MEDIATING THE NON-LITIGATED DISPUTE

Managing Non-Justiciable Conflicts in the Public and Private Sectors

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I. What is a “Non-Litigated Dispute”?

A. A justiciable controversy, but not yet in litigation

B. Possibly a justiciable controversy, but not likely to be litigated

1. The parties are simply litigation averse for any reason.

2. The parties are not financially able to litigate.

3. Although the controversy is justiciable, the likelihood of success is so marginal for the claimant that a non-court resolution is the only practical opportunity for any relief.

C. A non- justiciable controversy, i.e. no real litigation option

1. There are many examples of non- justiciable controversies and possibly justiciable controversies not likely to be litigated that can benefit from the involvement of a third party mediator or facilitator.

a. Transactional Matters - For example, the Mediation Committee of the Dispute Resolution Section of the American Bar Association recently discussed the growing use of neutral third parties to facilitate business transactions. Noting that most of the time the reason a transactional negotiation collapses is unrelated to the merits of the underlying deal, the Committee observed that third party neutrals often make the difference between a failed negotiation and a successful deal. Although this use of mediation is not yet widespread, it has sufficient currency that it even has been given a name – “Deal Mediation.” The Mediation Committee sees Deal Mediation as possibly the next frontier in the growing use of mediation.

b. Internal Organization Governance – For example, in another recent development, a World Bank Group entity, the International Finance Corporation, published a 57 page report of its Global Corporate Governance Forum, entitled “Mediating Corporate Governance Conflicts and Disputes,”

in which they strongly advocated the use of mediation skills and techniques, and the involvement of third party neutrals, to manage and control internal corporate governance conflicts in order to help keep them in the boardroom and prevent them from mushrooming into public disputes. As the IFC observed, full-blown disputes "are always bad news for a company. They can lead to poor performance, scare investors, produce waste, divert resources, cause share values to decline, and, in some cases, paralyze a company." The IFC promotes both the training of upper management in the skills and techniques of mediation and facilitation and the use of outside third-party neutrals in the more classical mediation and facilitation models. In discussing the many benefits of mediation in corporate governance, the IFC noted:

> More than helping solve corporate governance disputes in a more efficient and effective way, mediation can also help manage conflicts and, therefore, prevent disputes. Conflict has the potential to be constructive, by bringing to the surface issues, interests, perspectives, and concerns that need to be addressed so that the corporation can perform more effectively and efficiently. The challenge for effective boards today is to harness the potential for conflict, which would lead to constructive outcomes rather than destructive ones.

These observations apply equally to partnerships, limited liability companies, associations and virtually all other organizations dealing with internal management and governance issues.

c. Public Policy Determinations – For example, another area in which mediation and facilitation are growing exponentially is in land use matters. Land use disputes, like many public policy issues, by their very nature, are often multi-party and multi-dimensional. It is not unusual to have, directly or indirectly, property owners, developers, interested neighbors, advocacy groups (local, regional and national), elected officials, appointed officials and governmental agencies all asserting diverse and overlapping positions and interests simultaneously. As a result, such conflicts are generally difficult to manage in the more structured and traditional adversarial processes, and are often

administrative and political in their nature and not susceptible to determination by litigation. The City of Phoenix has encouraged the use of mediation in a number of high profile land use conflicts in the past five or six years, almost all of which have resulted in mutually acceptable solutions by the private interests, which were then accepted and adopted by the public bodies. This intersection of political science with alternate dispute resolution is often referred to as "Deliberative Democracy," and has recently been the subject of a number of books and articles. The American Bar Association Section of Dispute Resolution made Deliberative Democracy the focus of the Winter 2006 issue of their Dispute Resolution Magazine. In Arizona, Project Civil Discourse, a special initiative of the Arizona Humanities Council, is a partnership of almost twenty separate organizations created to promote the use of civil dialogue and collaborative problem solving skills in dealing with public policy issues.

d. Estate Planning and Business Succession - Possibly the newest applications of mediation techniques to non-litigated or non-litigatable conflict management are in the area of estate planning and business succession. Some estate planners and business consultants (attorneys and others) are engaging third party mediators to facilitate pre-estate planning or business succession conversations among family members, business owners and other interested parties. The goal is to develop a better understanding of the real interests and intentions of all of the parties (trustors, testators, potential beneficiaries (spouses, children, partners), trustees and executors) and create more enlightened estate plans and business succession plans less likely to produce misunderstandings, resentments, alienation of family members, and even subsequent litigation.

