act in a civil manner. Thus the mediation may not necessarily change attitudes directly, but it can provide a situation which encourages a change in attitudes.

Advantages:

1. Agreements more satisfactory

2. Process more cooperative

2.5.2 Limitations of Mediation

While mediation can be used in a broad range of situations it is important to recognize that there are also times when it may be less effective. Sally Engle Merry described three limitations of mediation: the relative power balance of people in the dispute, the degree of involvement that the disputants will have with each other in the future, and the community or background in which the mediation takes place[7]. William Felstiner and Lynne Williams identified "rights consciousness" and "deep" problems as limits of mediation[8].

* While many of the approaches are similar for both mediation and arbitration, this manual deals only with mediation. Those who wish to use arbitration should supplement these materials with other resources.

Power Balance

Mediation is less likely to be effective when there is a large power imbalance between the disputing parties. (However, in fairness to mediation it is doubtful that *anything* will be effective in such situations.) The strong party will often refuse to participate in a mediation or else will negotiate in an unfair way, such as "dictating terms" to the weaker party. Unequal parties generally produce unequal agreements or else no agreement at all, since powerful parties often benefit by the existing situation. For example, mediation is often difficult between a consumer and a large commercial establishment.

In addition, people who are relatively powerless (like the poor, the elderly, or minority groups) often have a special need to take matters to court. This is not necessarily in order to win the case, but to at least bring the powerful party to a forum (the courts) where they must act as equals. Mediation sessions may deny powerless persons this opportunity for equality since power differences are difficult to balance in a mediation session. Without the threat of coercive action, powerful parties may see no incentive to cooperate.* Disadvantaged groups also often need to bring the issue into a public forum, to increase awareness of the problem. A premature attempt to quietly mediate the conflict denies them this opportunity and helps to perpetuate the injustice[9].

Interdependence

People who know each other are more likely to try mediation. Parties that are totally independent of each other see few areas of mutual interest that encourage them to resolve the dispute.

The future of the relationship is also important. Neighbors who have lived beside each other for twenty years may refuse to take a dispute to mediation if one of them is planning to move in the next month. This limit on mediation is not clear-cut, however. Research on mediation programs suggests that strangers (such as merchant and consumer) will be less likely agree to mediate, but when they do their agreements are more likely to hold up than agreements between people who continue to interact[10].

Community Base

Mediation is often most effective when it is used between disputants who are members of existing community structures (such as ethnic or religious groups, rural communities, etc.). In these cases, disputants already view each other as having something in common. There is also likely to be support (or pressure) from other community members to make it work.

* The claim that courts aid the powerless is a broad generalization with some serious limitations, however. There many ways in which the legal system is biased against the powerless in maintaining the *status quo*.

People convinced against their will are of the same opinion still.

Rights Consciousness

Mediation is less effective with disputants who are inclined to emphasize their rights ("I have a *right* to my day in court...") or view the solution to all conflicts in terms of a coercive courtroom model. In such cases the mediator is rejected outright, since he or she is viewed as being powerless.

Deep Personal and Social Problems

Mediation can often deal with situations in a more complete way than the courts. The process can get behind the immediate issues in a conflict and deal with causes such as mistrust, resentment, and poor communication. The courts, by contrast, deal only with an immediate matter, like a charge of assault. There are realistic limits, however, on the kinds of underlying causes that can be corrected in mediation. Conflicts are often rooted in deep personal and social problems (such as alcoholism, neurosis, unemployment, and poverty). These problems may be discovered in a mediation session, but they are beyond the scope of what mediation can deal with completely. In these cases the mediator may need to refer one or both of the disputants to a more appropriate agency, or help them find advocates to work at the underlying problems.

Don't be discouraged by these limitations or allow them to prevent you from experimenting in new areas. Mediation can be very helpful in a wide variety of conflicts. But your first task as an effective mediator is to know where you can be most successful and thus avoid creating false expectations that you can do everything.

Know your limits

2.6 SUMMARY

Conflict has the potential for either constructive or destructive results. Understanding the issues in the conflict and the parties' goals can help to handle the dispute successfully.

There are a variety of roles for a third party in a dispute, such as mediator, arbitrator, or judge. Mediation is preferable in many situations, but it is not a panacea. The type of relationship between the parties, personal and social problems, and social conditions can limit the effectiveness of mediation.

Notes

1 Ronald Kraybill, *Repairing the Breach: Ministering in Community Conflict.* Scottdale, PA: Herald Press, 1982, p. 56.

2 Ronald C. Arnett. *Dwell in Peace.* Elgin IL: Brethren Press, 1980, p. 70.

3 See Morton Deutsch, *The Resolution of Conflict.* New Haven, CT: Yale University Press, 1973; also John G. Holmes & Dale T. Miller, "Interpersonal Conflict." In J.W. Thibaut, J.T. Spence, & R.C. Carson (Eds.), *Contemporary Topics in Social Psychology.* Morristown, NJ: General Learning Press, 1976.

4 Dean E. Peachey, "Understanding the Preferred Third-Party Forum: The Role of Restorative Justice and Relationships." Paper presented at the Annual Meeting of the Law and Society Association, Amherst, Mass., 1981.

5 Morton Deutsch, pp. 29-31.

6 Richard A. Salem, "Outside Intervention in Community Dispute Resolution." *Peace and Change,* Summer, 1982.

7 Sally Engle Merry, "The Social Organization of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America." In R. Abel (Ed.), *The Politics of Informal Justice,* Vol. 2. New York: Academic Press, 1982.

8 William L.F. Felstiner & Lynne Williams, "Mediation as an Alternative to Adjudication: Ideology and Limitations." *Law and Human Behavior, 2,* (1978), pp. 223-244.

9 For some helpful ideas about the need for different types of intervention in disputes and the ethics of different approaches see James H. Laue, "Understanding Strategies and Developing Skills." *Engage/Social Action,* August, 1978; and James H. Laue & Gerald Cormick, "The Ethics of Intervention in Community Disputes." In Gordon Bermant, Herbert Kelman, & Donald P. Warwick (Eds.), *The Ethics of Social Intervention.* Washington, D.C.: Hemisphere Publishing, 1978.

10 Royer F. Cook, Janice A. Roehl, & David I. Sheppard, *Neighborhood Justice Centers Field Test: Final Evaluation Report.* Washington, D.C.: Dept. of Justice, 1980. See also, "The Citizen Dispute Settlement Process in Florida: A Study of Five Programs." Tallahassee, FL: Office of State Courts Administrator.

MEDIATION PRIMER

A Training Guide
for Mediators in the
Criminal Justice
System

III.
CHAPTER 3:
Elements and Issues in Effective Mediation

CONTENTS

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Chapter 3

ELEMENTS AND ISSUES IN EFFECTIVE MEDIATION

3.1 INTRODUCTION

A mediator performs various functions in a conflict. There are four in particular that a mediator needs to know and practice: instilling ownership and motivation, regulating the interaction, aiding communication, and monitoring the process[1]. There are different ways to fulfill these functions in mediation, each with its advantages and disadvantages. To help you decide how best to carry out the mediator's functions, the second part of this chapter includes the pro's and con's of different styles and approaches.

3.2 FUNCTIONS OF A MEDIATOR

3.2.1 Instilling Motivation and Ownership

Motivating

People usually are intimidated by the prospect of a face-to-face encounter. They are also often convinced that it is impossible to discuss matters with the other party and arrive at an agreement. Thus the first task of the mediator is to provide the parties with some hope that their problem can be resolved, and to help them take the responsibility for creating that resolution.

The mediator needs to be sensitive to people's aversion to face-to-face confrontation and provide realistic hope and encouragement that progress can occur. Such encouragement must be given at various points: the time the individual is deciding whether to participate in mediation, the beginning of the session, and during the discussion when the parties may feel that talking about the problem is only making it worse and they want to just give up and go home.

Motivating the parties to actively participate is especially critical since the mediator has no power to impose a solution. Mediated solutions are, for the most part, created and carried out by the disputants themselves. People are more likely to live up to an agreement that they helped to make than one which is imposed on them by someone else. This usually requires that the parties interact directly with each other, although on occasion they communicate through intermediaries.

Helping disputants to agree on and understand the objectives for the mediation can also make it easier for them to participate. People's reluctance to participate in mediation can stem from a misunderstanding of the goals of mediation (such as thinking the mediator is trying to get them to "kiss and make up"). In some cases reconciliation might be an appropriate goal, but other times the best objective may be to help the parties end a relationship with a minimum of damage.

3.2.2 Regulating the Interaction

Regulating

Although the mediator does not determine the outcome of the session, he or she is very active in shaping the process. The overall purpose in structuring the process is to minimize the amount of threat experienced by the parties and to assure each person that his or her concerns will receive a fair hearing. The mediator does this in such a way that he has control of the session without being domineering.

This regulatory function starts with the choice of location for the meeting and includes the physical environment and seating arrangement. The mediator is also responsible for setting the tone for the meeting, establishing "ground rules," and ordering the discussion. Once the session has begun, he regulates the pace of the discussions, and often decides how much to encourage or allow in the way of emotional outbursts, insults, and criticism.

3.2.3 Aiding Communication

Communicating

For a variety of reasons (see Chapter 2) people in conflict find it difficult to express their ideas and feelings clearly, and to understand the thoughts and feelings of the other party. The mediator wants to assure each party that he understands what they are saying, and to assist them in hearing and talking to each other.

Communication is both verbal and nonverbal. The mediator must be attuned to the nonverbal information that is being communicated by the parties through body positions, facial expressions, nervous behaviors, and eye contact or the lack of it. While nonverbal "cues" provide useful information about what is happening in the session, *they are easily and frequently misinterpreted.* Just as with any other form of communication the mediator needs to test the messages he is receiving and allow the other people to confirm or correct his interpretation. The mediator also needs to be aware of his own nonverbal signals of interest, boredom, or partiality. Using techniques that will be described in Chapter 4, the mediator can model clear and open communication and demonstrate effective listening. There is often a need to summarize for the parties what has happened so far in the discussion before moving on to the next step.

Above all, it is important to view the communication from the disputants' point of view. What kind of communication do they want or are they willing to risk? Remember that communication usually involves risk, and for a variety of very good reasons the parties may not really want to improve their communication with each other.

3.2.4 Monitoring the Process

Monitoring

While participating actively in the session, the mediator must also take the time to analyze what is happening and develop a strategy on the basis of those observations.

Self-awareness

This monitoring and analyzing begins with developing an awareness of how you respond to conflict in general and to these disputants in particular. Do you like to avoid blow-ups and keep things as low-key as possible, or do you actually get a measure of enjoyment from being in the thick of things? Is one party more convincing and believable, or does one of the persons repeatedly irritate you?

Narrowing the issues

Then there are a series of decisions about which of the many issues are more or less important, and which ones are presented largely for the sake of argument and bluff. On which ones can the people compromise, and where would compromise represent a betrayal of their values and important beliefs? Having made at least some preliminary judgements about the relevant issues, the mediator must then decide the order in which to approach them.

