

Development as a Mediator

Unconscious Incompetence	Unconscious Competence
Conscious Incompetence	Conscious Competence

Adapted from Presentation of Bernard Mayer at Academy of Family Mediator's Forum, 1997

Table 1. Advocates' views of reasons for mediator success: average across all advocates and all mediators.

Description	Average %
Confidence-Building Attributes	
Friendly, empathic, likeable, relates to all, respectful, conveys sense of caring, wants to find solutions.	60%
High integrity, honest, neutral, trustworthy, respects/guards confidences, non-judgmental, credible, professional	53%
Smart, quick study, educates self on dispute, well-prepared, knows contract/law	47%
Process Skills	
Patient, persistent, never quits.	35%
Asks good questions, listens carefully to responses	28%
Diplomatic; makes sides feel they are winning; softens the blows of bad news; makes suggestions tactfully	21%
Proposes solutions, creative	18%
Candid, firm as necessary (other than in pointing out legal/contractual strength/weakness)	17%
Keeps parties focused on issues, manages issue ordering	16%
Understands people, relational dynamics	13%
Calm, deliberate	12%
Flexible, capable of varying process to fit situation	10%
Understands organizational culture(s)	9%
Good sense of timing, knows when to set deadlines/apply pressure	8%
Uses humor	8%
Allows venting, manages emotion	8%
Reframes issues	7%
Confident, optimistic	5%
Persuasive	2%
Evaluative Skills	
Does useful reality testing regarding legal/contractual weaknesses, evaluates likely outcome in court/arbitration; candid regarding same.	33%

Stephen Goldberg and Margaret Shaw
The Secrets of Successful (and Unsuccessful Mediators) Studies II and III
 Negotiation Journal Vol. 23

Table 3: Advocates' Views of Reasons for Mediator Failure

Description	Percentage of Advocates (96)
Lack of Confidence-Building Attributes	
Lack of integrity, not neutral, disclosed confidential information, failed to accurately convey position, inconsistent evaluations, interested in settlement at all costs, too quick to reach conclusions.	48%
Self-absorbed, self-important, not empathic, not respectful, didn't care, not interested, didn't listen	20%
Didn't understand issues/applicable law, not well-prepared	16%
Lack of Process Skills	
Not firm/forceful, just went through the motions, just delivered messages	24%
Lack of patience/persistence, quits too easily	11%
Not flexible in approach, had his/her approach and would not vary to fit situation	7%
Failed to propose solutions, not creative	3%
Did not keep the parties focused	2%
Poor sense of timing, didn't know when to push/when to back off	2%
Lack of Evaluation Skills	
Faulty/no evaluation	7%

MEMORANDUM

To: Woody Mosten
From: Steve Goldberg
Subject: Feedback: Mediator Study
Date: June 19, 2007

Dear Woody,

I have enclosed a copy of The Secrets of Successful (and Unsuccessful) Mediators. Studies II and III, 23 *Negotiation Journal* (forthcoming), which is the article that Margaret Shaw and I wrote based upon the data we collected from the mediation advocates whose names you and other mediators sent us. While the article reports aggregate data, and no individual mediator is identified, I thought that you would be interested in the following information that we gleaned from the 10 advocates who commented on the reasons for your success as a mediator.

1. Your strong point, as identified by the responding advocates, was your process skills.
2. You received many rave reviews. I have selected excerpts from some of them:
 - I would say that Woody is extremely patient and kind. He gives all parties and clients the opportunity to tell their story -- to say everything they need to say, because they *need* to get their problems off their chest -- no matter how boring or inconsequential. . . . He is tireless at listening to whatever needs to be said. As great as that is, he has all the right tools at his fingertips -- and he uses them.
 - I think the best quality that Woody possesses is his ability to allow each person the time to share their view and feelings regarding the situation at hand. He doesn't allow people to go on for hours and hours and hours, but he lets all parties express their views -- no matter how far off, or how far removed from reality, or when the views will have nothing to do with final considerations in the case ultimately. He never says or acts as if you're way off. . . . He has a calming and peaceful demeanor. Each client who's there feels comfortable. He creates a safe zone. . . He's creative; always looking for alternatives outside the box.

- Woody has an incredible amount of patience. But, he also *really* lets parties' know when it's time to move.
- He's a great listener; he's very creative, very good at getting to the real interests of the parties. He's good at initially establishing a range of options that suit peoples' real interests. He's also very good at keeping people positive and on track.
- He has a really good understanding of the limitations of what the adversarial process can accomplish. . . Woody tries to get away from the language of rights and focuses more on a realistic plan, (e.g., what can this process give you that the adversarial legal system cannot give you?)

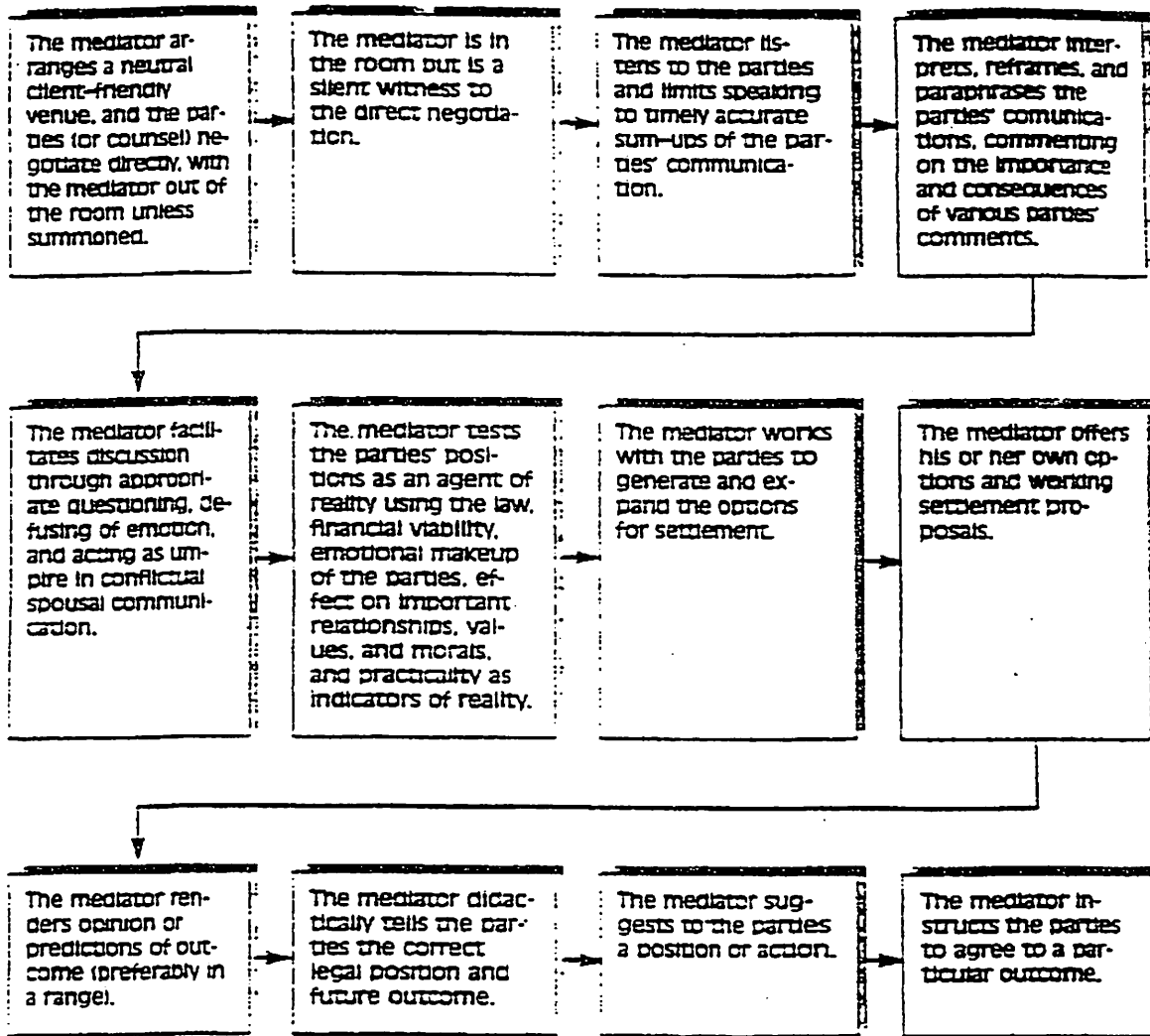
Woody is keen on keeping people talking, humanizing each case a little, getting people over the *real angry zone*, and getting people to a more practical solution and mode of communication. . . He pushes for the compromise and establishing ongoing communication systems.