e. Dysfunctional Relationships - Mediation and facilitation are being used regularly by all kinds of organizations and communities to promote better decision making. In almost any business, organization, group or community, issues arise from time to time that generate such strong emotions and seemingly intractable positions, that, for all practical purposes, the organization and individuals involved are so polarized as to become dysfunctional. Some common examples are in areas of employer-employee relationships, neighborhood and community problems, homeowner associations and charitable and religious

organizations. Proceeding by fiat from the top or even by Roberts Rules of Order and majority rule rarely produces satisfactory outcomes, and often only furthers exacerbates the disenchantment of those in the minority or those who simply feel disempowered. In such situations, more and more frequently enlightened organizations are utilizing third party neutral mediators and facilitators to manage the situations and incorporate more collaborative approaches to the decision making process. Such collaborative approaches reduce the polarization of the parties; mend fences and restore personal relationships; focus on finding areas of mutual interests or at least compatible interests rather than adversarial positions; lessen the sense of disenfranchisement of the stakeholders, and produce decisions that everyone can buy into and that endure.

D. Although Alternative Dispute Resolution has its roots, and the basis for much of its early acceptance and success, in providing alternatives to litigation (which will continue to be a significant part of the field), the real promise of ADR is in the ever expanding uses for the techniques, skills and processes to not only resolve full-blown litigated disputes, but to prevent, control and better manage all kinds of conflicts in their early stages. In time the field may redefine itself and be known as "Conflict Management" or "Conflict Management and Dispute Avoidance and Resolution." In the meantime, for those who practice in the field, ADR should be seen as not only an alternative to litigation, but as a collection of powerful tools for the prevention, management and resolution of non-litigated disputes and emerging conflicts before they reach the level of litigation.

II. How does the mediation of a Non-Litigated Dispute differ from any other?

A. Mediation, at least as envisioned by its early proponents, is a process in which the disputants are the ones empowered to fashion their own solution to their own problem. The mediator is an impartial third party with no power who facilitates the negotiations, manages the process, and helps the parties reach a mutually acceptable resolution. In connection with litigated disputes, as the mediator pool has been increasingly populated by lawyers and former judges, however, there has been a gradual move away from the traditional roots of mediation toward a judicial settlement conference model, in which the parties and their lawyers are encouraged to defer to the judgment of the mediator.

1. In the judicial settlement conference model, the mediator, almost always a lawyer, focuses on the legal claims and theories of the disputants and pursues settlement based upon an assessment

or evaluation of the probabilities of success or failure in court (or arbitration) and the likely costs (both monetary and otherwise) of continuing down that path. This is, of course, what lawyers have been trained for and do best.

2. While most skilled mediators, even in the judicial settlement model, include some facilitative techniques, at least in the early stages of the process, in the litigated cases they tend to fairly quickly slide down the scale to evaluative, and even directive, approaches, often resorting (even if unintentionally or unconsciously) to pressure, coercion and manipulation to produce settlement.

3. Many, if not most, lawyer mediators using a judicial settlement conference model conduct no substantive joint sessions, permit little or no direct dialogue between the parties, and rely principally on caucusing separately with the parties and their lawyers.

4. Some purists would suggest that evaluative or directive mediation is an oxymoron, and, although it may settle disputes, is really just a settlement conference masquerading as mediation. In the context of a litigated dispute, however, this may be an unfair criticism, because the analysis of the probable litigation outcome and likely costs are a part of the reality of the conflict. The real magic of mediation in a litigated dispute arises out of the blending and implementation of techniques drawn from both facilitative and evaluative philosophical orientations by a skilled mediator. A good mediator in a litigated dispute, when asked if he or she is facilitative or evaluative, ought to be able to simply answer “yes!”

B. If the dispute being mediated is a justiciable controversy, but just not yet in litigation, there is much less difference between it and the litigated dispute. The threat of litigation is real and the analysis of the probable litigation outcome and likely costs will probably be a part of the mediation process, and at least is an available tool for the mediator who moves down the scale from facilitative to evaluative during the process. The primary differences are of degree. The parties are not likely to be as polarized and may be much more receptive to facilitative techniques. There is often a greater opportunity to restore and preserve relationships and reach positive, value added, outcomes when the mediation occurs pre-litigation.