The mediator needs to be conscious of any power imbalances that the parties perceive, whether they are real or not. Power imbalances can range from financial clout to the simple ability of one person to talk and argue more persuasively than the other.

Selected comments

At times the mediator may comment upon the relationship between the parties as he sees it, and offer tentative observations that can be challenged by the parties without losing face. In particular, the mediator may want to point out positive and interdependent aspects of the relationship or identify implications of their present actions for the future.

The disputant's perspective

Once again the mediator needs to view all of this from the perspective of the disputants. For example, it is helpful to recognize that some people feel a need to bargain or barter, and to allow time for the exchange of offers and counter-offers. To ignore this and encourage the parties to reveal their "bottom line" too early in the process may seriously jeopardize the outcome.

3.3 ISSUES ENCOUNTERED BY MEDIATORS

In carrying out the mediator's functions you will encounter a seemingly endless series of decisions. Some of them are questions of strategy or technique, while others involve philosophical and value choices.

Different mediation programs interpret and deal with issues in their own unique ways. Perhaps more than one approach is correct for certain situations. The goal here is not to provide conclusive answers but to stimulate your own creative thinking by suggesting some pro's and con's that highlight the distinctive aspects of various views on each subject. Then as specific mediation skills are described in Chapter 4, they can be viewed in the context of this section and tested for their appropriateness and usefulness.

3.3.1 Clarifying Objectives

There are many possible goals of conflict management, ranging from establishing a "cease-fire" to making repayment for damages to achieving reconciliation. Any or all of these might be appropriate, depending upon the situation.

Reconciliation can be difficult to achieve in a mediation. A mediator's task is to bring parties to a point where they can negotiate. He may assemble them to work at restitution with the hope that some of the more intangible aspects of reconciliation (such as breaking down stereotypes or understanding the other person's position) will also take place. Aspects of reconciliation can occur when the parties first meet, during the negotiations, or possibly even after the mediation formally concludes. When reconciliation occurs there may be offers and acceptances of compromise and forgiveness; wholeness and dignity are often restored to everyone[2]. True reconciliation is the exception, however. Reducing tension, agreeing to make restitution, or agreeing to disagree but leave each other alone are also valid goals.

The type of conflict and nature of the previous relationship of the parties will have a major effect on the appropriateness of a given goal. An agreement to make restitution by an offender to the person she vandalized may be sufficient if the two people are strangers and are unlikely to interact in the future. But when two sisters-in-law have had a fight, simply agreeing who will pay the dental bill may be inadequate. Here the two individuals are likely to continue to have contact with each other, either directly (having to show up at the same Christmas dinner) or indirectly (through relatives and mutual friends). While reconciliation will often be more difficult to achieve here than between strangers, it is more important to reduce animosity because of the potential for additional problems in the future.

If the parties in a mediation are unable or are initially unwilling to deal with the conflict in more than a superficial way, it becomes the mediator's responsibility to prod the parties gently so that genuine reconciliation has a chance to occur. Reconciliation is impossible until the participants have expressed their feelings. It may take time and a lot of repetition before they can deal with real issues. This process cannot be rushed. However, if one or both parties make it very clear that they want to deal with only the tangible issues in the conflict such as monetary restitution and avoid the more emotional aspects, this is their choice and it should be respected[3].

3.3.2 Issues in Regulating the Interaction

Use of Preliminary Meetings

Preliminary meetings are sometimes used before the actual face-to-face encounter between the disputants occurs.* In these meetings, the mediator talks with each side separately to hear their story, find out what their demands are, and hopefully become more familiarized with them and their emotions. Preliminary meetings provide an excellent opportunity for the mediator to begin to earn the trust and confidence of each party and to establish himself as a supportive yet fair third party. Such meetings may even be essential to convince someone of the value of a face-to-face session.

Pro:
More familiar
Build trust
Persuade to mediate

Preliminary meetings also have some drawbacks. They can be time consuming and when a mediation is needed immediately it often isn't practical to arrange preliminary meetings. In disputes with a complex history or high emotional level, preliminary meetings can give an inaccurate picture of the situation. What the people will tell you individually may be dramatically different from what emerges when the two are face to face. Also, when the people in this type of conflict are first asked to participate in mediation, they are typically angry and can be very abusive to the person who is contacting them. This may make it difficult for that person to later function as a mediator. The problem can be solved by having someone who is not the mediator make the initial contact to arrange the meeting.

Con:
Can distort
Can create bias

In the programs where this manual was developed both approaches are used. The mediator routinely holds preliminary meetings in post-trial cases between victims and offenders who are generally strangers. Here time is often less urgent and emotions less intense than in pre-trial cases between people who know

* Some people call these meetings "conciliation" and only use "mediation" when they are talking about a formal structured meeting with all parties present. This distinction is one of jargon, however, and is not found in common usage.

each other. In pre-trial interpersonal disputes the case intake is usually performed by the staff and the volunteer mediator then meets both people for the first time when they are together.

Number of Mediators

Mediation programs use varying numbers of mediators. A mediator can function alone, with one other person, or as a member of a larger mediation panel.*

One Mediator. A mediator acting independently is responsible for all aspects of the case. Because the mediator is operating alone and there is no second person with whom to continually coordinate the effort and check signals, the session can proceed more quickly. Working alone avoids the potential difficulties of the mediators having incompatible styles and approaches. Obviously, this approach requires that the mediator feel competent to act independently. She needs the skill to direct and analyze the mediation without the help of another party's clarifications and perceptions.

Two Mediators. Working with two mediators also has advantages. Mediators can be matched more closely with disputants to reduce the appearance of bias and help trust to develop more quickly. For instance having both a male and female mediator in a dispute between a man and a woman reduces the chance that someone will feel that "he (the mediator) just doesn't understand what it's like to be a woman and have to put up with that kind of treatment."

The old adage, "Two heads are better than one" certainly has merit in the mediation setting. While one mediator is active and talking, the partner can be observing, analyzing, and providing feedback or coming up with new suggestions. Mediators who work together also learn from each other and gain new insights and strategies.

Finally, working in pairs or groups provides a natural check on the mediator whose work is otherwise private and unsupervised. This minimizes the possibility that the mediator will start to "play god" in his private mediation domain and begin to impose his values on the parties as he comes to feel he knows what is best for them.

Working together requires teamwork, however. The mediators must plan their approach and remain sensitive to each other. Disagreements between the mediators must be settled privately if they occur. They should never disagree in the mediation session.

* Using more than two mediators is rare, but sometimes occurs in programs that stress a high degree of public involvement in community disputes.

Location and Physical Environment

The location of a mediation directly affects the dynamics of the meeting. Three considerations in choosing a location are its neutrality, the degree of control the mediator can exercise over the environment, and its convenience for everyone involved. The typical meeting places are the agency's office, a neutral spot such as a community center or church basement, or the place where the crime occurred (for post-trial mediation).

The agency office offers an advantage to the mediator because it is familiar, neutral, and offers the greatest control over physical arrangements and interruptions. The mediator can prepare the setting to allow for "personal space" and arrange seating that will be conducive to direct dialogue and eye contact during the mediation.

Disadvantages of the agency office may be that it is less convenient and familiar for the participating parties. It may seem too impersonal or "bureaucratic." However some programs use empty courtrooms or a prosecutor's office to create formality and credibility.

A neutral location such as *community center* or *church* is also a possibility. However, this location may be only slightly familiar to all parties involved, including the mediator. There may be limited privacy which would hinder conversation and free expression. The mediator may have very little control over the larger situation and may not be able to arrange the setting suitably.

If a community-based facility offers the privacy and control needed for a mediation session it also has advantages. Use of a building with a strong positive image in the community also brings to the mediation program a stronger neighborhood identity. Mediation sessions with a large number of participants may find it necessary to use the large rooms available in community settings just to accomodate all the people.

A third possible location is the *home or workplace* of one of the parties. In post-trial mediation the use of the victim's "turf" as the location for the mediation is desirable for a number of reasons. First, the home or business environment is convenient for the victim. This is important since the victim may refuse to participate in any meeting which is a further inconvenience. Also the victim's property is usually the scene of the criminal incident, so the discussion about what happened and the damages involved becomes more immediate. The advantage to offenders who have agreed to meet victims of their crimes is that by going back to the location of the incident they may become more aware of the costs and consequences of their actions. Both victims and offenders can relive to some extent their thoughts and feelings about the incident.

The disadvantage of the home/work location is that it is not neutral. The victim may feel powerful in the this environment while the offender becomes intimidated. The mediator must consciously try to balance the parties' power in an unfamiliar setting in order to encourage the parties to talk constructively and work at reconciliation. Some victims may also refuse to meet at their home or business because of the potentially traumatic nature of the meeting or because they do not want the offender back on their property.

Degree of Control

A mediator can choose to exert varying degrees of control over the mediation process. There are both advantages and disadvantages to strict or loose control by the mediator.

Greater Control by the Mediator

The mediator may want to maintain control of the situation by laying very specific ground rules and not allowing any deviation from them. The ground rules may include:

1. Setting a time limit for the meeting.

2. Defining procedure for asking questions – whether disputants may ask questions directly of one another or if all questions must be directed to the mediators.

3. Clarifying whether any venting or angry outbursts will be tolerated.

Advantages

* It is time efficient.
* The mediator is better able to avoid any unrelated information and issues.
* Parties know exactly what is expected of them in the mediation process.

Disadvantages

* Parties may feel dissatisfied at the end of mediation because they have not had an opportunity to express themselves fully.
* The mediation process may be cut off prematurely because of an infraction of the ground rules, where with some leniency in the rules the mediation would have been successful.

Less Control by the Mediator

The mediator may feel comfortable with a less structured mediation procedure with few specific rules. Whatever the structure, a mediator should always be able to maintain some degree of control over the proceedings.

Advantages

* It may encourage disputants to communicate directly to each other and be more creative in developing solutions.
* There is greater commitment to follow through on a settlement when the disputants do not feel that the settlement was forced upon them.

Disadvantages:

* There may be venting or outbursts of anger that will lead to further conflict or a premature end to discussions.
* The mediator may actually lose control of the situation.
* It may take a longer time to reach an agreement.

3.3.3 Issues in Aiding Communication

Degree of Confrontation

While the final goal of mediation is to reduce the conflict, it may be necessary at times to temporarily escalate the conflict to allow important issues and emotions to be aired. The mediator may encourage the parties to speak to one another directly about how they feel or address an issue they are reluctant to face. This is not a blanket rule, however. While much has been said and written in recent years about the value of free-flowing communication and open expression of feelings, "open communication" should not be a goal in itself. It is not always helpful or desirable. The mediator must be careful not to create new conflicts or open old wounds unnecessarily.