- Woody has:
 1. A sincere regard for others and a sincere interest in their problems.
 2. A soft and rich voice which conveys empathy.
 3. A comfort with the skills needed for mediation, honed over years of experience
 4. A wisdom of one who knows his craft well. Who has acquired the wisdom to know when one approach is not working and to try another tactic, the wisdom of knowing that the anger being expressed by one of the parties is actually pain, the wisdom of knowing how much might be accomplished and what is not possible.
- I guess patience is number one. He's a very good listener, and he's also creative about coming up with ideas on how to resolve a problem. . . He basically depends on the law (in an evaluative sense) to let people know what their rights are, and to let them know what they may be giving up if they do X instead of Y). . . I think he is fair and instills trust. He doesn't have partiality to any gender.
- He is exceptional at diffusing "hot button" issues and keeping parties on track. He does this with interest based techniques that show parties that there is a common goal. He re-frames positions that parties take so that they will listen to ideas instead of shutting down. He is exceptional at diffusing "hot button" issues and keeping parties on track. He does this with interest based techniques that show parties that there is a common goal. He re-frames positions that parties take so that they will listen to ideas instead of shutting down.

- First of all he's intelligent. he knows the law. he knows the personalities involved – the attorneys, judges, the “players”) and he knows the downside of using the court system. . . He's not shy about telling the parties the difficulties in using the court system and lauding the benefits you reap from mediation – in that very nice way that only Woody can do. For me he has taken some very difficult cases and made them work beautifully. He creates situations where the parties can live better without tearing up the estate. He thinks outside the box. With mediation you can do so much more that you can do in court.

Pretty impressive if you ask me!

Thanks once again, from both Margaret and me, for your cooperation.



Some lawyer/mediators will cover the entire range of involvement during a mediation, even in negotiating a single issue. Others will consciously plan and execute their interventions on one end of the continuum or the other. While it might be assumed that a mediator would generally start passive and work up to more and more involvement as needed, there is no universal pattern. For example, very experienced mediators who are also tough litigators might not have the patience for the passive role and also might sincerely believe they are saving the parties dollars and angst by moving quickly to the bottom line. Yet other mediators, also with litigation experience, might be dedicated to not interfering with the consulting lawyers' handling of the case and therefore might be steadfastly nondirective and not increase involvement even to avert an impasse.

STRATEGIC MEDIATION

Use of Theory in Mediation

Importance of Understanding Theory

In this training, you will learn specific techniques as well as analysis of important mediation theory. Many trainings focus primarily on teaching specific procedures, which can be very helpful. It is generally easier to learn to follow specific procedures than to understand theories and apply them. It can be disorienting simply to follow procedures, however, without understanding the underlying theoretical premises. Practitioners can become disillusioned when they use recommended procedures and do not get the expected results.

It is worth the effort to learn, develop, and apply mediation theories. Given the variability of dispute situations, it can be tremendously empowering for practitioners to have many theories and diverse skills in one's "toolkit" to apply in different situations.

Use of Values, Theory, Strategy, and Interventions (Moves)

Throughout my trainings, I will urge us to be rigorous in applying these concepts. We will use a template developed by Donald Schoen in *The Reflective Practitioner* and applied to mediation by Lang and Taylor in *Making of a Mediator (2000)*. In brief, everything you do in this course can be analyzed in the following way:

Values---what are the underlying core life beliefs and values at stake in the mediation?

Theory---What concepts and unifying theories will permit the values to be carried out at the mediation table and give meaning to the strategies and moves?

Strategies—Models and Approaches—What are the goals of a specific task and desired outcomes? What is your approach (developed by you or borrowed from others) to get the job done?

Interventions (Moves)--What do you actually do? What do you say, what actions do you take to accomplish the goals of your strategies?

You can use this template in many ways. You can start with values and work down to moves. Or you can look at what you did and think through the strategies, theories, and values behind your words or actions.

This is the key to thinking like a mediator—but it is not easy. Training participants are often frustrated in being able to focus on each element of the template and relate each element to the others. We will practice this template from the first hour of training through our closing ceremony on the 5th day. We will look at each of the elements of the template and put them all together.

Once you get it—you will be able to use your mediator thinking in every aspect of your work as a peacemaker.

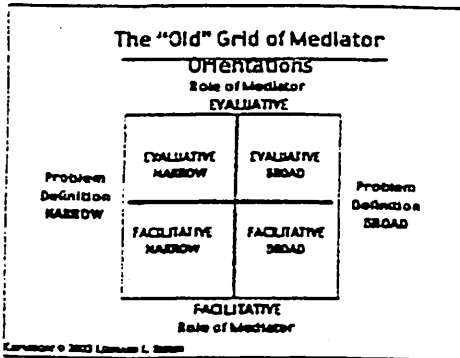


Who Decides What?

Rethinking the grid of mediator orientations

By Leonard L. Riskin

In 1994 and 1996, I published two articles that proposed a system for understanding mediators' orientations, strategies and techniques.¹ The system employed a grid composed of two continuums. One measured the role of the mediator; the terms evaluative and facilitative were its anchors. The other continuum had to do with the mediator's approach to problem definition, and it ran from narrow to broad. When I put these two continuums together, a grid appeared, and I posited that the quadrants showed mediator orientations: Evaluative/Narrow, Facilitative/Narrow, Evaluative/Broad and Facilitative/Broad.