C. A real paradigm shift occurs, however, when the dispute is a non-justiciable controversy without any real litigation option. A dispute that is possibly a justiciable controversy, but not likely to be litigated, falls

between the justiciable and non-justiciable controversies, and, the less likely it is to be litigated and the stronger the reasons that it won't be, the more it resembles the non-justiciable controversy for mediation purposes.

1. When a dispute is not in litigation and never will be, the primary technique of the evaluative or directive lawyer mediator, analysis of the probable litigation outcomes and likely costs, evaporates. If that is all the mediator has in the tool box, he or she is in big trouble.

2. The judicial settlement conference model, with its reliance upon caucuses rather than joint sessions and evaluative rather than facilitative philosophies, is almost always inappropriate and, virtually by definition, inapplicable.

3. Although some non-litigated disputes are two party (i.e. transactional matters between a buyer and seller or an issue between an employer and employee), many, if not most, are multiple party conflicts (i.e. public policy issues, land use matters, neighborhood conflicts, family disputes). Management of large complex multi-party non-litigated disputes almost always requires a highly facilitative approach, and too much evaluation and direction is generally not only ineffective, but may be very counter-productive. In fact, the process often more closely resembles group facilitation than mediation. Although group facilitation and mediation have much in common, and we sometimes tend to use the words facilitation and mediation interchangeably, group facilitation is a distinct process. Consider the following two definitions.

> Mediation [is] a voluntary, nonbinding dispute resolution process in which a neutral third party meets in private caucuses with each party, as well as in joint sessions, and guides the parties to a mutually beneficial resolution by defusing hostilities, narrowing the issues, and helping the parties gain realistic assessments of the merits of their case. Costello, Edward J., Jr., *Controlling Conflict: Alternate Dispute Resolution for Business*, 480 (Chicago: CCCH, Inc., 1996).

> Group facilitation is a process in which a person whose selection is acceptable to all the members of the group, who is substantially neutral, and who has no

> substantive decision-making authority diagnoses and intervenes to help a group improve how it identifies and solves problems and makes decisions, to increase the group's effectiveness. Schwarz. Roger, *The Skilled Facilitator*, 5 (San Francisco: Jossey-Bass, 2002).

Note how the definition of mediation focuses on the assessments of the merits of the case, totally appropriate and effective in mediating the litigated dispute, while the definition of group facilitation emphasizes how the facilitator intervenes to help the group identify and solve problems and make effective decisions, a process far more akin to that required in managing the non-litigated conflict.

4. Even in situations that would more appropriately be characterized as group facilitation, one advantage to continuing to identify the process as mediation is that the process will retain the protections of existing mediation confidentiality statutes and other case law relating to mediation.

5. Mediating the non-litigated dispute, particularly the complex multi-party non-litigated dispute, requires very different preparation than the typical litigated dispute.

III. Preparation for the non-litigated dispute

A. Litigated disputes generally involve two parties, the plaintiff and the defendant. Most litigated disputes involving multiple parties involve multiple plaintiffs who are similarly aligned and/or multiple defendants who are similarly aligned, and sometimes a third party defendant (i.e. insurance, indemnification or contribution claims). Mediator preparation for the litigated case, whether two party or multiple party, generally entails:

1. Studying a pre-mediation memorandum (with all significant documents and court papers attached) obtained from each party

a. Confidential for mediator and not exchanged by parties?

b. Exchanged by parties, but with a confidential, "for mediator's eyes only", supplemental letter or memorandum?

2. Sometimes having a pre-mediation telephone conference with the attorneys for the parties

a. Jointly or separately?

B. Preparation for the mediation of the non-litigated two party dispute is not too different in magnitude from the litigated dispute. Because there will be no analysis of the probable litigation outcomes and likely costs, however, the mediator requires different kinds of information to better prepare for and design the facilitative process that will used. The mediator should consider all of the preparation involved in the multiple party non-litigated dispute, and pick and choose what is suitable, probably scaled down, to fit the particular case.

C. Multiple party non litigated disputes in the private Sector might involve:

1. For example, in a business transaction, buyer, seller, seller's employees who might be retained by buyer, seller's officers who might be expected to give representations and warranties, seller's employees who might be asked to provide non-compete covenants, lawyers who might be asked for opinion letters, etc.

2. For example, in an employment matter, different categories of employees, immediate supervisors, middle management, upper management, etc.

