

# Mosten Mediation Training



## **MOSTEN'S TOOLBOX TO BUILD AGREEMENTS**

### Ten Step Tool-Box Approach

1. Acquire the Tools
2. Organize Your Tools and Know What Tools You Have;
3. Learn When and How to Use Each Tool
4. Practice Using Your Tools
5. Design Your Agreement Process
6. Plan Your Strategies to Implement Your Design
7. Execute Your Strategies
8. Experiment With Your tools
9. Monitor Your Progress
10. Reflect on What You Have Done Well and What You Could Do Better Next Time

# I. GETTING THE PARTIES IN THE DOOR

- Developing a Signature at the Negotiation Table
- Client Information Packet
- Client Education Strategies
- History of Mediation and Lawyers
- Benefits of Mediation with and without Attorneys
- Qualifications of Mediators to Work With Lawyers
- Qualifications of Lawyers to Serve as Peacemaking Attorney
- Avoid myopic limitations to one school of practice or one tool.
- Building Rapport
- Building Integrity
- Create Connection for Rapport and Emotional Support

- Lend hopeful energy to heal
- Make Consensual Dispute Resolution the Last Stop on the Divorce Highway
- Lawyers and Mediation rather than Lawyers or Mediation
- Building Client Confidence
- Restate Benefits of the Process
- Go Over Definition of the Process
- Primary Dispute Resolution
- Educate as to Different Models
- Self Resolution
- Party-Party Negotiation
- Lawyer-Lawyer Negotiation Without Clients Present
- 4 Way Settlement Meeting
- Resolution Options Inside and Outside the Courthouse
- Single Session v Sequential Sessions
- Stages of the Process

- Roles of Professionals
- Values and Personal Attributes
- Co-Mediation
- Short v Long Telephone Intake
- Mediation Intake with Counsel
- Delegation of Intake to Dispute Resolution Assistant/Case Manager
- Overcoming Resistance to Suggested Process
- Ethical and Professional Standards
- Inventory of Services Offered
- Knowledge of Hot Topics in the Field

## II. INITIAL CONSULTATION AND INFORMED CONSENT

Spectrum of Primary Dispute Resolution Models (compare with ADR and CDR)

- Criteria for Comparison of Dispute Resolution Models
- Unbundling Concepts and Innovative Lawyering Roles
- Mythology of Court Process
- Courthouse Field Trip
- Reframing: Agenda Issue to be Decided, Substantive Issue, Emotional Content, Underlying Interest
- Roles of Lawyers in Mediation Sessions
- Mediation/collaborative cheat sheet

- How did I do? What went well? How can I improve next time?
- Bring Peace Into the Room
- Contain conflict to enable resolution
- Point out that by choosing mediation/CL, parties act out unspoken hopes that were once a meaningful relationship
- Separate Advisor from Provider Role in Client Decision Making
- Predict how people will behave
- Reveal choices between resolution and transformation without caring which if option is chosen
- Different Styles and Models
- Roles of Experts ( Consultant, Investigator, Reporter, Evaluator, Arbitrator, Mediator (Sole or Co), Party Coach, Neutral Coach
- Client Friendly Environment
- Low Expectations--High Hopes

- Assessment for Appropriateness for Process
- Types of Private Sessions
- Confidentiality Rules--Cases, Statutes, Ethical Opinions
- Review Mediation/Participation Agreement Term by Term--out loud

### III. CONVENING (ENROLLING) THE PROCESS

- Separate People from the Problem
- Inviting the Other Party to Mediation or CL (convening)
- Steps to Setting Up a Mediation/CL Process
- Completing the Collaborative Participation Agreement/Mediation Contract
- Solidifying the CL Professional Team
- Managing Overt Conflict Between the Parties
- Be easy on yourself, the parties, and your collaborative colleagues, and ask the same from them.
- Read Aloud the Agreement and Collaborative Guidelines and Principles in Session; Prepare An



## Estimated Budget of the Costs of the Mediation/CL

- Develop genuine relationship with parties to increase rapport
- Increase mutual respect and shared concern of parties
- Tap into higher wisdom of parties
- Utilize a preference for peace
- Work toward growth and change of all concerned
- Look to future to cope with change
- Open hearts of parties to move toward change
- Observe how parties communicate with each other to analyze conflict tendencies and dysfunctional patterns
- Provide Confidence to the Client that the other Party and Attorney will reciprocate with cooperation