This system of understanding mediators' approaches has been used widely in training, evaluating, regulating and choosing mediators. And it has affected the way many mediators conceptualize, and perhaps carry out, their roles. As a consequence, I developed a warm feeling of self-satisfaction. Then, about a

year and a half ago, Prof. Jennifer Brown invited me to revisit the grid and its uses in a talk at Yale Law School as part of the Quinnipiac-Yale Dispute Resolution Speaker Series. About 15 minutes after I agreed to do that, my complacency began to dissolve.

I quickly noticed a bundle of problems, weakness and limitations connected with the grid and the way people have used it. This brief article, which draws on a larger work in progress,

Looking back, I like to think about this confusion in terms of three gaps between mediation theory (descriptions of mediator practices in well-known writings and training programs that dealt with mediation outside the labor context) and mediation practice (what mediators actually did.) First, mediation theory held that mediators don't evaluate, make predictions about what would happen in court or tell parties what to do. In practice, however, many, many media-

A number of my friends and colleagues asserted that I did a disservice to the profession in saying that evaluation was an appropriate mediator activity.

describes the background and goals of the grid and some of the problems I recently have recognized. It also presents proposals—both for revising the grid and for replacing it.

Gaps of the past

In 1993, a large law firm in Kansas City invited me to prepare a training program for its lawyers and clients on how to participate in a mediation session. I realized that I could not adequately develop such a program without knowing what would happen in the mediation process. And I knew that, in Kansas City and across the United States and Canada, there was a vast and diverse array of processes called mediation. Yet there was no accepted system for distinguishing among the various approaches. As a result, there was great confusion about what mediation is and what it should be.

tors did all these things. Second, mediation theory posited that mediation was intended to address the parties' underlying interests or real needs, rather than or in addition to their legal claims. Quite commonly, however, mediations in civil disputes—especially those that were in the litigation process, or might be—were very narrow and very adversarial. The third disparity between theory and practice concerned self-determination. The experts touted mediation's potential for enhancing self-determination. Yet in practice, many mediation processes did not fulfill that promise.

These gaps between theory and practice produced a number of problems. To me, the most salient problem concerned evaluation. Sometimes parties went into a mediation thinking they were not going to get an evaluation, but got one nonetheless—without consenting to it or preparing for it. And sometimes the

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reverse happened: parties who thought they would get an evaluation, because they analogized mediation to some judicial settlement conferences, didn't get one. Similarly, parties who entered a mediation thinking it would focus either broadly or narrowly often were surprised to find the opposite focus. Moreover, some mediators gave short shrift to party self-determination by extensively controlling the focus and even the outcome.

For all these reasons, most conversations about mediation were suffused with ambiguity. In addition, many parties, potential parties, lawyers and mediators did not recognize the numerous choices about what would happen in a mediation and about who would make those decisions, either explicitly or implicitly.

The system I developed was designed to address these problems. It focused primarily on two of the gaps: evaluation by the mediator and problem definition, which was my vehicle for addressing the tendency of many commercial mediators to focus on positions, usually in the form of claims of legal

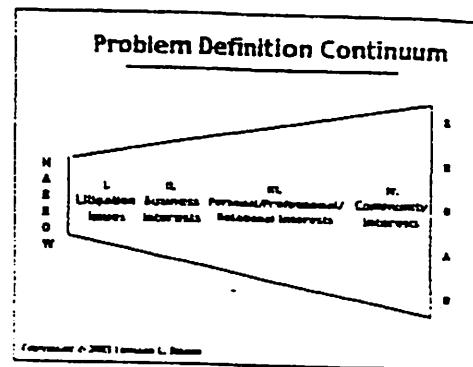
facilitative or evaluative—a practice that my writings may have encouraged. But the reality is much more complex. Many mediators both evaluate and facilitate—on the same issue, on different issues, simultaneously or at different times. In addition, even if a mediator intends to facilitate, others may interpret the behavior as an evaluation; in other words, there may be a gulf between the mediator's intent and the impact of his or her actions. Moreover, evaluation can be facilitative and facilitation can produce an evaluation. For all of these reasons, it is both problematic and difficult to label a particular move—let alone a mediator's approach or orientation—as either evaluative or facilitative.

Terminology. Because mediation is facilitated negotiation, facilitation is the essence of mediation. If facilitation is the essence of mediation and if evaluation is the opposite of facilitation, then evaluation would seem to rob mediation of its essence. Puzzling through this, I now appreciate Lela Love and Kim Kovach's

or impairs self-determination depends on the circumstances.

Problems with the "problem definition" continuum

There are two major problems with the problem definition continuum, which is depicted below.



First, I thought this continuum would describe the goals or focus of any approach to mediation. But proponents of some approaches, such as transformative and narrative mediation, probably disagree, believing that the grid applies only to mediation that they would call problem-solving—that is, designed to resolve a dispute.

Second, many commentators have ignored this continuum or confused or conflated it with the facilitative-evaluative/role of the mediator continuum. In asserting or assuming that a facilitative mediation will produce a broad problem definition, or that an evaluative mediation will employ a narrow problem definition, they ignore completely the Facilitative/Narrow or Evaluative/Broad approaches. In fact, however, some mediators who are very facilitative in helping parties work toward resolving the problem are very narrow and evaluative or, as suggested below, directive, in determining the problem definition.

The idea of overall orientations

I see several problems with the idea—central to my presentation of the grid—that each quadrant describes a common orientation of mediators. First, the grid does not distinguish between the process and the meta-process. The term mediation process here refers to understanding, addressing, settling o

Facilitation and evaluation are not opposites, any more than kicking a football and playing in a football game are opposites.

entitlements rather than underlying interests. I thought this system would take care of the third gap, party self-determination.

Problems with the "role of the mediator" continuum

The major criticism of the facilitative-evaluative/role of the mediator continuum attacked the simple fact that it includes the idea of evaluation. A number of my friends and colleagues asserted that I did a disservice to the profession in saying that evaluation was an appropriate mediator activity. But the continuum caused or encountered confusion in other areas as well.

Structure. Some commentators have not understood that the facilitative-evaluative dimension was a continuum; instead, they used it to label mediators as either

assertion that "evaluative mediation is an oxymoron." Facilitation and evaluation are not opposites, any more than kicking a football and playing a football game are opposites.

Self-determination. The continuum does not fulfill one of the goals I assigned to it: measuring the mediator's impact on self-determination. I believed that evaluation usually impairs self-determination and facilitation usually enhances it. But the matter is not so simple. Evaluation can either foster or impair self-determination—or both foster and impair it. If parties need to know what is likely to happen in court, for instance, and they are not able to learn that except from the mediator, then a mediator's statement about the worth of a case could actually enhance self-determination. In other words, whether evaluation fosters

resolving issues or disputes. Meta-process means the process about the process—or deciding how the mediation process will work. Thus the meta-process includes deciding such matters as whether the mediator will evaluate, what will be the problem definition, who will participate and in what ways and whether there will be caucuses and mediation briefs. These and other procedural issues obviously can have great impact on the nature of the process and on self-determination.