Improved communication is often helpful in dealing with conflicts based on a misunderstanding or misperception, but when the disputants really do have substantial disagreements or differences, it can also result in further alienation. The mediator may not always want to air all the feelings of the disputants, but merely provide a structure where negotiation over concrete issues can occur.

Caution!

To Caucus or Not to Caucus

Mediators sometimes "caucus" or meet separately with one party during the mediation. This allows various aspects of the mediation to be discussed so that when the participants are back together negotiations can be more effective. It allows the mediator to ask questions that might not be appropriate when the parties are together, to build more trust with each of the parties, or to clarify with one party their goals and discover their "bottom line." Caucusing allows the mediator to be more selective in discussing which issues might be brought up in the mediation and how to deal with them.

There are also disadvantages in caucusing. First, the more a mediator uses caucuses the less direct communication there is between disputants. That may be acceptable in a dispute where the people will not need to interact in the future, but it raises serious

questions when a goal of the mediation is to help the people learn to communicate more effectively. Second, one party may perceive the caucus as the mediator's way of helping the other party. *Whenever there is a caucus with one party it is important to have at least one caucus with the other side.* Caucusing can also consume a lot of time.

A mediator needs to be conscious of how the parties feel towards caucusing and the effect if could have on the mediation. The mediator should mention the possibility of a caucus in the introductory comments so that the parties will not be surprised by the procedure and view it with suspicion.

When more than one mediator is involved, the mediators may caucus by themselves. These private meetings provide a chance to plan strategy and keep the mediators from misunderstanding each other's actions.

3.4 SUMMARY

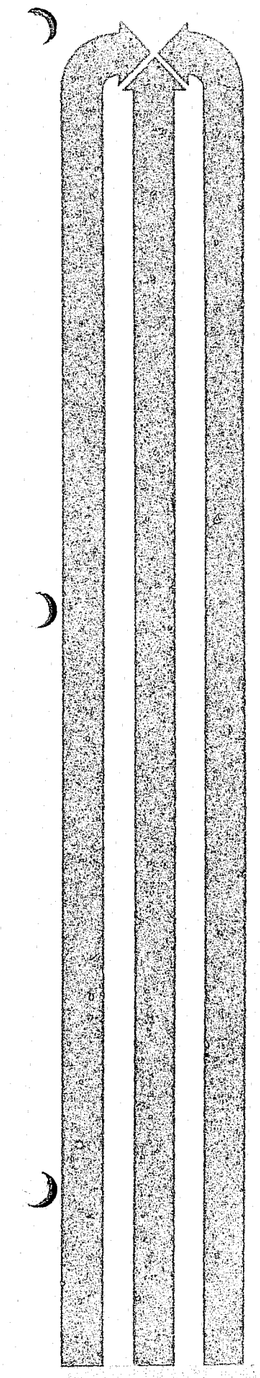
Four functions of a mediator are instilling ownership and motivation, regulating the interaction, aiding communication, and monitoring the process. In trying to fulfill these functions there are a host of questions that arise. Discussing the pro's and con's of the various alternatives may be confusing at first. However, an awareness of the various alternatives can also help you develop the approach that is best for you and your situation.

Notes

1 The four functions described here are adapted from Roger Fisher, "A Method for the Study and Resolution of Conflict. *Journal of Conflict Resolution*, 1972, *16*, pp 67-94.

2 For further discussion of this theme, see Mark Yantzi, "Third Party Functions in the Victim Offender Conflict." Unpublished paper, available from Community Justices Initiatives of Waterloo Region.

3 Some excellent material on the value of encouraging reconciliation can be found in books which address conflicts in church settings. See, for example, Ronald Kraybill, *Repairing the Breach*. Scottdale, PA: Herald Press, 1982, and G. Douglass Lewis, *Resolving Church Conflicts*, San Francisco: Harper & Row, 1981. "Mediating the Victim-Offender Conflict" by Howard Zehr also offers a biblical rationale for reconciliation. (Available from Community Justice Initiatives of Waterloo Region, or Elkhart County PACT, 115 West Cleveland Avenue, Elkhart, IN 46514.)



MEDIATION PRIMER

A Training Guide for Mediators in the Criminal Justice System

CONTENTS

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Chapter 4

APPLYING MEDIATION SKILLS

4.1 INTRODUCTION

The first three chapters have presented an overview of the criminal justice system, general theory of interpersonal conflict, and the roles and functions of mediators. Now it is time to begin applying these understandings. The outline of this chapter will follow the rough sequence of events in a mediation session. While each situation is unique, the agenda for the session generally includes the following:

1. Introductory comments to set the stage
2. Identification of issues by each party
3. Discussion and negotiation
4. Agreements and closing comments

4.2 GETTING STARTED

4.2.1 Building Trust and Confidence

How does one build "the will to settle" among parties? The key is to gain trust in you as the mediator, and confidence in the process. Trust must be earned. When someone shares a confidence with you, it is imperative that you honor that trust. Once trust is broken, it is rarely re-established.

Honor the trust

Using Preliminary Meetings

An opportunity for the mediator to build trust is to meet with each side prior to the mediation session. Although preliminary meetings have limitations (see Section 3.3.2), they do provide an opportunity to hear each side's story and get a feel for their positions. While being careful not to side with or make promises to either party, you can gain their trust and confidence through careful, sensitive listening.

When you have developed some trust with both parties, you can act as a bridge through which they can direct comments to

each other. Hopefully from this pattern direct communication between disputants will evolve as the meeting progresses. In fact, the mediation itself may not be as difficult as the preliminary meetings with each side.

Motivating Victims

In post-trial mediation the victims of crime can be encouraged by reminding them that mediation provides a chance to negotiate restitution personally. If no agreement is reached, the court will unilaterally impose restitution (which may be less than the actual cost of damages). One can also appeal to the victim's sense of civic responsibility by stressing that the judge recommends this process and that it can help the offender to see the damage he has caused and take responsibility for it.

Motivating Offenders

In addition to the fact that the offender usually has been requested by the court to meet the victim and make restitution, there are other incentives for him to participate in mediation. He will have a part in deciding how much restitution is to be paid. If the agreement occurs before sentencing it may help reduce the severity of the sentence. Also if the restitution is part of the offender's probation, the length and severity of the other terms of probation may be reduced after an agreement is reached and completed.

Motivating Pre-trial Disputants

In pre-trial mediation there are a number of factors that can be emphasized. For example, there may be potential or pending charges or court appearances which can be avoided by reaching an agreement. Another obvious reason to reach agreement is the effect on the disputants' future relationship. If they don't come to agreement, the chances are higher that the causes of the dispute will continue to fester into the future.

Without creating unrealistic expectations the mediator should also emphasize the positive aspects of agreement. Problems which affect both parties will be resolved and life will be less miserable for all concerned. There can be a return to normalcy as has happened with other similar situations through the mediaton service.

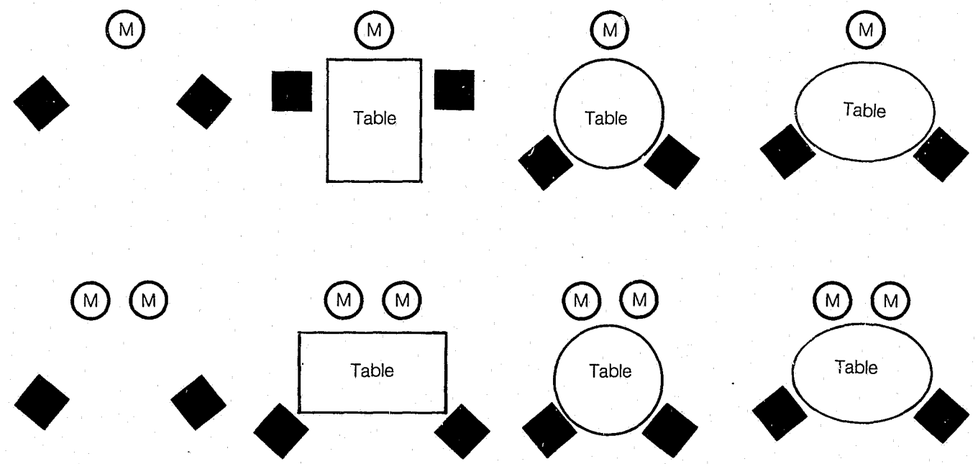
4.2.2 Preparing For the Meeting

You will want to arrive before the time scheduled for the meeting. Make sure that there are enough chairs for everyone and that their placement is conducive to effective communication, but also respects space needs. See Figure 4.1 for possible seating arrangements. If smoking is allowed ashtrays should be available. Paper and pencils should be provided for each party to make notes if they would like to do so. Before the parties arrive you will want to be familiar with the case. This includes knowing something about the parties invoived, their names, the nature of their dispute, and the source of the referral. This information is available from the file and also the staff persons who did the intake. When working with a second mediator it is necessary to agree on such things as who will make the opening statement or how you will share the tasks that need to be done. You may also want to talk about some of the unique aspects of your mediation style so that you can better coordinate your efforts.

Checklist:
- **Seating**
- **Ashtrays**
- **Paper and pencils**
- **Case information**
- **Coordinate with partner**

FIGURE 4.1

Possible Seating Arrangements



A seating arrangement should always allow for easy and direct eye contact and communication. However, different arrangements meet particular needs for formality, control, and "space" between disputants.

4.2.3 Introductions and Opening Statement

The mediators should make relaxed introductions and suggest to the parties where they should sit. While the way you approach the opening statements will vary, here are some elements to include:

1. Initial courtesy – make sure of names (including pronunciation) and that the parties know how to address you.

2. Brief description of the function of the mediation service and your role:

   a) Mediator does not judge who is right or wrong or tell people what they have to do.

   b) Mediator does not support one side over the other.

   c) While mediation is not easy it is often successful, and their presence here indicates their willingness to work at the problem.

3. Confidentiality:

   a) The mediator is committed to confidentiality and maintaining this to the fullest extent possible under the law. (See Appendix C for further discussion of confidentiality.)

   b) The mediator may take notes in order to keep track of the discussions, but after the session they will be destroyed. (The parties are also welcome to take notes if they so wish.)

4. Procedure:

   a) Each person presents his or her issues. (Indicate an objective reason for who will start, such as the person who first contacted the mediation service.)

   b) Mediator may at times meet privately with each party (if you are using caucuses).

   c) When an agreement is reached it can be written down and each party can have a copy.

5. Rules:

   a) No interrupting

   b) Remain seated

   c) This is not a time for insulting and name calling

6. Obtaining the parties' consent to the procedure

   a) Is there anything they want to know or don't understand?

   b) Is this procedure acceptable?

This introduction is important in setting the tone of the session for several reasons. First, it gives the people a chance to get used to the setting before they have to start talking. Just being together in the same room can often produce a lot of anxiety for the disputants.

Second, it gives them confidence that you have a plan and know what you are doing. (You may not be so sure about that at this point, but they don't have to know that!)