3. For example, in a corporate governance matter, different classes of shareholders, directors, officers, employees, etc.

4. For example, in a family estate planning or business succession situation, trustors, trustees, beneficiaries, business partners, spouses, children, other interested family members, etc.

D. Multiple party non litigated disputes in the public Sector might involve

1. Administrative agencies

2. Elected public officials

3. Appointed public officials

4. Interested citizens

5. Citizen advocacy groups (local and national)

6. The media

E. In multi-party non-litigated disputes (private or public sector) substantially more preparation generally required

1. Still need pre-mediation memoranda

a. Obtain farther in advance of first formal mediation session

2. Often need to do extensive background research into the history of the organizations and the conflict

3. Before the first session, need to begin to ascertain real, as opposed to nominal, alignments of parties and more about their positions, interests and needs (problems, issues, goals, strengths, weaknesses, personalities, prior relationships) than is generally contained in the pre-mediation memoranda

a. face to face interviews?

b. questionnaires?

4. Determining who needs to be at the table is often more complicated and more important

a. Who decides – parties? their attorneys? sponsoring organization? mediator? some facilitated collaborative decision?

(i) If all parties who are affected by decision have opportunity to be heard, much greater chance of buy-in by all interested parties and a satisfying and enduring resolution

(ii) appearance of fair and open process

b. Who are the “stakeholders”, i.e. parties with a real interest in the outcome, and are they included?

c. Who are the decision makers, and are they included?

(i) With multiple parties in private sector, every party will usually be a party to the resolution, and needs a decision maker present

(ii) With multiple parties in the public sector, some stakeholders, i.e. citizens and citizen advocacy

groups, need to be heard but often are not parties to the actual resolution and do not need real decision makers with authority to bind present

(iii) For those parties who do have decision makers present, be certain they have full authority with respect to any negotiated reslution

(iv) In large complex multiparty cases this is often complicated by the need for institutional approvals, i.e. Board of Directors or legislative body. In such cases, the mediator should try to insure that the decision makers present are persons whose recommendation to the Board or legislative body will carry weight and likely be adopted

d. Who are the people with power to veto, reject or sabotage any agreement, and are they included?

e. Should the “troublemakers” be invited, or is it better to exclude them?

(i) If they could cause the agreement to be rejected or sabotaged, it is almost always better to include them and try to deal with them at the mediation, despite the difficulty they are likely to cause

f. As to the stakeholders, decision makers, people with power to veto and troublemakers

(i) Should they all be there, or are there representatives who can adequately represent their interests?

(ii) Will they all “buy in” if only participating through representatives?

g. Are there issues for which there should be public input? Official (political or administrative) input?

(i) If so, who are the proper representatives and how do you get them to the table

5. Should you invite pre-mediation memoranda from any additional parties being invited to the table?

a. Interview them?

b. Send them the questionnaires?

6. Need to assess amount of time likely to be required and how to best allocate and use it

a. Opening joint session may well require half a day, and often needs a whole day, particular with numerous parties in the public sector

(i) Absolutely critical that all parties feel they have had an opportunity to really be heard, and not just by the mediator, but by the other parties

b. With multiple parties in private sector, it is sometimes possible to complete the mediation in one day, but, with non-litigated disputes, additional time will probably be necessary

(i) Should mediator plan for additional consecutive days or for a number of days interrupted by recesses?

c. With multiple parties in the public sector, multiple days almost certainly will be required, and such public policy conflicts generally spread out over weeks and months, with joint sessions and separate caucuses taking place followed by sometimes lengthy recesses

(i) Consider how to best schedule the sessions to minimize the down time for the parties

(ii) Consider whether “homework” can be given to the parties to make the sessions more productive when they occur, and to keep everyone engaged during their downtime while the mediator is caucusing with others

d. Begin to determine the order of caucusing with the various parties

(i) With only two parties, the order is less important, but, with multiple parties the efficient use of time depends in part on the order of the meetings

(ii) There is no good general rule; it really depends on the particular facts and circumstances in each case and how the mediator initially assesses them

IV. Mediation philosophy

A. Facilitative, Evaluative or Directive?

1. In the litigated case, most mediators move from facilitative to evaluative, and sometimes even to directive, as the day goes on