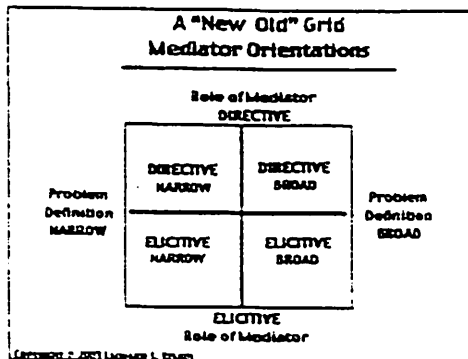
The grid's failure to distinguish process from meta-process, combined with the idea of overall mediator orientations, partially explains the problem described above—that many commentators have ignored the Facilitative/Narrow and Evaluative/Broad orientations. They assumed instead that a facilitative mediator will be facilitative in both the process and the meta-process. In fact, however, it is quite common for mediators to be very evaluative or directive about the process—that is, in the meta-process—and yet very facilitative within the process.

Another problem is that the grid is static. It ignores not only the time dimension, but also the dynamic interactions between and among all the participants—the mediator, the parties, the lawyers. In this way, it obscures the reality that what often happens, or could happen, in a mediation depends not only on the perspectives and influence of the mediator, but also on the perspectives and

minology. The second replaces both mediator orientation grids with a new grid system.

The "new old" grid

I propose a new version of the old grid of mediator orientations.



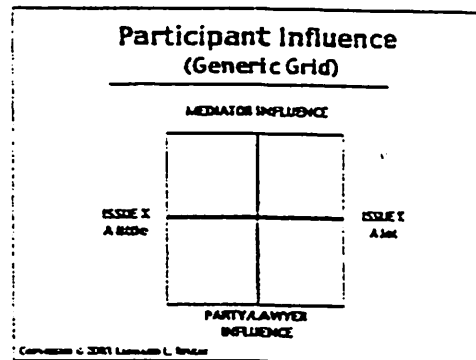
In this depiction, the terms "evaluative" and "facilitative" have given way to "directive" and "elicitive." The new terms get much closer to the underlying issue that I meant to address with the facilitative-evaluative continuum: self-determination by the parties.³ Directive means that the mediator directs the parties toward something or away from it. Elicitive means that the mediator draws out information or perspective or influence from the parties.

Although this revised grid improves on the old one by using more helpful terminology, it retains the other problems of the old grid that were described above. In addition, its exclusive focus on the mediator's orientation suggests a rigid

Each is necessary for the other and each contains the seeds of the other. Thus, if a mediator's directive behavior doesn't yield a suitable result, then he or she has to become elicitive. And if the mediator's elicitive behaviors do not produce anything helpful, then the mediator has to become more directive.

A new system

The key concept in this new system is the influence that each participant exerts or hopes or plans to exert. I intentionally use "influence" rather than "control" because it allows a more subtle understanding of how some decisions are made in mediations. The first grid is generic, and it depicts influence on the north/south axis.



The north end shows the mediator exerting influence; the south end shows the parties and lawyers exercising influence, and the areas in between show some combination of their influences. This draws attention to the influence that all participants wish to exert or actually

Another problem is that the grid is static. It ignores not only the time dimension, but also the dynamic interactions between and among all the participants — the mediator, the parties, the lawyers.

influence of the parties, their lawyers—and sometimes, the program administrators or regulators. These concerns, along with the difficulty of labeling a particular mediator move, suggest that the idea of an overall mediator orientation obscures more than it illuminates.

Revising and replacing the grids

I offer two proposals. The first revises the old grid of mediator orientations by making small changes in ter-

quality not common among good mediators. And it discourages attention to the role of the parties and lawyers. Like the old grid, this one obscures what mediators actually do because it ignores the dynamic interactions and the dimension of time.

Most important, this grid also obscures the fact that virtually every mediator will sometimes direct and sometimes elicit, and that directive and elicitive behaviors actually travel in tandem.

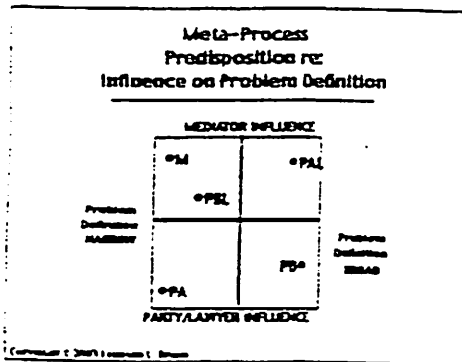
exert. The east/west axis can depict a particular issue or set of issues. In illustrating one issue, the west end would show little or none of it; the east would show a lot of it. For example, if the issue is the use of private caucuses, the extreme west end would show no caucuses, and the extreme east end would show heavy use of caucuses.

Influence illustrated

The system I proffer includes two

different kinds of grids, both of which focus on influence. The first has to do with predispositions about influence; the second concerns actual influence. The grids of predispositions depict participants' attitudes, beliefs, assumptions or wishes as to a process or meta-process issue either before the mediation begins or before a particular issue arises. The actual influence grids depict the influence participants actually exert.

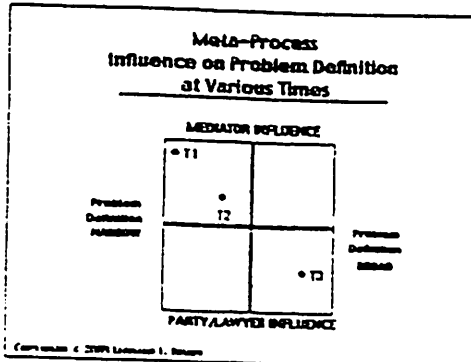
Predispositions regarding influence. The grid below depicts the meta-process decision about problem definition—including participants' predispositions about both what the problem definition should be and about who should influence its development.



Point M shows that the mediator is predisposed toward a very narrow problem definition and toward influencing the development of that problem definition. PA shows that Party A also is predisposed toward a narrow problem definition and expects to exert control over it. But PA's lawyer, PAL, is inclined toward a broader problem definition and toward having the mediator exert a strong influence on the evolution of that problem definition. Party B or PB, however, hopes for a much broader problem definition and to have influence over the development of that problem definition. Yet Party B's lawyer, PBL, is predisposed toward a narrower problem definition and expects that all the participants would contribute to the forming of that definition.

Grids such as this can help all participants become aware of potential or actual differences in predispositions. And this awareness could foster better decisionmaking about the problem definition or other meta-process issues, and thus foster greater party self-determination.