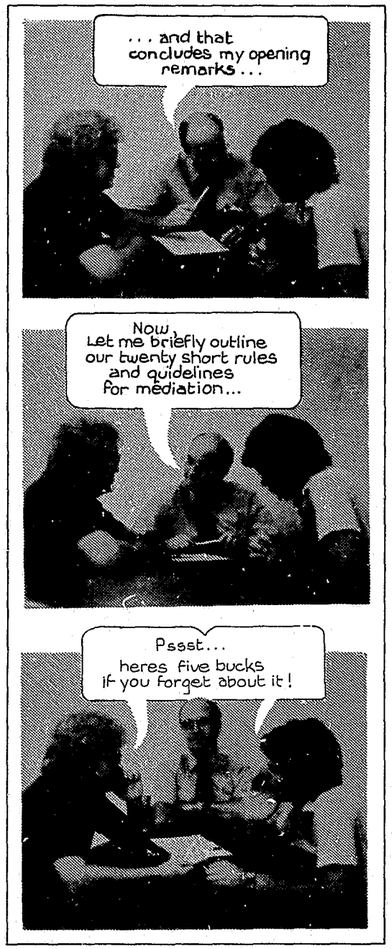
Third, the introduction tells people what to expect. Even though mediation may have already been explained to the parties it is important to go over it again. People who are angry and upset don't always hear very well the first time. Making the process understandable also means that you don't use jargon. Avoid terms like "arbitration," "adjudication," "caucus," "disputant," "complainant," "respondent," etc.

The fourth function of the introduction is to begin to get their cooperation in the task that lies ahead. By explaining the procedure to them and enlisting their commitment to follow it, you are giving them a greater stake in the outcome. Make sure that each person present has an opportunity to nod or reply verbally when you ask whether the procedure is acceptable.

Finally, explaining the ground rules at the beginning also allows you to intervene later without seeming biased. To impose a new rule in the middle of the session or suddenly announce that you want to talk to one party privately is much more likely to be interpreted as favoritism if the people have not been forewarned.

Your opening remarks should be relaxed and conversational, not something you memorize or read. *But make sure you include everything* and be brief. You may find it helpful to have an outline of one-word points on a pad in front of you. If two mediators are working together, you can avoid the impression that one mediator is stronger or more in charge by sharing the opening remarks. Be sure you plan in advance who will start and which points each person will cover.

Here is a sample of what might happen after the initial introductions have been made.



First Mediator:

Mediator's role

"As we get started, I want to explain how this procedure works. Our program was set up so that people can get together to work out their conflicts. We will help you in whatever way we can, but we can't support one person more than the other. We also aren't judges, and we won't be telling anyone what they have to do or ought to do. It will be up to each of you to decide what you are willing to do. This isn't an easy process, but we've found that it does work, and people usually are able to come up with an arrangement that they are willing to live with.

Procedure

"The procedure works like this. First, each person describes the issue or issues that he or she wants to deal with. As a general rule we ask the person who first contacted us to begin, so in this case I believe that would be you, Mr. Williams. When he finishes, you can describe how you see the situation and what issues you would like to deal with, Mrs. Miller. Then we will spend some time working on those issues. At some point we may want to talk to each of you separately for a few minutes. We've found that often this helps the settlement process.

Private sessions

Agreement

"If you come to an agreement it can then be written down so that each of you can sign it and have a copy."

Second Mediator:

Confidentiality

"There is one thing in particular that I want to stress. Anything that is said here is confidential. It remains within this room and as mediators we will maintain that confidence as much as we possibly can under the law. From time to time we may take notes, but those notes are just to help us keep track of the discussion and will be thrown away after the meeting. There is also extra paper here for you if you would like to use it.

Notes

Rules

"There are also a couple of basic ground rules for this meeting. The first is, no interruptions. You will likely hear some things tonight that you don't agree with, but we ask that you wait to respond until the other person has finished. Everyone will have a chance to speak. If there is a point to which you would like to respond later, you can use this paper to make a note of it. Secondly, we will likely be talking about things where you have strong feelings. If you are angry it is alright to express that, but this is not a time for exchanging insults or criticisms.

Any questions?

"Okay, are there any questions before we go on?

Acceptable?

"Are the rules and procedure that we have outlined something that each of you can agree to? Mrs. Miller? Mr. Williams?

"Okay, Mr. Williams, perhaps you can begin by telling us the issues you would like to deal with. Take a minute or two to collect your thoughts if you like."

Note the deliberately neutral wording that was used in introducing this stage. Asking the parties to identify issues (or perhaps concerns) avoids using terms that are potentially loaded, such as "complaint," "problem," or "tell me your *story.*" Asking them to identify issues also signals the parties that you want to move forward in the discussion. "Tell me what happened" is more likely to invite a long tirade against the other person. It may be necessary to review what happened, but don't emphasize that. The history will come out if it is important; otherwise it can be skipped.

4.3 IDENTIFYING THE ISSUES

By the time the second party has an opportunity to speak, she will often be fairly defensive because of the first person's complaints. It may help for you to discourage a premature rebuttal to these accusations: "Mrs. Miller, the easiest thing for you at this point may be to start responding to what Mr. Williams has just said. But before we get to that I would encourage you to take some time to say what your concerns are and what you would like to discuss here."

When listening to and observing each side in the meeting, it is important to suspend judgement. Remember that you are not there to place blame; you are there to mediate a dispute and help the parties solve their problems. Similarly, the disputants are not there to admit guilt. Placing blame and admitting guilt may be important in other forms of dispute settlement, but they have little value in mediation.

In listening to each person's story, therefore, try to understand their point of view. Put yourself in their shoes. Avoid premature assessments. Hear them out. At the end of their initial presentations you may be genuinely convinced by each side and feel totally confused. Take heart in knowing that you are doing a good job of being neutral and sympathetic. If you can sensitize yourself to each person's feelings, you will find it much easier to see areas of possible cooperation and agreement.

Sometimes it is necessary to review what happened. It is wise to avoid using the term "facts" when initiating this. "The facts of the case" exist only in a court of law. Outside of court facts don't exist; in the mediation we have only impressions, perceptions, and memories and the mediator's language should reflect this.

From this point, the session might move to a discussion of the emotions and feelings. Both parties can be encouraged to recall their thoughts and feelings at the time of the offense or confrontation and their frustrations since then.

4.4 DISCUSSION AND NEGOTIATION

If the parties agree on what has happened, the focus can shift to sorting out what needs to be done. However they may remain in total disagreement over what took place and each may believe that the other is lying to you. It can be helpful to remind them that people often have different perceptions of the same event ("You know, if you have 20 witnesses that see something happen you are likely to get 21 different stories..."). Even so, at some stage the mediator may need to point out that while each person has his or her own version of the past, the more important task of the mediation is to discover what can be done to avoid more problems in the future. One indication of the time to make such a shift is when the people begin repeating what they have already said or the conversation wanders in circles.

4.4.1 Provide Hope for a Solution

By now the parties may be frustrated, feeling that the session is only making things worse. They may even be ready to stand up and leave. You can do several things. First, offer some reason to hope that things can be worked out. Point out encouraging signs of understanding or progress so far in the discussions. Or remind them of the benefits of getting the problem worked out. As a mediator your ingenuity will be tested to find creative ways to keep the parties committed to the process.

Tackle Problems in Manageable Sizes

One reason disputants have little hope that a dispute can be settled is that to them the problem appears so long and complex that it is almost impossible to resolve. Or the issue can be defined in such grand terms that the person feels he would be a fool not to stand his ground and fight it out. "By defining an issue in all-or-nothing terms, we tend to make sure that we get nothing unless we are prepared to exert the force required to get it."[1]

In complex conflicts motivation can often be increased by breaking the big problem into several *smaller* distinct issues. Start with smaller segments. Take issues in "bite-size chunks." If an issue is still too big, break it up further. Dealing with disputes in a step-by-step fashion can be much more productive than facing a vast dispute head-on. Small agreements can also encourage disputants into making larger agreements. (A word of caution – in cases where emotions are heavily involved people often cannot deal with any part of the mediation agenda until the thing that is really bugging them most has been taken care of.)

No country is likely to fight over what it perceives as a small issue. It is only when a country fears that it might lose a great deal...that it will go to war.
- Roger Fisher

Power Imbalances

At this point in the process power imbalances may also become more apparent. Power imbalances cause two related problems. Strong parties may begin to believe that they are going to "win" this session by stonewalling or wearing down the other person's resolve. Weak parties may feel, "What's the use, I'm just going to be pushed over anyway." "Sometimes one party in a conflict does not want to resolve the issue. This happens most often when he is in a position of power or has something to gain from the continuation of the conflict."[2]

Power imbalances are difficult to deal with, but there are several ways of lessening their impact. One way is to ensure that disputants have roughly *equal air time* to tell their story and state their feelings. A second way is to slow down the process and help the weaker party to articulate his needs and concerns.

Think of a mediator as the pivot point on a pendulum arm. She can move slightly in the direction of either side for a short time, but will always return to the middle position. Even the person with more power can often recognize that the mediator's behavior is in line with general principles of "fairness." But this must be done with extreme care, or the mediator will lose her impartial status. It must be clear that she is concerned that what happens is fair to *everyone*. She must remain trustworthy in the eyes of both parties. But without the mediator's support the weaker party may have little motivation to continue working toward an agreement.

4.4.2 Using Private Caucuses

Another way to address some power imbalances is to physically separate the parties so that you can talk to the weaker one without the intimidating presence of the other. In fact, when the potential for intimidation is strong you may want to routinely caucus with the disadvantaged party just to check whether there is something that he or she is afraid to say in front of the other party.

There are other reasons for caucusing. (See Section 3.3.2.) Much of the content of opening statements can be bluster and bluff, and a caucus can be helpful in exploring each person's position and getting a better sense of their "bottom line." The private caucus can provide an opportunity to develop greater trust and rapport with a person and allow that individual to share with you relevant fears and feelings that he or she wouldn't be ready to expose to the other person.

Whatever the reasons for using a caucus, there are several guidelines to follow:

1. If you caucus with one party, always have at least one caucus with the other side.

2. Assure the person at the beginning of the caucus that anything said here can be kept in confidence.

3. Be conscious of the time. Keep a caucus short. In the relatively unstrained atmosphere of a private session it is tempting to continue listening to the person's story and working out ideas for settlement. But remember that for the people who are waiting outside wondering what you are being told and anxious about how much of it you are believing, each minute seems like five. If you should need to continue for more than five or ten minutes, it is best to step out for a moment to reassure the waiting party that you have not forgotten them, but that you need a few more minutes to try to work things out.

4. You can use a caucus to test tentative settlements, but avoid making promises or giving away the other party's position. For example you might ask, "Would you perhaps consider doing X if she will agree to do Y?" even though you already know that the first party will gladly do Y.