## IV. CREATING AGREEMENT READINESS

- Theory-Strategy-Intervention-Reflection (Lang-Shoen Model):  
Think about your goal (what you want to accomplish through your strategy), determine what you want to say (or do), and then say it or do it in the most effective way
- Strategy Planning Memo
- Intervention Planning Worksheet
- Impact of Structure on Negotiation Behavior
- Conflict as An Opportunity
- Awareness that Old Ways and Current Position Are Not Working
- Commitment to Try New Way
- Baby Steps Toward Agreement
- Interdependence of Parties
- Expert as Co-Mediator

- Build Agreements Rather Than Negotiate Positions
- Emotional Interest Based Strategies to Diffuse Financial Issues
- Normalcy and Solvability
- Dig for Interests
- Find Commonality of Interests
- Preliminary Private Planning Meetings
- Presentation of Info by Parties (Flipchart or Power Point)
- Christopher Moore's Pizza of Sources of Conflict
  - Data
  - Relationships
  - Structural
  - Interest
- Use of Homework
- Listen Again
- Anchor Use First Offer to Anchor the Negotiation

- Bias Confirmation
- Single v Multiple Issues
- Avoid Zero Sum Thinking
- Improving Communication of the Parties
- Developing the Parties' Agreement Readiness
- Handling Resistance to Agreement Building
- Flip Chart – All Purpose Tool
- Celebrate mini-agreements
- Confirming agreements previously reached
- Start with Easy Agreements.
- Look through windshield, not rearview mirror
- Use “I” statements--.
- Focus on the opportunity that you have to make a difference in that client's life Demonstrate respect

and compassion for the client's spouse.

## CREATING AGREEMENT READINESS (continued)

- Maintaining calm and caring for the other spouse
- Jointly Draft and approve summary letters before sending to clients:
- Debrief Regularly
- Ask, Don't Assume
- Before reacting or making a demand, ask what the other party's needs and concerns are and fashion communication accordingly.
- Acknowledge the Positives
- Celebrate Movement
- Identify and Acknowledge Initial Positions of the Parties:

- Use professional articles and research to offer commonality:
- Explain How Reaching a Settlement Can Accelerate Healing for the Family:
- Share Boilerplate Early:
- Treat people with potential for growth
- Improve quality of choices of intervention
- Try to be freed of limiting mindsets and habitual behavior
- Stress realistic outcomes
- Connect Individuals, Relationships, and Networks
- Work toward maximum satisfaction
- Focus on needs—not just rights
- Broaden definition of problem
- Omni partial—be part of conflict yet neutral with personal boundaries

- Use compassion to see the essential humanity of parties
- Speaking from center inspires trust and permits others to reflect their own truth
- Ritual can bring people out of rehearsed or worn story and creates room for something new to emerge—people can speak from the core
- Describe set of behaviors associated with successful outcomes
- Reinforce importance of peaceful choice as commendable effort toward higher moral ground
- Reframe in higher principle or fundamental truths: No life without loss; pain in great teacher, all things change
- Recognize and respect the history of the conflict

- Show commonality of parties and how they are joined at the hip
- Mix and match best of all parties ideas, needs and concerns
- Ground rules against personal attacks
- Use least invasive method to preserve client control
- Courage to share failure and lack of knowledge with other professionals
- Treat Other Professionals with respect
- Be transparent about the process
- Teach Party Communication and Negotiation
- Manage Own Biases to Reduce Non-Neutral Feelings
- Avoid Premature Negotiation
- Explain Reframing Process and Types of Reframing
- Phrases for Active Listening



- Building Trust Between Parties
- Open Questions--Life Time Curiosity and Learning
- Dialogue--Going Beyond Debate or Discussion
- Reciprocity
- Develop and Show Empathy
- Healthy Boundaries and Parameters
- Encourage Party Alignment Against Mediator/Professionals
- Levels of Parental Conflict
- Scapegoating, Acting Out, Parent-Child Alliance
- Describing the Good Divorce
- Have All Witches at the Table

## V. SMOOTHING OUT THE BUMPS IN THE PROCESS

- Two Set of Proposals to Create Priorities
- Bread-Cake-Frosting to Create Priorities
- Provide Statutes, Cases, and Articles to Parties
- Use of Summary Letters
- Joint Sessions—Benefits-Downsides
- Caucuses—Benefits-Downsides
- Transition to Caucuses
- Balancing Caucuses
- De-Position with Positive Self-Interest
- Self-Confrontation
- Self-Soothing