Actual influence. Other grids could deal with actual influence—as opposed to predispositions—during the meta-process or the mediation process. The grid below, for instance, shows the degrees of influence over the problem definition exercised by the various participants at three different times.

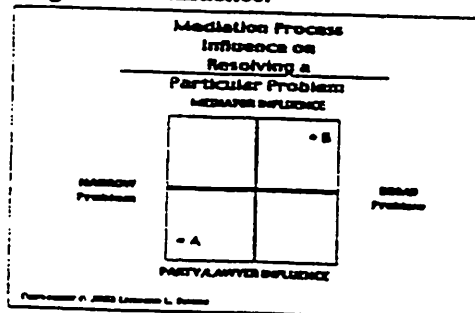


At T1, the mediation is focused on a narrow problem and nearly all of the influence to develop that problem definition has come from the mediator. At T2, the mediation has a broader scope, and although the mediator's influence in determining that problem definition still predominates, the other participants also have exercised some influence. At T3, the participants have influenced the development of a broader problem definition.

Other issues on the grid

Similar grids could deal with other meta-process issues—such as whether the mediator will evaluate, whether and to what extent caucuses will be employed and the extent and nature of pre-mediation submissions.

We also could produce separate grids depicting the extent to which participants influence the understanding or resolution of a particular issue or a number of issues. In the grid below, for example, Point A shows that with respect to a particular narrow problem, such as how much the defendant will pay the plaintiff, the parties and lawyers are exercising a lot of influence.



Point B shows that with respect to a particular broad problem, such as how to develop and maintain a smooth working relationship in light of interpersonal tensions, the mediator exercises a great deal of influence.

This is a small sample of the kinds of issues for which the grids of influence might be helpful. In addition to creating customized grids for each of a large number of issues, we could use separate grids, to depict participant influence on particular issues at specific times.

The old vs. the new

The new grids, like the old, are not mathematical or precise—and I hope they are not used to label mediators. Instead, I hope they can help to enhance understanding and awareness of choices, facilitate discussions and foster wise decisionmaking. And I hope this new system can help make everyone involved more mindful of what happens, or could happen in a mediation.

Yet I appreciate the insight of Professor George Box: "All models are wrong. Some are useful." No graphic can capture the rich complexity of real life. The greatest strength of the old grid—and its greatest weakness—was its simplicity. The new system is no less wrong than the old one, but I hope it will be more useful in meeting the needs of today's more sophisticated mediation consumers, providers, regulators, trainers and teachers.

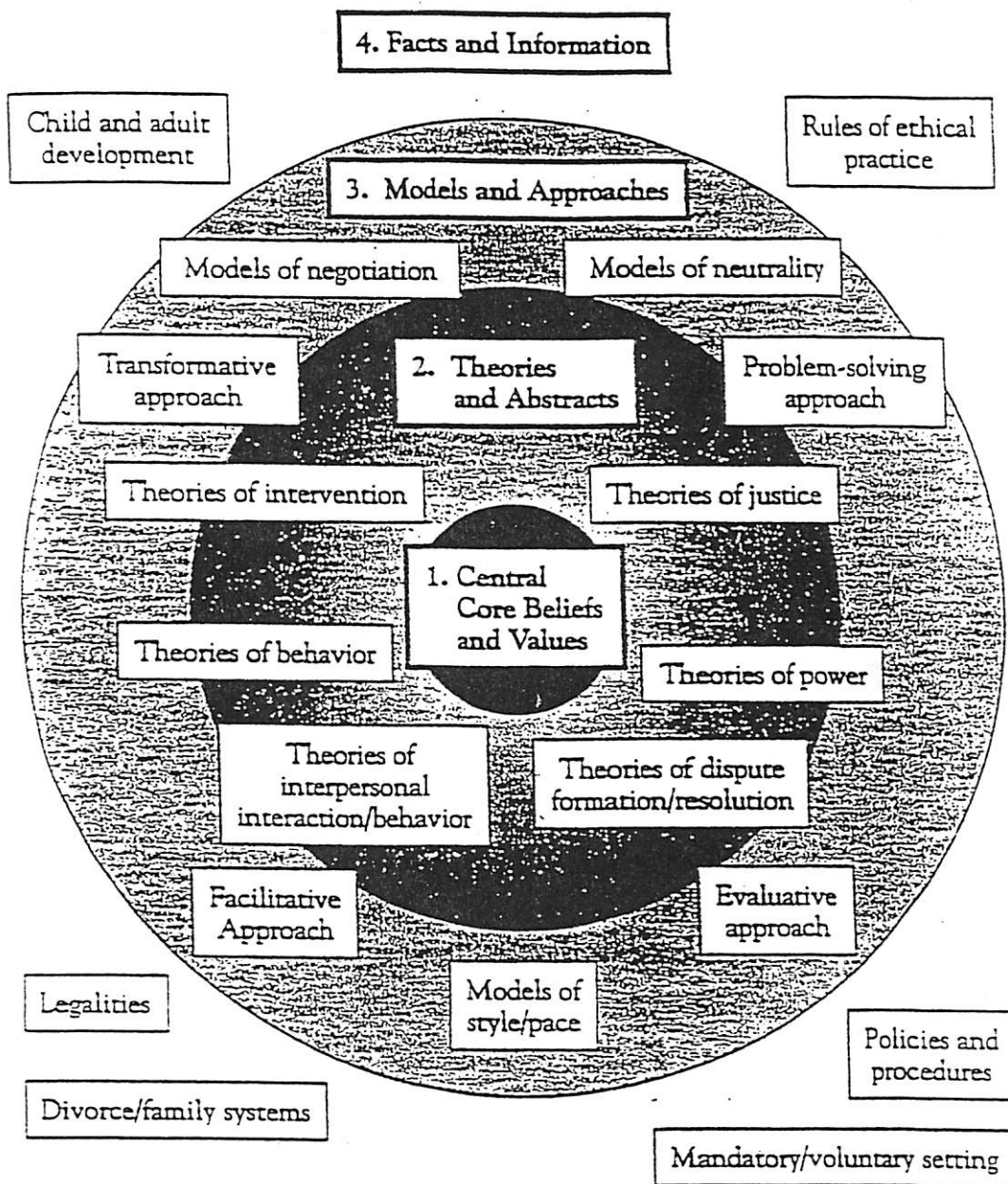
Endnotes

¹ Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO THE HIGH COST OF LITIGATION 111 (1994); Leonard L. Riskin, *Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

² Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation is an Oxymoron, 14 ALTERNATIVES TO HIGH COST OF LITIGATION 31 (1996).

³ The idea of party self-determination becomes very complex in cases in which lawyers are involved and is not covered in this brief article.

Figure 5.2. Levels of Organization of the Constellation of Theories.



4th ring: Facts and information—sometimes organized, sometimes isolated

3rd ring: Models and approaches—specific ways of doing mediation practice

2nd ring: Theories and abstracts—concepts and unifying theories providing meaning

Center ring: Core values and beliefs—life experiences, spiritual teachings, and personal choices

PREPARATION FOR MEDIATION

Forrest S. Mosten

The model of my training programs is that planning (before the parties ever walk into the room) is the key variable that enhances competence at the mediation table).