5. When ending a caucus check whether there is anything that the person doesn't want you to repeat to the other party.

4.4.3 Regulatory Skills

Enforce the Ground Rules

One specific function is making sure the ground rules are obeyed. For example, usually each side is given an uninterrupted time period at the beginning of the mediation to identify issues and communicate feelings. This rule should be adhered to and it is up to you to enforce it. While you may allow some flexibility, if one person is allowed to bend the rules *the other person will expect equal treatment.*

Regulate the Pace

As well as the order of topics, the mediator should regulate the pace of the conversation. Are the parties getting bogged down by rehashing the same issue? Are they going at things without sufficient thought toward details which may cause problems later? You may want to make tentative observations or raise questions to slow down or speed up the process at times.

Dealing with Confrontation

The first time that a mediator encounters a confrontation between disputants he may feel very uncomfortable, and unsure of what to do next. He may even fear that the mediation will fail. This, of course, is not necessarily true.

When the parties strongly disagree some type of confrontation is probably inevitable and even beneficial. Confrontation and heated exchanges with the frank expression of feelings are often necessary before conciliation and negotiation can occur.

People need to "get things off their chest." Often these things will come out early, when the party is telling his story. In post-trial mediations, the victim may give a "lecture" to the offender concerning his wrongdoing and the amount of unnecessary pain and damage that he has caused.

The mediator should strive to maintain optimum level of tension within the mediation[3]. Too low a tension level will result in low motivation to solve the problem. However, too much tension can be just as unproductive, with emotions overtaking thought. Each participant's ability to view the other accurately is reduced. Things may be said in the heat of the moment that would have been better left unsaid. The mediator must guard against either of these two extremes. At times the mediator may open the floor to issues of known contention. But if things get too tense the mediator can suggest a break for five or ten minutes, decide to hold individual caucuses, or switch to a less controversial topic.

4.5 COMMUNICATION SKILLS

Another task of the mediator is to try to improve the communication in a mediation session. Of course, it is important that the disputants begin talking directly to each other – but this alone does not ensure a productive mediation. One can just as easily communicate insults and threats as give out conciliatory remarks. Therefore communication without some type of guidance can be disastrous. The mediator must monitor and regulate conversation so that one party does not end up abusing, threatening, "steam-rolling," or dictating terms of agreement to the other party.

Continual monitoring of communications by the mediator – encouraging more direct communication and making sure meanings are clear and understood by the other party, as well as modelling by rephrasing any of the disputants' angry outbursts – is an essential task and contributes greatly to the possibility of dispute settlement.

Encouraging Direct Communication

As the mediation progresses there may be times when the parties will continue to speak to you about the other person instead of directing their comments to that individual. This may be necessary at the beginning, but later you may want to encourage them to speak directly to each other. Ask one of the disputants to repeat what he has just said to you, but this time to say it directly to the

other person. You can sometimes accomplish this without interrupting the conversation by using non-verbal signals such as shifting eye contact to the other person, nodding your head, or gesturing with your hand.

Are the Disputants Understanding Each Other?

When the disputants are talking to each other, it is important to monitor what each is hearing from the other. Do they seem to be understanding what the other person is saying? There are a number of techniques which can be used to ensure better communication.

First of all, the mediator can occasionally *feed back or summarize* what each person is saying. For example, the mediator could ask, "Joe, are you saying that...?" This feedback is especially valuable if the details of what he is saying are unclear. By summarizing the speaker's statements you can clarify what he is saying for his sake and your own, as well as for the benefit of the other disputant. Because of the tension level they may hear it more accurately from a third party than from each other. Keep your summary tentative so that if it is inaccurate the disputant can clarify what he really means. By checking each disputant in this way, misunderstandings can be avoided.

A similar approach is to ask the *disputants* to summarize what they are hearing. The simplest way to do this is to ask the listener to repeat what he has heard. (For example: "Paul, what do you understand Joe to be saying?" or "Mrs. Taylor, what did you hear her telling you?"). Then ask the speaker if the summary is correct. ("Joe, does what Paul said accurately reflect your position?").

Rephrasing Information

Another important technique is asking the disputants to rephrase statements which may be perceived by the other side as threatening, damaging or insulting. One disputant says to the other: "You really bug me!" Naturally this will put the other side on the defensive. To defuse this threat the mediator could encourage the speaker to be more specific. ("Joe, can you tell Paul what it is that irritates you?").

4.5.1 Verbal and Non-Verbal Listening Skills

The familiar warning of the dangers of speaking too much and listening too little holds true in mediation. The majority of the mediator's time needs to be spent listening rather than talking. Good listening may be what distinguishes him from other individuals. "When a minor dispute has escalated to crisis proportions it is often because nobody has been listening."[4]

The mediator must *be attentive* to each disputant when he is speaking. Doing so provides a model for the disputants. The mediator can use non-verbal cues such as occasionally leaning forward, maintaining eye contact with the speaker (while also making eye contact with the other people to keep them involved), and appearing relaxed and interested. He should avoid shifting around in his chair too much or other nervous habits which may be distracting or sugest impatience or lack of interest.

But don't just appear to listen – really listen! Don't become so self-conscious about everything you do that you are unable to be sensitive and alert to the concerns of the people.

Reply to the Emotion

It is good to listen to the way something is said as well as to what is said. Responding to the emotion behind the words helps to identify the feelings so that they can be recognized and dealt with. A disputant may say angrily, "I can never get to sleep at night with all that noise you guys make!" The mediator, sensing the anger, may reply, "That must have made you angry." Or he may simply observe, "You sound angry." The disputant then has a chance to face his emotion and deal with it instead of letting it simmer in the back of his mind.

Another disputant may protest, "I really don't think we are going to get anywhere. What's the use of this meeting anyway?" A natural response would be to justify mediation because of its past successes or other advantages. However, the mediator may also respond to the emotion or intent behind the statement: "It sounds like you are frustrated about the chances of coming up with an agreement." This helps the disputant identify his feelings and also gives the mediator an opportunity to check out her hunches or assumptions.

Remember the Disputant's State of Mind

Despite the mediator's good example, disputants will not always listen to each other as carefully as the mediator does. Their anger and frustration will inevitably cloud their ability to listen well and observe closely. They may be so busy forming counter-arguments that the other person's words and actions float by almost unnoticed. And remember that a disputant may not really want to improve communication with "that person."

What About Silence?

Obviously there are many things to do when you are not talking. But what about the times when no one is talking? A good mediator knows the value of silence. Silence can be your partner, a useful tool for effective mediation. Don't jump in to fill the time with some type of sound. During moments of silence it can be helpful to look directly at each party without saying anything. This lets

them know that silence is okay and that shortly you will move on again.

Periods of silence can be used by the mediator to reflect on what has happened and to collect your thoughts about where to go next. Silence can also provide subtle pressure for the disputants to initiate negotiations and make compromises to move the mediation forward. Listen for silence and use it.

Well-timed silence hath more eloquence than speech.
- Martin Farquhar Tupper

4.5.2 Diagnostic Skills

In certain instances it is helpful to *offer observations* about the relationship. However, this requires care and tact. Examples of positive observations include: "You both seem to be more relaxed with each other now. Am I right?" "You seem to be talking together more freely now," or "I've noticed that you both began by talking to me but that now you're talking directly to each other."

Negative observations can also be expressed, such as: "You don't seem to be really listening to each other," "You seem to expect each other to agree to your position, yet neither of you seem willing to compromise," or "Whenever this problem comes up, we get detoured by talking about something else."

By offering selected and tentative observations on the way the disputants interact you may help them become more aware of their actions and better able to recognize when their dialogue is becoming unproductive. In short, through your observations they may recognize some of their destructive communication habits and learn that there are more productive ways to interact. If they continue to relate to each other in the future, this knowledge will be extremely useful.

Caution!

In some situations and relationships these strategies are not suitable, and in fact they might backfire. It is in the cases where personal reconciliation is both possible and desirable that sensitizing people to their emotional responses to each other is most useful. Even when the use of such observations seems appropriate it is important to offer them naturally and sensitively. Experience and training in such settings as role plays helps the mediators to develop effective use of these skills.

4.6 BUILDING AN AGREEMENT

4.6.1 Finding Creative Solutions

Despite your best initiatives, however, the disputants may fail to find a mutual solution or agreement. They may become so entrenched in their positions that they cannot see any alternatives. Or they may want desperately to settle, but they may be unwilling to suggest something new because to do so would mean losing face because of their previous hard-line positions. In either case there can be a place for a careful, well-timed suggestion from the mediator.

Suggestions should always be offered tentatively so that either party is free to accept or reject them without feeling threatened or losing face. "What if..." "I'm wondering if perhaps we could look at..." "Might it be worth considering..." and similar phrases help to keep suggestions tentative and flexible.

One should be careful about making too many suggestions, however. It is important that the disputants continue to try to come up with solutions. Keep asking them for suggestions or solutions. One way to stimulate their creative thinking might be to say that neither will be allowed to criticize the other's plan unless he comes up with an alternative suggestion.

Never appear more eager for a settlement than the parties themselves.

Listening Between the Words

Listen for clues that may convey what the parties really want or need out of mediation. Watch for signals of compromise and cooperation on each side. The parties usually don't offer outright to agree with each other, but offers of "deals" often slip out without fanfare[5]. Remember that in negotiation "no" often means "maybe," and "maybe" means "try me again."

When the mediator decides that all the issues and points of conflict have been adequately raised and dealt with, he shifts the process towards roughing out an agreement. This shift may take some effort. For example, the mediator might say, "There are numerous items both of you have mentioned during this discussion. Perhaps now we could look at the points that have been raised and try to work them into some type of agreement. John, I heard you say that you would be willing to consider..."

Watch for Hesitation

As well as listening for conciliatory remarks, it is important to be alert to signs of hesitation when an agreement is being formed. One potential risk in making an agreement is that the disputants become so conciliatory that they ignore or neglect to mention some aspect of the problem. Are they agreeing too quickly? Do they seem unsure as to whether the agreement will work? If so, there may be more issues or feelings that should be brought up

and hammered out. Agreement and reconciliation will be short-lived if problems have been just smoothed over or not addressed at all.

4.6.2 Writing the Agreement

Draw up an outline of an agreement including points that the parties have suggested. This is a critical stage in the process and one where many mediations that appear headed for settlement erupt into new battles. Whenever possible use the exact words of the parties in drafting the agreement. Change them only when necesssary for clarity. A good agreement should be perfectly clear to someone who was not involved in the mediation, such as a spouse, lawyer, or judge. (See sample agreements.) Avoid the temptation to hurry through this stage when everyone is exhausted and aching to go home.

Exact words

Clarity
- **Use names**
- **Dates**
- **Amounts**
- **Times**

Use names rather than pronouns to prevent confusion. (Avoid, "Jones will pay Brown $75.00 in a meeting at *his* house.") Make sure that dates and amounts are written out in full and times are specified for something to be completed or delivered.