2. In the non-litigated dispute, particularly in the private sector, mediators may move a little way down the same continuum, but it is much more important to remain primarily facilitative throughout the process. This is particularly so for the lawyer mediators in the non-litigated dispute, because they generally do not bring any special substantive expertise to the table as they do in the litigated case when they analyze the probable litigation outcomes and likely costs based on their training and experience

2. With multiple parties in the public sector, the mediator's role is almost totally facilitative throughout the process

a. When dealing with public policy issues, elected officials, interested citizens and citizen advocacy groups, the resolution is not dependant upon some evaluative or directive assessment by the mediator of the risks and rewards of litigation or arbitration, and the stakeholders generally are uniformly uninterested in the personal opinions of the mediator on the hotly contested public policy issues involved

3. With multiple parties, even more than in two party mediations, however, as the process develops the mediator may well be the only one to have a real grasp of the "big picture" and the opportunity to see possibilities for resolution that will not be obvious to the parties

a. As a result, even while being facilitative, and whether dealing with multiple parties in private sector or the public sector, as the process proceeds and the parties develop trust and respect for the mediator, the mediator probably can and should become more proactive

b. Although the distinction may be subtle, there is a difference between being more active or proactive and being openly evaluative or directive

V. The opening joint session

A. In litigated disputes there is real disagreement among parties, their lawyers, and even among mediators, about whether to do an opening joint session

1. Those opposed (mediators and advocates) argue:

a. The parties can't even be in the same room – their positions will become more polarized at best, and at worst the mediation will blow up before it really gets started

b. Everyone already knows everyone else's position – it is a waste of time

2. Those in favor argue:

a. The parties (not their lawyers) need to vent, need to tell their story and need an opportunity to feel that they have been heard, all of which distinguishes real mediation from judicial type settlement conferences

b. If done well, it may be most important part of the mediation process and sets the stage for everything that follows

B. In non-litigated disputes, particularly the multiple party non litigated disputes that are more like group facilitations, there should be no debate. A key component of the process of helping a dysfunctional multi-party group identify and solve problems and make effective decisions is helping the parties to understand each others' perspective and point of view. One prominent writer expresses the importance of mutual understanding in four principles:

> *Principle 1: For multistakeholder collaboration, building mutual understanding is not optional; it is mandatory.* So long as participants in a collaboration have not acquired sufficient mutual understanding, their chance of success will be painfully low. . . . To be effective cothinkers participants

have to be able to think from each other's points of view, even when they disagree

* * *

Principle 2: The existence of the Groan Zone is a normal fact of life, making it visible to participants is a powerful, grounding intervention. It does not matter what you label it. . . . But whatever one calls it, this period of struggle and impatience and frustration – this period, fundamentally, of poor communication is a natural, normal, recurring phase of multi-stakeholder collaboration. When its existence is left unrecognized, participants frequently misdiagnose and misattribute their frustrations, which lead generally to ineffective interventions.

* * *

Principle 3: It takes careful, effective listening to build mutual understanding. . . . Under most circumstances, participants in a collaboration will probably never be able to know the private depths and crevices of one another's inner worlds. But that level of intimacy is rarely required by the demands of collaboration. What does matter is whether participants can understand each another well enough to think from each other's points of view. Careful listening is the behavior that enables that level of comprehension. . . . When people chronically are not listening, they are not collaborating.

*Principle 4. Collaboratives, and the skillfulness of the participants, develop over time.*Building mutual understanding is not accomplished at a single sitting. Genuine mutual understanding unfolds and emerges, analogous to the peeling of the proverbial onion. For all participants, learning how to persevere, in good faith and with tolerance, is not merely a good practice. It is essential. Kaner, Sam, *Promoting Mutual Understanding for Effective Collaboration in Cross-Functional Groups with Multiple Stakeholders*, in The IAF Handbook of Group

Facilitation 132-133 (Sandy Schuman ed. 2005).

1. Joint sessions are not only essential in mediating non-litigated disputes, they are the heart of the process. The parties cannot build the mutual understanding necessary to a successful collaborative resolution if they do not have the opportunity to interact with each other

2. Gary Friedman and Jack Himmelstein, in their new book *Challenging Conflict: Mediation Through Understanding* (Chicago: American Bar Association, 2008), explain how they mediate both litigated and non-litigated disputes through their "understanding based model," in which they do not caucus at all, and conduct the entire mediation in joint session. The notion of understanding, and particularly mutual understanding, is central to their model, as it is in traditional mediation theory. Friedman and Himmelstein base their approach on four core principles:

> First, we rely heavily on the power of **understanding** rather than the power of coercion or persuasion to drive the process.
>
> Second, the primary **responsibility** for whether and how the dispute is resolved needs to be with the parties.
>
> Third, the parties are best served by **working together** and making decisions together.
>
> Fourth, conflicts are best resolved by **uncovering what lies under** the level at which the parties experience the problem.