Some professional mediators claim that preparation cramps their creativity and spontaneity---these mediators choose to suspend any thinking or preparation until the parties walk into the room—then they believe that everything worth knowing or thinking about will come from the parties. They believe that mediation is a party centered process and any issues, facts, concerns, or communication will come from the parties. In his video, Dr. John Haynes, the father of modern mediation, masterfully resolves a tough issue between conflictual issue (with the help of a script) with the express strategy of never looking at the file before the clients walk in.

Very few mediators have the ability to innovate and react as successfully as Dr. Haynes. For the rest of us, planning strategies and interventions helps us anticipate what will be coming from the parties so that we can better manage the process. If you wish to read more about planning, see Lang and Taylor, The Making of a Mediator .

Strategic planning involves two major areas: Planning overall mediation strategies and Planning Individual Interventions. You have been provided templates for both and we will discuss and should practice them after this training—perhaps in mediation study groups.

The Planning Memo helps you focus on the overall picture of the mediation and determine your goals and objectives based on what you know. The more you learn from the parties, the more it will be necessary to assess and rethink your objectives. You have been provided with an illustrative planning memo to give you an idea how to use this tool. Remember, the illustrative planning memo is tool—not a blueprint or a recipe book. You are free (and encouraged) to innovate and adapt with each different mediation, and within any given mediation itself. You do not need to fill out every topic or elaborate equally on every topic. The memo is designed to help you help the parties—if you find a topic is less relevant—or not relevant to your planning—you may treat it accordingly.

After completing the Planning Memo, you can use the Mediator Planning Worksheet to help you anticipate your interventions (moves). An intervention is what the mediator does or says based on thinking through the structure of the mediation, interests of the parties, emotional and relationship dynamics and data needed for resolution.

Example from Planning Memo—Emotional Dynamics:

“Frank may be angry—but that anger is probably covering up intense hurt—I will need to demonstrate empathy for his situation. It may be premature to establish normalcy—he may not care that others go through the same problem. I will need to acknowledge his courage of coming to mediation—particularly since he feels to be the innocent party.”

Strategy (WHAT) : to acknowledge Frank’s courage for coming to mediation.

Intervention (move) (HOW): Any of the following (and many many others)

“Frank, given how angry you are, you clearly have done a lot of work with yourself to be able to put your anger aside and come her to do business”

“Frank, how were you able to handle your anger to permit you to come here to try to work with Becky to resolve your situation”

“Many people caught up in an emotional break-up give in to those feelings and play them out in court. You have taken a different route.”

For each move, you should be thinking about how this will accomplish your strategic goal of providing acknowledgment. Once you make your choice (it can be done in a split second), think about:

How did that work?

What was the party’s reaction—did it meet my goal?

Do I need another intervention to get the job done—or can I move on?

If it went well, how can I do that again in another issue?

If it did not go well, what can I do better next time?

This is difficult—it is also the art of mediation—in fact, the art of other aspects of lawyering as well. Do not expect to get it the first time—be easy on yourself. Just keep working on the baby steps—Planning, Overall Strategy, Interventions (moves), and Self-Assessment—and you will see the progress. Remember, mediations are built step by step—agreements evolve---as will your competence at the table.

STRATEGIC PLANNING WORKSHEET

CLIENT POSITION: _____

UNDERLYING INTERESTS:

RELATIONSHIP

DYNAMICS: _____

**DATA: WHAT ADDITIONAL DATA IS NEEDED—HOW CAN CURRENT
DATE BE BETTER UNDERSTOOD—DEVELOP A RANGE _____**

**WHAT STRUCTURAL OBSTACLES (TIME, LEGAL REQUIREMENTS,
GEOGRAPHY, ETC) NEED TO BE OVERCOME?**

WHAT LEGAL, FINANCIAL, OR EMOTIONAL REALITY MIGHT HELP?

WHAT MUTUAL GOALS OR INTERESTS CAN BE SURFACED?

HOW CAN THIS CONFLICT BE AN OPPORTUNITY FOR THE PARTIES?

WHAT DIFFERENT ROLES CAN I PLAY TO HELP?

WHAT USE OF EXPERTS CAN BE UTILIZED ?

HOW CAN LAWYERS BE BETTER ALLIES FOR SETTLEMENT?

HOW CAN A CAUCUS OR OTHER PRIVATE MEETING BE HELPFUL?

HOW COULD FINAL PROPOSAL OR FINAL FINAL PROPOSAL BE USEFUL?

WHAT PEACEMAKING STRATEGIES COULD BE UTILIZED?

CLIENT EVALUATION FORM

1. NAME OF PARTY: _____
2. ATTORNEY: _____
3. MEDIATOR: _____
4. DATE OF MEDIATION: _____
5. LOCATION: _____
6. NATURE OF CASE: _____
7. SETTLEMENT REACHED? _____

Please use the following rating scale and determine an overall rating under each category. Below each heading are listed several factors to consider in making a rating. Under the "Comments" section, discuss specifically the areas of strength and those areas needing improvement.

- | | | |
|----------------------|-----------------------|--------------------|
| 5 – Excellent | 3 – Satisfactory | 1 – Unsatisfactory |
| 4 – Highly competent | 2 – Needs improvement | 0 – Not applicable |

Overall Rating

1. Orientation with Dispute Resolution Associate _____
- _____ Provided information packets
 - _____ Provided welcome and opening comments
 - _____ Explained mediation process
 - _____ Clarified role of participants
 - _____ Provided a selection of Mediators
 - _____ Established ground rules
 - _____ Covered Mediation Agreement

Comments:

2. Location/Mediation Setting _____
- _____ Location
 - _____ Convenient to all parties

- Provided comfortable mediation room
- Provided necessary equipment (flipchart, computer, calculator)
- Comfortable and safe setting

Comments:

3. Mediator's Performance _____

- Provided information sharing between the parties
- Understood and clarified issues
- Accurately and briefly summarized information and concerns
- Balanced time and focus between clients
- Identified common ground
- Generated options
- Facilitated negotiation and bargaining
- Discussed options for noncompliance or resolving future conflict
- Worked effectively with attorneys (if applicable)
- Drafted agreement which addressed all issues (if applicable)

Comments:

4. Do you have any ideas or suggestions for improvement?

THANK YOU FOR TAKING THE TIME TO HELP US IMPROVE.