Be careful to use language in the agreement that does not imply blame or guilt. For example, Frank wants George to pay the cost of having his coat fixed after it was ripped in a fight. If George agrees to pay for the repair, the agreement could read like this:

> George agrees to pay for the repair of the right arm of Frank's coat to a cost not to exceed thirty dollars ($30.00). The receipt for the repair work will be brought to the follow-up meeting at the mediation center on March 5, 1982, and the money will be exchanged at that time.

This example indicates two things about the written agreement. Even though George is willing to pay for Frank's coat repairs, implying that he is responsible for the damage, the pre-trial agreement *never includes an outright admission of guilt* such as "George admits to ripping Frank's coat." Such an admission of guilt is of little value in a mediation agreement. It could be hard to obtain, and more importantly, in trying to force such an admission one could sabotage efforts for a general agreement. Mediation is not trying to find guilt but rather to find solutions for problems.

Avoid blame or guilt

Particularly in pre-trial mediation there is a possibility of future court action, and even though the mediation process is confidential the agreement itself could be used in court. Therefore, the mediation agreement should be clear and concise, but should not include any direct admission of guilt. With a post-trial situation, however, such an admission may be appropriate since a conviction or finding of guilt has already been registered. These differences are illustrated in the sample agreements in Appendix A.

When a consensus is reached, the mediator either types or rewrites the agreement in final form. Copies are distributed to all parties and double checked for accuracy and completeness before signing. Each copy of the agreement can be signed by all parties present so that everyone can keep a copy.

Double check

Sometimes it is essential to have consent of an absent person (such as a lawyer or spouse) and they cannot be contacted for their approval. It may be necessary to initial the copies and return a signed copy later.

4.6.3 No Agreement Reached

If no agreement is reached after exploring all the possible alternatives and methods, this result must be accepted. Not all disputes will end in an agreement.

When there is no agreement the mediators can exercise a couple of options. They can suggest another meeting. This is most appropriate when both parties have something to work on in the interim (checking out cost of repairs, consulting with lawyers, etc.) The meeting should finish with a clear statement of what will be discussed at the next session.

If this is not possible or the mediators conclude along with the disputants that no agreement is likely, the mediators should end the meeting with a summary statement, including the following points:

1. Remind the parties of the confidentiality of the mediation session and (if appropriate) that the mediators will not willingly testify in court.
2. Affirm the parties for making the effort to resolve the dispute.
3. Explain what the mediation service will do with the case (e. g., send it back to the referring agency) or possible actions that the parties can take.
4. Offer the services of the mediation center in any future conflict situation.

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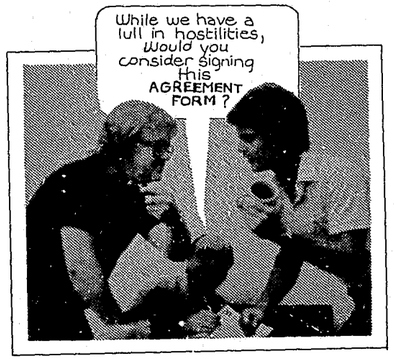
3. Explain what the mediation service will do with the case (e. g., send it back to the referring agency) or possible actions that the parties can take.
4. Offer the services of the mediation center in any future conflict situation.



4.7 REVIEWING THE PROCESS

Regardless of the outcome of the case it offers you a valuable opportunity to learn from it. Reviewing what happened in the meeting is an essential part of the mediation. Try to get beyond the "I wish I had tried to..." stage and think systematically about the entire process:

1. Why did the parties come to mediation?

2. What were the basic issues for each person? Were they able to express them openly?

3. What were the critical points or break-throughs in the meeting? Why did they happen?

4. If there was a pair of mediators, how well did they work together? How can the teamwork be improved?

Obviously this review process is more fun (and perhaps more threatening) when two people are involved, but even when you are alone it is still important. Don't cut it short even though you are exhausted.

Learn from your experience

4.8 A FINAL NOTE

This manual outlines ideas for mediating effectively in a variety of situations. It will be most helpful when it is combined with direct training that includes discussion, practice exercises, role plays, and opportunities for feedback.

The amount of information in this manual may seem at first to be too much to remember. Take heart! It isn't as complicated as it seems. The most important thing is to *get involved.* All mediators experience anxiety over their first few cases. Remember that the other people in the meeting are probably more anxious than you are. Also take comfort in the fact that with experience the anxiety about what to say or do decreases. As with so many other things, experience is a valued teacher. We do not become mediators; we are always becoming better mediators.

Notes

[1] Roger Fisher, "Fractionating Conflict." In R. Fisher (Ed.), *International Conflict and the Behavioral Sciences: The Craigville Papers.* New York: Basic Books, 1964.

[2] Barbara Stanford, *Peacemaking: A Guide to Conflict Resolution for Individuals, Groups, and Nations.* New York: Bantam Books, 1976, p. 88.

[3] Richard E. Walton, *Interpersonal Peacemaking: Confrontations and Third-Party Consultation.* Reading, MA: Addison-Wesley, 1969.

[4] Richard A. Salem, "Outside Intervention in Community Dispute Resolution." *Peace and Change,* Summer, 1982.

[5] Ronald Kraybill, *Repairing the Breach: Ministering in Community Conflict.* Scottdale, PA: Herald Press, 1982.

Appendix A

SAMPLE AGREEMENTS

Sample: Pre-trial

AGREEMENT

THIS AGREEMENT, entered into this 28th day of November, 19__.

BETWEEN: Name: Ken and Mary Miller

Address: 241 Main Street, Anywhere

- and -

Name: Carolyn Brown

Address: 243 Main Street, Anywhere

WITNESSES that, in consideration of the mutual covenants herein contained, the parties agree as follows:

1. Billy Miller will apologize to Bobby Brown and Bobby apologize to Billy.

2. Mrs. Brown will speak to Billy about not swearing in Mr. Miller's presence.

3. Instead of talking with each other's children when problems arise, both parties agree that they will speak directly to each other. In case Mrs. Brown is not home, her parents can be contacted.

4. Mediator will call both parties by the 15th of December to see how things are going.

The parties agree that in the event they have future difficulties with this agreement, or with one another, they will contact COMMUNITY MEDIATION SERVICE before taking any other steps to enforce their rights under this agreement, or under any statue.

WITNESS:) _____

) _____

) _____

AGREEMENT

THIS AGREEMENT, entered into this 17th day of December ,19__

BETWEEN: Name: Larry and Susan Williams

Address: 112 Maple Street, Anywhere

- and -

Name: Elaine Johnson

Address: 2481 Country Lane, Anywhere

WITNESSES that, in consideration of the mutual covenants herein contained, the parties agree as follows:

1. Mrs. Johnson agrees to deliver to Mr. and Mrs. Williams a two-burner hotplate, a sofa and chair cover and a half-moon table.

2. Mr. and Mrs. Williams agree to pay $500 for back rent and $100 for property repairs. This amount will be paid in installments of $100 per month for six months, with the first payment due on Jamuary 14, 19__, and subsequent payments on the 14th of each month. If the payments are late, 12% annual interest will be charged on the total amount remaining unpaid. The money will be paid to the Community Mediation Service in money order or certified cheque to then be picked up at the office by Mrs. Johnson. (If payment is late the full amount becomes due and payable immediately.)

3. Both parties are in agreement that the interests of justice would be served by the dismissal of criminal proceedings, and authorize the Community Mediation Service to address the Crown Attorney on their behalf for the withdrawal of any relevant charges.

The parties agree that in the event they have future difficulties with this agreement or with one another, they will contact COMMUNITY MEDIATION SERVICE before taking any other steps to enforce their rights under this agreement, or under any statute.

WITNESS:)
)
) _____
)
)
) _____
)
)
) _____

STATEMENT OF AGREEMENT

BETWEEN

Bill Jones and Bruce Smythe

1. Following is the agreement reached:
   (a) About what happened
   (b) What is to be done about it

On three occasions Mr. Jones was involved in breaking into Mr. Smythe's sports store. The total loss to Mr. Smythe was $2 359.35. Mr. Smythe's after-insurance loss amounted to $750 on the three break-ins. Since Mr. Jones was accompanied by two other men, he has agreed to pay Mr. Smythe one-third of after-insurance loss, that is, $250.

2. If agreement involved work done for victim, it will be _____ hours per week/month and performed for:

   NAME: _____

   ADDRESS: _____ TELEPHONE: _____

3. If agreement involves monetary payment, it is at the rate of $10.00 per week/~~month~~ and is payable to:

   NAME: Mr. Bruce Smythe

   ADDRESS: 37 Zenith Street, Anywhere TELEPHONE: 498-6329

4. Agreement to be completed by (date): May 1, 19__

5. SIGNATURES _____ DATE: _____

   _____ DATE: _____

   _____ DATE: _____

STATEMENT OF AGREEMENT

BETWEEN

Michael Stacey AND George Herriott

1. Following is the agreement reached:
   (a) about what happened
   (b) what is to be done about it.

Michael Stacey admits entering George Herriott's home by forcing open the garage door. Damage to the door was slight. Upon entering the house, Mr. Stacey had some second thoughts and decided to leave without taking anything. Mr. Herriott has not been aware of anything having disappeared.

Mr. Herriott does not require any financial restitution but feels that Michael should make amends for his crime. Mr. Herriott has asked that Michael donate fifteen hours of his time to the March of Dimes campaign. Mr. Stacey is agreeable to this.

2. If agreement involved work done for the victim, it will be 15 hours performed for:

   NAME: March of Dimes

   ADDRESS: 27 Market Street, Anywhere TELEPHONE: 578-3453

3. If agreement involves monetary payment, it is at the rate of $_____ per week/month and is payable to:

   NAME: _____

   ADDRESS: _____ TELEPHONE: _____

4. Agreement to be completed by (date) November 6, 19__

5. SIGNATURES: _____ DATE: _____

   _____ DATE: _____

   _____ DATE: _____

Appendix B

SELECTED RESOURCES

American Bar Association. Special Committee on Alternative Means of Dispute Resolution. *Dispute Resolution Program 1983 Directory.* (1800 M Street, N.W., Washington, D.C. 20036), 1983.

Aspler, Carl. *Restitution & Mediation in Corrections.* Scarborough, Ont.: Community Support Services Branch, Ontario Ministry of Correctional Services.

Beer, Jennifer, Eileen Stief, and Charles Walker. *Peacemaking in Your Neighborhood: Mediator's Handbook.* Mimeo, 1982. (Available from Friends Suburban Project, Box 462, Concordville, PA 19331. $6.00)

Buzzard, Lynn Robert and Ron Kraybill. *Mediation: A Reader.* Christian Legal Society, (P.O. Box 2069, Oak Park, IL 60303), 1980.