Although some degree of understanding might be possible in separate caucuses, Friedman and Himmelstein make a compelling case for their belief that real understanding can best be achieved by having the parties communicating directly with each other in the same room. Facilitating that kind of emotionally laden and tension filled dialogue is extremely frightening and very hard work, but has the potential to pay great dividends. As Friedman and Himmelstein note, mediators who separate the parties immediately are generally doing so for their own comfort, and not because even they believe it is necessarily the best way to proceed.

3. An extraordinary mediator and trainer once said, in response to those who argued they could not even have certain parties in the same room together, that any mediator who regularly skips the substantive opening joint session and separates the parties into caucus rooms is a mediator who is afraid of conflict himself, so how can he help anyone else work through conflict.

4. Put even more succinctly, “Facilitation is not for wimps.” Ghais, Suzanne, *Extreme Facilitation* 2 (San Francisco: Jossey-Bass, 2005).

5. The opening joint session is really two joint sessions, (1) the mediator’s introduction and (2) the substantive opening joint session

C. Mediator’s introduction

1. What is the purpose?

a. Primarily for benefit of parties, secondarily for lawyers

b. Make parties comfortable and relaxed

c. Create safe environment

(i) Mediator has no power

(ii) Confidentiality

d. Mediator begins to establish knowledge of process, knowledge of the dispute, impartiality, integrity, rapport and trust

e. Begin the absolutely critical process of changing the way the parties think about their dispute and the resolution of it

(i) Not about who is right or wrong, but perceptions, perspectives and misperceptions

(ii) Not about rehashing the past, but reshaping the future

(iii) Not about winning or losing, but it is just a problem that needs a solution

(iv) The dispute may be an opportunity for positive growth and change

(v) It is the parties' problem, not their lawyers', and they should use their lawyers more for legal advice and counseling during the process, and less as their advocates to speak for them

f. View the mediator's introduction as an abbreviated Mediation 101 for the parties

(i) Although the mediator's introduction is primarily for benefit of parties, as a secondary bonus the mediator often can subtly influence how the lawyers will approach the rest of the day, and the dynamic between the lawyer and the client. The mediator can not only empower the parties to deal with each other, but to work more productively with their own lawyers and take control of the resolution of their own dispute

2. Most mediators probably do a mediator's introduction in joint session, even if they then skip the substantive opening joint session

D. Substantive opening joint session

1. What is the purpose of the substantive opening joint session?

a. Each party's opportunity to be heard by the other parties, not just the mediator and their own lawyer

b. Each party's opportunity to understand the other's perceptions and perspectives on the dispute, even if they don't agree with them

c. Each party's opportunity to express the personal, physical, emotional and economical impact the dispute has had and for each party to understand, often for the first time, how the dispute has affected the other parties

d. Each party's opportunity to achieve the extraordinary catharsis that almost always occurs during this process, which tends to clear the way for meaningful discussions and decision making

e. To expose misperceptions held by each party, often about the other's motives and actions, which also tends to open the door to real problem solving

f. Although the opening joint session sometimes leads directly to meaningful decision making, most of the time it sets the stage for more productive caucuses. Often, after a particular difficult and emotional substantive opening joint session, the mediator will go into the separate caucuses and hear parties acknowledge that they never really understood how the other parties felt, or why they did what they did until now. Often the opening joint session exposes the misperceptions of the parties about the other's motives, and, although they still disagree, they are now able to at least engage in civil discourse, and negotiate and pursue decisions in good faith.

2. Who speaks – parties or lawyers?

a. Based on the foregoing purposes or goals for the substantive opening joint session, the parties should be expected to do most of the talking in this part of the mediation

b. Try to keep the lawyer's role in the substantive opening joint session to a minimum

c. Lawyers' opening statements, which tend to be adversarial closing arguments, are counterproductive

d. Invite the parties to speak freely and openly. In the mediator's introduction, they should have been told that they are going to hear things they don't agree with, maybe even things that make them angry, but they need to listen and try to understand how the other parties feel, and when it is their turn to speak, they will probably say things that the other parties do not agree with and that will make the other parties just as angry, but before they can solve the problem, they each need to understand how the other perceives it and feels about it.