NAMES OF PRINCIPAL MEDIATORS

Role Play Observer Checklist

(use this to make notes about the co-mediators as you watch)

What to Look for by Stage:

Contracting

- Get parties seated & comfortable
- Give clear & complete explanation
- Answer any questions
- Establish rapport & confidence
- Check suitability (stress & conflict levels, ripeness, commitment to the process)
- Note possible mutualities
- Get agreement signed

Information Gathering and Issue Identification

- Emphasize open-ended questions
- Elicit facts & feelings
- Use active listening (paraphrasing, summarizing, reframing, open responses)
- Take the time to establish clarity and understanding
- Keep balance between the parties (time, taking turns)
- Cut off disputants if needed (personal attacks, dominance, running on, interrupting)
- Manage the interaction between disputants (defuse hostility, reframe destructive comments)
- Begin to uncover underlying needs & interests (substantive, procedural, psychological)
- Permit/encourage expression of feelings
- Frame issues neutrally
- Ensure issues are clear, complete & confirmed
- Discover & acknowledge mutualities

Agenda Setting

List issues clearly using flip chart or alternative

Select method to set agenda

Elicit principles for decision making

Resolving Each Issue

Discover additional information if necessary

Generate options (brainstorming [quantity], other methods)

Explore needs/interests to be met by options

Evaluate options (use principles developed earlier, check alternatives to negotiated agreement, look at consequences of impasse)

Negotiation process (build on mutualities, dovetail differences, manage concessions/compromises, develop packages/trade-offs)

Intervene to balance power. How?

Use of caucus (timing, length, strategies)

Acknowledge agreements & effort of parties

Reviewing Agreements

Combine agreements on issues

Reality-test overall agreement and parts for durability and satisfaction

Confirm terms & check commitments

Overall Things to Watch for

Demeanor and behaviors

Non-verbal signals (neutral, appropriate language, absence of jargon, humor, attentiveness, active listening)

Interaction & cooperation of co-mediators

What did you learn from your observation of the role play?

What mediator behaviors were most helpful in moving the parties along?

Mediation Skills Observation Sheet

Mediator _____ Case _____

Date _____ Observer _____

. Please include a brief comment for each category (if applicable)

Preparation for Mediation—Quality of Written Introductory Materials; Read and Understands Briefs

Introductions and Opening Statements

Displays empathy and develops trust:

Demonstrates neutrality and even-handedness:

Elicites important information:

Refined Questioning and Listening Skills—Professional Reframing

Assists in identifying issues, interests, and options, and in reaching agreements

Timing and Use of Caucuses

Manages interactions, including “dirty tricks” and emotional outbursts:

Provides Clear Directions to the Parties in Respect to the Mediation Process

Collaborates and Manages Attorneys

Demonstrates Negotiation Planning and Educates Parties on Negotiation Skills

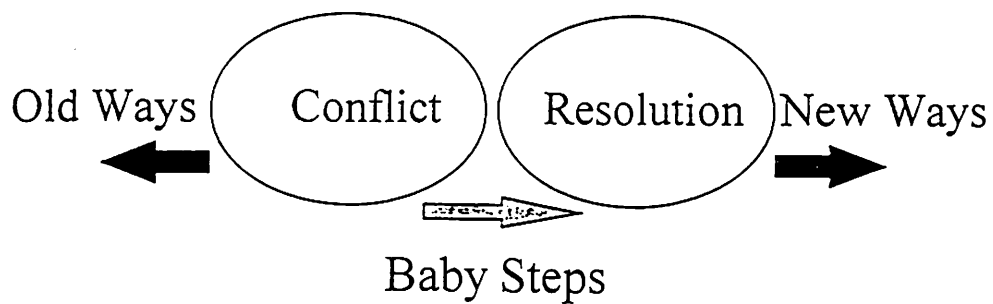
Adheres to ethical standards (e.g., respects parties’ self-determination, understands and insures confidentiality)

Committed to Learning from Parties and Inspires Them to Learn from Each; Encourages Collaboration

Interaction with Co-Mediator

Additional Comments

Conflict as Opportunity



Create Movement in Right Direction

Adapted from Melamed and Corcoran, Mediating Divorce Agreement

INTEREST BASED NEGOTIATION STRATEGIES¹

Forrest (Woody) Mosten

The term “Interest Based Negotiation goes beyond making a deal as to the terms of settlement.. You can also use these strategies with your own clients, colleagues, experts, your staff, and other people involved in your work. This summary sheet attempts to address the roles of both neutral mediator and collaborative professional so that examples use for one role can be adapted for the other.

TOOLBOX APPROACH

The toolbox approach means that you gather your strategies from a number of diverse schools of negotiation theory and utilize them in appropriate situations with the personality and talents that you bring to the table. The elements of the toolbox approach are:

1. **Acquire the tools of Interest Based Negotiation**

Understanding of what it is, how it differs from distributive bargaining, and the 10 Step Approach
. Further reading, discussion, training, and individual supervision

2. **Know what tools you have, and organize them**

Break down the Mediation Process into basic stages and anticipate use of interest based negotiation in each stage

3. **Learn when and how to use each tool.**

Develop check-lists and tool box to anticipate strategies and use when needed

4. **Practice using your tools**

More comprehensive training courses, focused sessions of Practice Group, Study Group, Simulation, and live client interaction

5. **Monitor your progress.**

¹ This article is based on concepts in Chapter 4, Toolbox of Strategies for Building Agreements in Forrest S. Mosten, Collaborative Divorce Handbook (Jossey Bass, 2009)

Reflect during and after sessions what you have done well and what you could do better next time, debrief with colleagues, write summary and planning memos, try to replicate your best practices.

10 STEPS TO INTEREST BASED NEGOTIATION

*Getting to Yes*² is the seminal book in our field that introduced interest based negotiation to the conflict resolution field (and to the world). Since its first publication in 1983, I have been teaching its concepts to lawyers and conflict resolution professionals. However, although they understood and appreciated the approach, I found that many professionals and students had difficulty putting it to use. I have broken down the concepts to a 10 stage process:

(Substitute Collaborative Professional for Mediator as appropriate)

Stage 1 (Party 1) States Position

Stage 2: **(Mediator)** Acknowledge and Reframes Party 1's Position Accurately (3 Types of Reframing: Issue to be on Agenda; Emotion embedded in the Position; Legal/Substantive Issue Raised

Stage 3 **Skip if Working with One Party in Caucus or with Individual Client:** (Party 2) States Position

Stage 4: **Skip if Working with One Party in Caucus or with Individual Client (Mediator/Collaborative Professional)** Acknowledge and Reframes Party 2's Position Accurately (3 Types of Reframing: Issue to be on Agenda; Emotion; Legal/Substantive Issue Raised Restate Party 2's Position Accurately

Stage 5: **(Mediator)** Uncover the Interests Beneath the Positions of Both Parties

Stage 6: **(Mediator)** Mutualize Interests

Stage 7: **(Mediator)** Brainstorm Options Developed by the Parties

Stage 8: **(Mediator)** Add Additional Options with Permission of Parties

Stage 9: **(Mediator)** Test Selected Options with Both Parties Using Criteria of Impact on Relationship (Cost, Children, Privacy, Speed of Resolution)

Stage 10: **(Mediator)** Facilitate Discussion Leading to Agreement

² Roger Fisher, William Ury and Bruce Patton, *Getting to Yes*, 1991

USE OF INTEREST BASED NEGOTIATION THROUGHOUT MEDIATION PROCESS

INTAKE

"I have to get my husband out of the house because his abusive language is frightening me and the children"

"I only have a budget of \$3,000 for professional fees. Can you do it?"