- Use of Children's Retrospective View of How Parents Handle Divorce
- Use Discussion of Benefits of Process
- Stop –Go to Another Topic
- Reformat Structure
- Use of Silence—Sit Back—Make Parties Work
- Reduce Fear of Compromise of Principle and Integrity
- Framing Movement/Concession in Terms of Gain or Loss
- Pleasing other Professionals
- One Large Move v Several Incremental Moves
- Image how children, parents or mentors are viewing the parties
- Each party comments on his/her own behavior
- Reduce or eliminate blame

- Reflection should be ongoing and gentle.
- Seek and Offer Help with Clients and Colleagues:
  - Acknowledge the need for a new approach to solve the problem:
  - Ask for permission before offering an alternative or suggestion:
  - Accelerate the pace: more frequent sessions, longer sessions
  - Manage overt conflict between the parties
  - Call Break
  - Help people to wake up to what they already know—touch upon their wisdom
  - Imagine relationship-outcome as might become in the future
  - Reduce or stop fighting
  - Propose least adversarial option at earliest opportunity

- Note anger and defer negotiation
- Vision breaking cycle of conflict
- Move away from egos
- If stressed, few deep breaths can empty mind and permit new outlook without judging or evaluating
- Use “altered eye: see people as they were before they were born and make connection on level of humanness

### SMOOTHING OUT THE BUMPS IN THE PROCESS (cont'd)

- Acknowledgment and seeing can bring person beyond narrow confines of story
- When source of positive sponsorship, can see the specialness and good intentions of people

who can act on those intentions  
more positively

- Sit with people in grief, loss, or tragedy of a situation
- Pray or call for guidance for clients brings you in more harmonious relationship with them
- Silence can focus, either open ended or with specific question
- Describe other parties' success
- Point out our small experience in relationship to larger order
- Ask people to answer from their heart
- Acknowledge loss and ask others to do so
- Give opportunity to grieve—comment on stages of grieving
- Pose solution as if feelings of anger, mistrust, did not exist

- Convey your faith that expects healing: Expectant Faith
- Trust Professionals to tell the truth even if the truth is difficult to hear
- Willingness to disagree with other professionals in front of clients
- Be transparent with other professionals
- Demonstrate an abundance of positivity to overcome negativity bias

## VI. LATE STAGE STRATEGIES: KEEPING THE PARTIES IN THE PROCESS

- Symbiotic Impact between Lawyers and Clients
- Creating Doubt and Dissonance
- Expert as Consultant
- Expert as Reporter
- Expert for Confidential Mini-Evaluation
- Protocol for Admissible Mini-Evaluation
- Develop a Range of Outcomes in Conveying Legal and Financial Data
- BATNA, WATNA, MLATNA
- Consultation with Litigator during Collaborative Process
- Changing Perceptions of a Gap of Positions



- Party Presentation of Offers in Mediation
- Attorney Presentation of Offers in Mediation
- Experiment with temporary agreements
- Suspend Meetings
- Confront Overconfidence in View of World and that Others Share that View
- Reciprocity—Procedural and Non-Substantive Issues v Deal Points
- Risk Aversion
- Agent v Principal Conflict
- Conditional Offers
- Dealing with Impasse, Suspension, or Termination of the Process
- Use of a Global proposal
- Open the Door to Stress Voluntary Nature of Process: Commit to Consult Before Walking Out

- Bifurcate Divorce Issues
- Salvage Agreements
- Plan for Contained Litigation
- Confidential Mini Evaluation
- Test of Agreement: Can You Live With It?
- Test Assumptions
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## VII. CLOSING CEREMONY-- PREVENTING FUTURE CONFLICT

- Required Return to Mediation or Collaborative Process after Expert Evaluation or Court Hearing
- Drafting the Agreement
- Closing Sessions
- Monitoring Post-Agreement Progress of the Parties
- Preventing Future Conflict
- Single Text—Track Changes:
- Future Dispute Resolution Clauses:
- Special Signing Pens
- Closing Statements by Parties:
- Monitoring Post-Agreement Progress of the Parties
- Follow Up Reminders

- Asymptomatic Regular Parenting Meetings
- Periodic Financial Assessments
- Prevent conflict from ever arising
- Encourage Reconciliation after conflict
- Provide conflict wellness check-ups
- Ritual: state purpose, choose symbolic object, develop method of enactment, closing ritual and honoring what has taken place
- Indirect references to healing and forgiveness can have impact on subconscious
- Aspirations can be as important as enforceable agreements
- Providing Detailed Informal Notice of Concerns
- In Person Meetings in Neutral Venues
- Probe Legal Soft Spots

- Mould Hot Facts for Future Planning
- Prevention does not seek an answer—reveals opportunities