Florida State Courts Administrator. *Citizen Dispute Settlement Guideline Manual.* (Available through office of State Courts Administrator, Supreme Court Building, Tallahassee, FL 32304)

Harley, Kathryn A. *Program Guide: Victim-Offender Reconciliation Program and Community Mediation Service.* Mimeo, 1981. (Available from Community Justice Resource Centre, 27 Roy Street, Kitchener, Ontario N2H 4B4. $2.00)

Kraybill, Ronald. *Repairing the Breach: Ministering in Community Conflict.* Scottdale, PA: Herald Press, 1982.

Nierenberg, Gerard I. *Fundamentals of Negotiating.* New York: Hawthorn/Dutton, 1973.

Peace and Change. Vol. *8,* No. 2/3, Summer 1982: Special Issue, "Conflict Resolution." (Available from Center for Peaceful Change, Kent State University, Kent, Ohio 44242. $8.00)

Sander, Frank E. A. and Frederick E. Snyder. *Alternative Methods of Dispute Settlement: A Selected Bibiliography.* American Bar Association (1800 M Street, N.W.), Washington, D.C., 1979.

Stulberg, Joseph B. *Citizen Dispute Settlement: A Mediator's Manual.* Mimeo, 1981. (Available from office of State Courts Administrator, Supreme Court Building, Tallahassee, Florida, 32304.)

Zehr, Howard and Kathy Makinen. *Victim-Offender Reconciliation Program Volunteer Handbook.* (Elkhart County PACT, 115 1/2 West Cleveland Avenue, Elkhart, IN 46514), 1980.

Zehr, Howard. *Mediating the Victim-Offender Conflict.* (Elkhart County PACT, 115 1/2 West Cleveland Avenue, Elkhart, IN 46514).

* * * *

For general information, materials about specific programs, and suggestions for training resources and audio-visual aids, contact:

American Bar Association
Special Committee on Alternative Means of Dispute Resolution
1800 M Street, N.W.
Washington, D.C. 20036
(202) 331-2258

Community Justice Resource Centre
27 Roy Street
Kitchener, Ontario N2H 4B4
(519) 744-6549

Appendix C

LEGAL ISSUES IN PRE-TRIAL MEDIATION

OUTLINE

1. Introduction
2. Civil Law and Criminal Law
3. Confidentiality
4. Enforcing Mediated Agreements
5. Due Process
6. Unauthorized Practice of Law
7. Limitation Periods

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APPENDIX C

LEGAL CONSIDERATIONS IN PRE-TRIAL MEDIATION*

By Patrice A. Reitzel and Dean E. Peachey

I. INTRODUCTION

Mediation that takes place before trial or as an alternative to the courts raises a variety of legal issues. Are mediated agreements legally binding? Can one party enforce the agreement if it is violated by other party? Is what happens in mediation really confidential or could the mediator be subpoenaed as a witness in the case if it goes to court? Does mediation violate due process? How does a mediator differ from a lawyer? Could a mediator be accused of unauthorized practice of law?

These are questions that concern mediators, disputants, and the legal system. A mediator need not be a legal expert, but it is important to be aware of the issues that can arise. We will begin by describing the relationship between civil and criminal law. The four issues raised above --enforceability of mediated agreements, confidentiality, unauthorized practice of law, and due process--will then be discussed.** The appendix concludes with a brief note on limitation periods.

2. CIVIL LAW AND CRIMINAL LAW

The two main areas of law in Canada are criminal law and civil (non-

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*Steven Schmidt assisted with the research for this article. Ted Giesbrecht and Russell Harrocks provided comments on the manuscript.

**This appendix contains only a general exploration of these four issues. It is not a complete statement of the law and should not be viewed as providing advice on how to deal with specific legal issues arising from the practice of mediation. Most of the material presented here concerns procedure. To obtain answers to questions about the actual content of the law, it is best to consult a lawyer. This appendix is a guide only and the authors will not be responsible for any loss or damage caused by reliance on any statement made in this material.

criminal) law. Civil law governs the relations between individuals, while criminal law deals with conduct which is viewed as being harmful to the society as a whole.

Civil law attempts to restore the disputing parties to the position that they were in before the conflict arose. Restoration to their original position is at best an approximation and today usually involves paying money as compensation to the aggrieved party. (Parties here include corporations and other types of businesses, as well as private individuals.) Civil court actions commonly involve breaches of contracts, personal injury claims (Torts), divorce petitions and judicial review of decisions made by government agencies (Administrative Law).

The focus of the criminal law is on protecting society by punishing, rehabilitating or deterring criminals. Restitution or restoring parties to their original positions is not emphasized or is left to the civil courts. Any fine or court costs recovered from the person found to be guilty goes to the State (Crown), not to the victim. A victim who wishes to receive financial compensation for the damage must initiate a claim in civil court after the criminal case is concluded. (Unless there is a victim-offender reconciliation or restitution program operating in the community.) There is also less choice for the victim in the criminal procedure. In civil cases, the plaintiff makes the decision to initiate proceedings. But in criminal matters, the police may decide to lay charges independent of the desires of the victim. The victim is then required to attend court as a witness for the Crown. A victim may also lay charges on her own. These are known as private complaints or private prosecutions, but in many jurisdictions it is still the Crown Attorney's decision as to whether these charges will be prosecuted.

Because of the different goals of the two areas of law, there are differing procedures and protections. Generally, the protection and the enforcement of procedures is greater in criminal cases because of the possibility of stringent penalties. Procedures and protections for someone accused of an offence are set out in the Criminal Code, whereas the protections of parties to civil proceedings arise more often from principles and rules of practice established by the courts over the years.

An example of the difference in protection is the burden of proof required in each area. In a civil case, the burden is on the plaintiff (claimant) to prove by evidence that the facts support her claim. The defendant will then present his side of the story. In order for the plaintiff to succeed, the judge must find that on a balance of probabilities the plaintiff's case is supported. In a criminal case on the other hand, the accused person is presumed innocent until guilt is proven beyond a reasonable doubt. The "burden" of proof in criminal matters is therefore heavier than in civil matters due to the greater likelihood of serious penalties, including the loss of liberty for a time.

There is a growing overlap between civil and criminal law. An increasing number of statutes (Acts of Parliament) concerned with civil law matters, such as those dealing with housing, environmental, or consumer issues, provide for prosecution and fines for failure to perform specific obligations. The actions (or failures to act) described in these civil statues are not criminal or immoral acts, at least, not in the traditional sense. In Canada, many of these areas are legislated by the provinces, and in Ontario, the Provincial Offences Act outlines a new procedure which is simpler than full criminal procedure for dealing with prosecutions concerning these matters of public interest.

As regulation of society continues to grow, so do the sanctions which lend force to the regulations. For this reason, as well as the perceived need to legislate in the public interest, we can expect to see more overlap between the civil and criminal areas of law. However, the law cannot make people do certain things or enter into certain types of relationships; it can only punish people if they do not do certain things or do not enter into certain types of relationships. For example, the law cannot make a tenant pay the rent and live harmoniously with fellow-tenants, but the law can evict a tenant who does not pay or who disturbs other people in the building.

It is not necessary in mediation to classify all conflict as criminal or civil. At times, this would be difficult to do. Problems between neighbours, for example, may start out as a property damage case (Civil law) and end up as an assault case (Criminal law). However, it helps

the mediator to have some understanding of the procedure the parties would go through if they chose to go to court.

3. CONFIDENTIALITY

Individuals fearing that something they say in a mediation session could be used against them in court will be very reluctant to talk freely and openly during the session. There are two aspects of the confidentiality issue:

a. Whether the disputants can have the discussions in a mediation excluded from court; and

b. Whether the mediator can be protected from subpoena to testify as a witness.

The law recognizes certain "privileges" that allow an individual to keep incriminating evidence out of court. There is a privilege of statements made by parties in furtherance of settlement. This privilege will exist if litigation is pending or contemplated. To take advantage of the privilege, both parties should have it in writing that any communication made between them is in furtherance of settlement and is intended to be confidential and made without prejudice. This privilege is extended to either party to the dispute but not to the mediator. If both parties waive that privilege at trial and intend to testify as to what was said during the mediation session, the mediator cannot protect the integrity of the mediation process by claiming a privilege.

As a practical matter, mediators are not likely to be called as witnesses since the mediator's testimony would be excluded as hearsay evidence. Hearsay is second-hand evidence. It is what the witness says he heard another say, and such evidence is generally not accepted in court. An important exception to this general rule occurs when someone hears another person admit guilt or liability.

The real issue facing the mediator then is being subpoenaed as a witness to a confession someone made in mediation. At this time there is no blanket privilege extended to mediators. Such protection is rare. There is a solicitor-client privilege that allows a party to exclude from evidence any communication made between client and lawyer when there is

litigation pending or contemplated. A matrimonial privilege also allows spouses to refuse to testify against one another in all but a few specific instances (e.g., a rape trial). The courts have consistently refused to give similar privilege to statements made between doctor and patient, priest and penitent, or journalist and informant.*

The Divorce Act of Canada (Section 21) states that any admission or communication made in an endeavour to assist parties to a marriage to reconcile is not admissible in legal proceedings. This section also protects family counsellors and potentially family mediators from being subpoenaed to court later.

The Crown Attorney's office at the local level may acknowledge the value of the mediation program, and agree not to subpoena witnesses in criminal proceedings. A good practical protection for a mediation program is to establish a strong relationship with the Crown Attorney that will yield an informal agreement of this type. Of course, the Crown is not required to do this, and should the Crown decide to subpoena any mediator, it will be of no avail to claim that mediators should not be required to testify because previous informal policy allowed them not to.

Finally, it is encouraging to note that certain statutes are now allowing for communications in a mediation to be privileged in specific instances. The Children's Law Reform Amendment Act now allows (Section 38) for communications made in a mediation prescribed under that Act to be privileged unless all parties to the proceeding consent to waive the privilege.

4. ENFORCING MEDIATED AGREEMENTS

Is a mediated agreement binding on all parties? If one party does

*While they deny the existence of such privileges, the judges often exclude certain evidence on grounds of public policy. In 1976, the Supreme Court of Canada said in Slavulych v. Baker (1976)1 S.C.R. 254, that confidentiality was essential for the full and satisfactory maintenance of the relations between the parties, and the injury caused by the disclosure would be greater than the public good obtained by full disclosure. It remains to be seen whether such a general privilege will be recognized in the future.

not live up to the agreement, can the other person enforce the agreement? In some situations the enforceability of the agreement will not be a major concern. But when it is, the key to enforceability is whether the agreement constitutes a contract, which can then be enforced in the civil courts such as Small Claims Court or County Court.