(i) If the mediator is not afraid of conflict, understands how to monitor it, when to intervene, and what interventions to use, it is not only all right, but often healthy, to let the situation get worse for a little while before it begins to get better. The mediator

might explain to the parties that, although being polite and respectful is desirable, it is not required, and it is more important that the parties express their true feelings in order to fully understand each other. When the parties have really had their say, with a little help from the mediator one often can feel the tension going out of the room and the climate changing

3. What is the mediator's role during this often tension filled substantive opening joint session

a. Bring peace into the room

(i) Listen actively – watch emotions and body language

(ii) Help the parties to listen actively

(iii) Demonstrate understanding of facts, issues and positions by paraphrasing and asking neutral informational questions

(iv) Relieve tension be reframing adversarial issues in more neutral and benign language

(v) Demonstrate empathy and sensitivity, but always retain the appearance of complete impartiality. Demonstrating empathy for all of the parties is so important that it is a recurring theme in virtually all of the literature

(vi) Be vigilant as to when intervention might be necessary

(vii) When intervening, always attack the problem, not the parties

(viii) Once the decision to intervene is made, be sure to retake control quickly and firmly, but with a light touch and maybe even a little humor, i.e. "Okay, it looks like it is time for me to put on my referee's striped shirt, blow my whistle and call a time out"

b. Prepare, prepare, prepare. The mediator can never know too much about the dispute, the parties and the lawyers, or be too prepared. While this is extremely

important even in the small two party litigated dispute, it is absolutely vital in the non-litigated dispute, and particularly the multiple party non-litigated matter

4. Do you discuss resolution during the substantive opening joint session?

a. Sometimes, but not generally

b. Less frequently in complex multiple party non-litigated disputes than in the smaller two party disputes, litigated or non-litigated

c. Good practice to ask the parties and their lawyers if they would rather separate into private caucuses before addressing real decision making and resolution

d. The lawyers and parties almost always want a chance to talk to the mediator privately in caucus before getting into the real work of trying to make decisions and resolve the conflict

e. Often what the mediator heard and observed in the substantive opening joint session provides real fodder for the first caucuses

VI. The caucus stage

A. How should the parties be grouped for the first round of caucuses?

1. Although various parties may have common interests, it is often best to allow each party, or distinct group of parties with clearly similar interests, to have a separate opening caucus

a. This insures each has a full opportunity to be heard by the mediator

b. Avoids any chilling effect that might occur by being combined with others who initially appear to the mediator to be similarly situated, but might not be for reasons not yet apparent and which the affected parties are uncomfortable discussing in front of the others

c. If mediator did separate interviews or questionnaires as a part of the pre-mediation preparation, then the mediator

may have basis for combining certain parties or reasons for separating them

d. Always safe to ask the parties and their lawyers before beginning the caucuses, but generally best to even do that on a one on one basis to avoid any chilling effect of the party or lawyer having to answer in front of other parties who assume they are similarly aligned

e. After the opening caucuses, the parties sometimes may then be combined in groups having similar interests

B. Who should the mediator caucus with first, and then in what order should the rest of the caucuses occur?

1. Be sure to tell everyone not to read anything into who the mediator caucuses with first, what order the caucuses take, or how much time is spent with any party or group of parties

a. Amazing how something so unimportant and innocuous can be misunderstood by the parties and undermine the mediator's appearance of impartiality and credibility and the parties' trust

2. No general rule – the order is case and fact sensitive

a. Sometimes, the decision is based on certain facts or positions uncovered by the mediator in pre-mediation preparation or in the joint session that require immediate understanding, exploration or other attention as a prerequisite to moving on

b. Sometimes, the decision is based on certain facts or positions uncovered by the mediator in pre-mediation preparation or in the joint session that indicate a particular party will be a problem or will be particularly helpful in achieving resolution and should be visited first

c. Sometimes there appear to be threshold issues that, if even tentatively or conditionally resolved, will expand the options or opportunities for settlement

d. Sometimes, the decision is based on certain facts or positions uncovered by the mediator in pre-mediation preparation or in the joint session that give the mediator, with a grasp of the overall "big picture", some ideas about how

the dispute might be resolved that dictate the order of initial caucusing.