I found your name on the ACR website. I don't want to go to court but this is the most important negotiation of my life. I really don't think mediation has the power to make the other side be fair?"

"I've got to see you by tomorrow because my business is about to file court papers"

I love your background and your approach, but you are too far from me (10 miles, 30 minutes). Can you refer me to someone just like you who is closer?"

INITIAL ORIENTATION MEETING (Substitute Collaborative Professional for Mediator as appropriate)

"My business partner is very controlling and manipulative. I want to take the money from the corporation account before he does."

"I don't want consult with a lawyer. I came to mediation because I don't want the expense or hassle of lawyers"

"If my daughter doesn't want to stay overnight at my house, there is no way that I will pay for college next year"

CONVENING THE PROCESS (Substitute Collaborative Professional for Mediator as appropriate)

"Your client wants this disqualification clause because he knows that we have the law on our side. I am willing to try to settle the case but not to sign any participation agreement."

"We are willing to sign the disqualification clause if your client pays for all the fees for the Mediation process because we don't think it will work."

"I like the idea of a neutral financial professional but only if we can use the reports if the case goes to court"

(CO-MEDIATOR OR COLLABORATIVE TEAM PLANNING/DEFRIEFING MEETING)

**"It is crucial that I be part of every meeting with the parties.
We can't be penny wise and pound foolish."**

Husband's Coach: I know that the wife needs financial support right away. However, our protocol calls for us to have a session on parental communication and developing a schedule so she will just have to wait until the next session."

FIRST JOINT SESSION

"I don't want to read the mediation (participation) agreement out loud. Let's just get down to it as this is my last session."

We must work out which schools the children go to next year and send a check by Friday. I don't have time to fill out a budget."

I can't come to any more sessions for the next 5 weeks as I am starting a trial next Monday.

If we don't come to an agreement on who gets the business phone number by next Wednesday, we are going to file the case in court."

AGREEMENT READINESS

"There is no way that we can sell the house until the market recovers"

Wife must go back to work in 6 months and earn at least \$2500 per month . If she doesn't, her income must reflect that amount of imputed income."

My father loaned us the \$300,000 for to open up this business and you agreed that you would repay your half to him if we every broke-up the partnership."

De-positioning With Self Interest

This key "agreement readiness "strategy is used to dislodge a position in order to start using the 10 step process to "close the deal.":

1. Accurately Restate Party's Position
2. Ask the Party: Imagine a Judge/Other Party/Magic Fairy/I accepted your position, how would that benefit you?
3. Ask the Party to List All Benefits That He/She would get if the position is accepted---squeeze dry.
4. Restate All Benefits

5. Ask the Party: If an ultimate settlement dealt with each of these concerns, would you consider it?

Emotional Outbursts of One Party

Getting a divorce can be difficult—often provoking people to have tantrums, tears, and other emotional outbursts. The strategy of Self-Soothing is an interest based client centered tool based on the work of Dr. Murray Bowen. it works using the following steps:

1. Acknowledges pain of party or fear of underlying conduct
2. Offer Party Some Time or Other Resources/People for Support
3. Try to Get Commitment by Party to gain grip on emotions and to continue in the session
Mediator Asks Party what has worked in past and applies to Situation
4. Party chooses self-soothing approach based on the party's past experience
5. Supports the Party's Approach to Self-Soothing
6. Stop all negotiation or other business until soothing occurs and Party is Ready to Go On

BUILDING AGREEMENT

"I want to stay in the house for another 8 years until our youngest child graduates high school"

"I will never pay a dime more of spousal support if she moves since she is living with the guy she had an affair with to end our marriage."

He always said that my novel was my separate property and I expect him to honor his word now that I have sold it and received a \$100,000 advance after separation.

BREAKING IMPASSE

Break Impasse: Float a Joint Mediation (Mediator/Collaborative Professional) Proposal

If you hit a deadlock after trading proposals from each party, rather than permitting the negotiation process to drift to termination, consider working with the other lawyer to develop a joint settlement proposal. This tool has ten steps that can be used to resolve a single issue or to cross-stitch an overall settlement.

STEP ONE Assess the progress of the negotiation.

STEP TWO Check in with your client and with the other party and the other lawyer to see if there are any new ideas.

STEP THREE Check in with the other lawyers to see if He/she would like to develop a joint proposal. Determine what facts or objective criteria are needed to bridge the gap.

STEP FOUR Both lawyers should ask their clients if they would like to consider a joint proposal.

STEP FIVE Describe the process of the joint proposal to both parties together in a joint session.

STEP SIX Ask the parties if they are ready to hear a joint proposal.

STEP SEVEN Indicate that a joint proposal is not take it or leave it—it is the Family Lawyers' collective ideas of what might meet the interests and concerns of both parties

STEP EIGHT Both lawyers should jointly present all terms—use range of options, various factors, and possible conditions within the joint proposal to give parties room to maneuver.

STEP NINE The lawyers should meet with their respective clients to discuss the acceptability of the proposal concepts and any additional concerns that need to be raised.

STEP TEN Continue to facilitate discussion and offer other joint proposals until a full agreement is reached on all issues.

“INTERESTS MOTIVATE PEOPLE;
THEY ARE THE SILENT MOVERS
BEHIND THE HUBBUB OF
POSITIONS. YOUR POSITION IS
SOMETHING YOU HAVE DECIDED
ON. YOUR INTERESTS ARE WHAT
CAUSED YOU TO SO DECIDE.”

Getting to Yes

STEPS IN INTEREST- BASED NEGOTIATION

- IDENTIFY POSITION
- IDENTIFY INTERESTS UNDERNEATH
- IDENTIFY COMMON INTERESTS
- BATNAS, WATNAS, MLATNAS
- EXPLORE COMMON SOLUTIONS
- FIND SOLUTION AND TEST

DePosition with Positive Self-Interest

- Accurately Restate Party's Position
- Ask: Imagine a Judge accepted your position, how would that benefit you?
- List: All Benefits---squeeze dry.
- Restate All Benefits
- Ask: If an ultimate settlement dealt with each of these concerns, would you consider it?

TIPS FOR DEPOSITIONING

- Use Either Joint Session Or Caucus
- Be Accurate In Restating
- Lean Over Backwards To Accept Party's Goals
- Go For Baby Step—not Agreement-leave It Hanging
- Can Be Used With Overall Goal Or With A Single Issue

Share Perspectives

- Ventilate - Condition for agreement readiness
- Can be structured - time content
- Assume disagreement
- Facilitate hearing each other
- Squeeze dry
- Lowest point in mediation