A contract is an agreement between two or more parties which is intended by the parties to be enforceable in the courts. The essential elements of a contract are:

a. An offer by one party

b. An acceptance by the other party

c. Consideration - the parties mutually confer benefits on each other

d. Consensus

Consideration

A contract is seen as a type of bargain. A contractual promise is binding only if another promise is given in return by the other party. For example, A offers a piece of land which B accepts and pays money to acquire. Here the money in exchange for the land is the consideration. Or A (a tenant) might offer to do some repair work in her apartment and B (the landlord) could accept this and agree to deduct some money off the rent in consideration of the time and supplies the tenant uses. An example of mutually beneficial acts might be that A (neighbour) agrees to turn his music down after 10:00 p.m. and in return B agrees not to mow her lawn before 8:00 a.m. All of these agreements are potentially valid contracts. But since civil courts deal mainly with monetary compensation, even a mediated agreement that is a valid contract can be difficult to enforce when it concerns non-monetary issues. Therefore, the last example would be difficult to compensate for or enforce.

Chapter 4 includes the following agreement:

> George agrees to pay for the repair of the right arm of Frank's coat to a cost not to exceed thirty dollars ($30.00). The receipt for the repair work will be brought to the follow-up meeting at the mediation centre on March 5, 1982, and the money will be exchanged at that time.

This is a clear agreement, but in a legal sense it is not a contract because it lacks consideration. There is no promise or benefit being given to the party agreeing to repair the coat, unless it is implied that the owner of the coat then promises not to sue in court concerning the coat. In the context of mediated agreements, it is questionable whether a final release from further liability can be negotiated or enforced. If a party later feels that he or she wants a court to look into the matter, that person would probably be allowed to initiate proceedings. (In cases that only involve property damage, a final release in a mediated agreement would be given more credence than a final release from personal injury claim.)

Agreements may be made enforceable, even though they lack consideration, as contracts under seal. Some formal legal documents either have the seal printed on the form, or have a small gummed red wafer attached to the form before it is signed by the parties. By using a contract under seal, the parties are relying on an age-old prescribed formula rather than on any kind of mutual agreement. It is a rigid, formal way of making a document binding on those signing it. All agreements reached as a result of mediation could be made legally enforceable by making them contracts under seal but it must be remembered that the formal and binding nature of such documents may discourage the open participation of the parties in the mediation.

Consensus

The fouth essential element of a contract is consensus. In contractual terms, this means that both parties must be clear about the subject they are discussing - they must not be agreeing to two different things. A precise understanding of what one is agreeing to can only be obtained by clear communication and should be reflected in a concise, specifically-worded contract. All specifics agreed to should be put in writing, including dates, times and limits for payment or other specific action. If there is fraud or misrepresentation by one party in the mediation, the other party will not be bound by the contract. More often, however, there is mistaken belief as to what was agreed to. Different types of mistaken belief (known as "mistake" in legal terms) determine whether the contract is binding or not. In order to avoid

mistake, full and honest communication should be encouraged by the mediator. An agreement that both parties understand and intend to abide by is more important over all than creating a contract enforceable in court which is not understood and is not accompanied by the voluntary goodwill of the parties.

In conclusion, most mediated agreements will be seen as contracts if there is a mutual exchange of beneficial promises. If there is no mutuality, the agreement could be made enforceable by the use of a seal. In some situations the contract would be difficult to enforce because of the kinds of promises made in it. The goal of the mediator should be to try to make it an enforceable agreement, if possible. However, an agreement concerning future behaviour is only as effective as the goodwill of the parties allows it to be. Good communication and understanding of each other's position before signing the agreement avoid problems afterwards. If an agreement will be very difficult to enforce, this could be pointed out to the parties by the mediator.

5. DUE PROCESS

"Due Process" has been the subject of much American litigation because of its presence in the American Constitution. The term was also used in the Canadian Bill of Rights but it is not found in the new Canadian Constitution. In its place we find a somewhat broader term, "the principles of fundamental justice" (Clause 7).

While "due process" is widely used, its meaning is elusive. Due process involves the idea of the right of a person to have access to the court and all of its procedures. Everyone is entitled to the protection of "due process of the law." Among these procedural protections are:

a. The right to receive notice of an intention to make a decision that could affect one's rights;

b. The right to an impartial decision maker;

c. The right to present one's side of the case, known as the right to be heard.

The right to be heard has been greatly elaborated on by Canadian legislatures and courts and many other procedural protections have

evolved from it. For instance, the right to be heard may include the right to have a lawyer as an aid in presenting one's case.

These due process rights relate to <u>any forum</u> where a decision affecting an individual's rights or personal liberties can be made. They therefore apply to the growing number of administrative and regulatory tribunals. The onus is on the decision-maker to ensure that procedural protections are enforced. The court can always review decisions if the party whose rights are affected claims due process protections were not observed.

The difference between mediation and arbitration becomes critical here. In arbitration, the arbitrator makes the final decision or at least plays a major role in making it. A mediator, on the other hand, does not make the decision. The parties themselves decide what, if any, agreement will be reached. For the third party to impose a decision within the present system would breach the due process requirements of the Charter of Rights and Freedoms and threaten the validity of any agreements reached in the mediation. Consequently, the mediator should be sure to stress the voluntary nature of the program to the participants. And while it may be proper to remind the parties of the value of resolving the dispute, the mediator should avoid giving the impression of pressuring the parties for agreement on any given point.

Just as the mediator may not coerce the parties to an agreement, it is also illegal for either of the parties in a mediation to coerce the other by threat. Section 305 of the Criminal Code of Canada provides that anyone who:

a. with intention of gaining something

b. threatens or uses violence

c. in order to get another person, against their will, to do something in particular that they want done

d. without having a justifiable excuse* to do so, is guilty of of extortion.

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*A "justifiable excuse" is not defined in the Criminal Code, but would include, for example, a parent's threat to punish a child unless...

Section 305 adds, however, that a threat to start a civil claim does not apply to this section of the Criminal Code.

Thus, it is legal to threaten someone with civil suit, but not to say, "If you don't pay for my broken teeth, I'm going to charge you with assault" (a criminal charge). Programs that provide pre-trial mediation in criminal (or potentially criminal) situations need to be careful that individuals are not pressured into mediation by an explicit threat of criminal charges.

In the same way certain cautions should be observed when dealing with cases where charges have already been laid. Avoid writing the agreement in a form where "Smith agrees to pay Jones $75 for dental bills. In return Jones will withdraw the charge of assault causing bodily harm against Smith." While the withdrawal of charges will be an important issue in this situation, the agreement should be worded more prudently. List the specific points to the agreement, and then include a final term such as the following:

> Both parties are in agreement that the interests of justice would be served by the dismissal of criminal proceedings, and authorize the Friendship Mediation Service to address the Crown Attorney on their behalf for the withdrawal of any relevant charges.

Whatever approach you use, check it first with the local judges and Crown.

In conclusion, the legal system's main concern with mediation is that the parties retain the opportunity for a formal trial and are protected from self-incrimination. The fact is that mediation is not the final resort of people in conflict. The courts, with all their formality and protections, are the people's last resort. If two people mediate an agreement, they can still go to court or go back to court if the agreement is not working.

Due process is a valued, but imperfect concept. It is interesting that the words "principles of fundamental justice" were chosen for use in the Charter of Rights and Freedoms. At times, due process, with its expensive and time-consuming process can be contrary to the principles of fundamental justice, as exemplified in the phrase, "Justice delayed is justice denied."

6. UNAUTHORIZED PRACTICE OF LAW

Could mediators be accused of practising law? This question concerns both mediators and the legal profession. The legal profession feels that only qualified lawyers can fully protect the rights of people involved in disputes. The profession argues that lawyers are subject to the control, regulation and discipline of the Law Society of each province. Other people, regardless of their personal or technical abilities, are not bound by the same professional responsibility and standard of care that apply to fully qualified members of the Law Society.

The following discussion is based on the legislation, cases, and the Law Society Rules of Professional Conduct of Ontario. It is important for readers in other provinces to check the equivalent legislation and case law relating to unauthorized practice in their province, or check with their province's professional body for lawyers.

In an Ontario case, a solicitor* was defined as someone who was employed to:

a. Conduct legal proceedings on behalf of another,

b. Give legal advice to others,

c. Prepare legal documents for others, and

d. Assist others in matters affecting legal rights or position (and, of course, was enrolled in the Law Society as a member.)

The main thrust of the definition is the acting for, advising, or representing one client in a legal matter. This definition fits in with the adversary process with its opposing sides.

Court cases about people acting as or representing themselves as solicitors contrary to Section 50 of Ontario's Law Society Act, generally concern individuals who have represented other people in court when they were not qualified to do so. Section 1 of The Solicitor's Act states that people who are not enrolled as a solicitor (with the Law Society) are incapable of recovering a fee for any representation they offer people in a court proceeding. Such a person is also guilty of contempt of the court in which the proceeding occurred. (There is provision, though, for someone to initiate a claim on their own behalf

*For all practical purposes, "lawyer," "solicitor," and "barrister" are terms that are used interchangeably in Ontario.

or defend themselves.) The section only mentions commencing, prosecuting, or defending court actions. It does not mention any of the other activities solicitors engage in which are closer to mediation-type activities, such as negotiation.

It would appear in Ontario, at least, that if one does not represent hemself or herself as a lawyer or as particularly skilled in the law, does not offer advice on legal matters, and does not actually represent individual clients before a court or tribunal, one is probably not in danger of being classified as engaging in unauthorized legal practice. There is a difference between legal advice and general legal information (about how the system works, for example.) Given the very different nature of mediation from traditional legal practice, there is probably little to worry about at this time. A mediator tries to be an impartial facilitator between two people trying to come to some agreement about a problem. A lawyer, on the other hand, is a "hired gun," the outspoken advocate for one party. The roles are very different. The mediator never represents one side of the story.

Anyone who is a lawyer but who is acting as a mediator must be clear about the differences in role between mediator and solicitor and must make it clear to the parties that he or she is acting as a mediator, not as a lawyer.

7. LIMITATION PERIODS - A WARNING NOTE

If mediation fails to produce an agreement, and someone wants to take the case to court, there are a variety of time limits for beginning court action. These time limits are called limitation periods. For example, if someone wants to lay a charge of common assault, they must do so within six months after the date of the assault or they lose their right to complain. This is set down in the Criminal Code of Canada under the procedure relating to summary conviction offences.

There are also time limits in provincial statutes. The Highway Trafic Act of Ontario states that in order to recover in court for personal injury or property damage arising from a motor vehicle accident,

the court action must be started within two years of the date of the accident. The rationale for the two year limit is to allow the case to be tried before the memory of the facts fades too much.

Unfortunately, there is little organization or consistency among various limitation periods set out in provincial statutes. Each Act has its own rules. There is a reform movement afoot to standardize these time limits to a greater degree, but there is no legislation yet to do this. If in doubt, call a lawyer or legal clinic.

There are many other time limits involved in litigation as well, such as a certain period of time within which to pay rent arrears or file a dispute. Once into the court process, lawyers and their staff must scrupulously follow time guidelines. For mediation purposes, however, the most significant time limits to know about concern the commencement of an action, in case one party decides they would rather pursue their cause in court. It is difficult to commence a claim after the time limit has passed unless one can give a good reason why the action was not started within the proper time period.

END