(i) Remember, the larger the number of parties in multiple party cases, the more the mediator, even while in a facilitative mode, should probably be more proactive than might be necessary in two party disputes, because otherwise there is almost no way to achieve a timely exchange of all of the ideas that might contribute to resolution and good decision making among so many parties and groups of parties

C. Sequencing and scheduling the caucuses

1. Unlike the usual mediation of a litigated dispute, where we go to caucuses immediately after the opening joint session, and continue to shuttle back and forth all day until settlement and closure, in non-litigated disputes, and particularly multiple party non-litigated disputes, that is rarely possible, and the amount of downtime for multiple parties is a constant problem

2. As early as possible, the mediator should determine how much time the next round of caucuses (whether the first round or subsequent rounds) should require and the order the mediator wishes to follow, and begin scheduling them.

a. The caucuses may require multiple days

b. Minimize down time for parties and their attorneys by sequencing the caucuses and only having the parties and their lawyers available when it is their turn

c. The caucuses may take place in a variety of locations, and in large complex multiple party cases it is often more efficient and less expensive for the mediator to go to the location of the respective parties or their lawyers for some of the caucuses

d. Although not generally advisable for the first round, and not really preferable ever, if necessary to keep the process moving efficiently, sometimes some of the subsequent caucuses can be done telephonically

e. At the conclusion of the first caucus with each party, particularly if it is a multi-party non-litigated disputes and considerable time will pass before the next caucus, it is a

good idea to try to provide the parties with some “homework” to keep them engaged in the process until their next caucus

f. Good idea to tell the parties and their lawyers that you may call from time to time with specific questions that arise as you caucus with other parties. If considerable time is passing between caucuses, for whatever reasons, it is a good idea to find an excuse to contact the parties just to keep them in the loop and actively engaged

D. The opening - what do you want to achieve in the first caucus with each party

1. Give parties and attorneys a chance to tell mediator everything they wanted to say but didn’t want to say in front of the other parties.

2. Find out whether each party really understands how the others perceives the dispute

3. Begin to deal with the emotional components of the dispute

a. Emotions are almost always present

b. To ignore them is to increase your risk of failure

c. Have a strategy for dealing with the emotions?

d. In their recent book, *Beyond Reason*, Roger Fisher (one of the co-authors of *Getting to YES)* and Daniel L. Shapiro offer what they call **“**a strategy to generate positive emotions and to deal with negative ones.” At the outset, they recognize that for a negotiator in the heat of the moment to observe, correctly identify, ascertain the real cause of, and develop an appropriate response to any one or more of the literally hundreds of human emotions that might be present would be a virtually insurmountable task. Instead, Fisher and Shapiro propose a manageable method for dealing with this broad range of specific emotions by focusing on five core concerns that arguably are responsible for many of the individual emotions.

Fisher and Shapiro define core concerns as basic human desires that are important to virtually everyone, and therefore will almost certainly be important to all of the participants in any negotiation - the parties as well as the

lawyers and other players. As a result, by addressing these core concerns, a negotiator, whether a party, a lawyer or a third party mediator, should be able to generate the kind of positive emotions that foster better personal relationships and encourage mutually beneficial agreements among the negotiators.

The five core concerns identified in *Beyond Reason* are appreciation, affiliation, autonomy, status and role. Fisher and Shapiro explain that everyone wants to be appreciated, and in the context of negotiation that means everyone at least wants their ideas acknowledged as having merit, even if one does not entirely agree with or accept them. Affiliation means that people want to be treated as colleagues, not adversaries. By autonomy, Fisher and Shapiro suggest that everyone wants their freedom to decide respected. People want their standing to be given recognition. And finally, they all want to have a role that feels fulfilling. Fisher, Roger and Shapiro, Daniel, *Beyond Reason* (New York: Penguin Group, 2005).

4. Encourage the parties to reexamine some of their assumptions coming into the mediation and they will probably recognize that some of their perceptions, particularly about the other side's behavior and motives, may in fact be misperceptions

5. Should the mediator solicit settlement offers in the first round of caucuses?

a. Generally not, but instead just try to have the parties define the starting playing field, so mediator can learn whether all parties are in the same ball park or even in the same universe

6. Everything the mediator does in the first round of caucuses should be aimed, in part at least, at continuing to build trust and engender confidence, which the mediator is putting in the bank to draw on in the later phases of the process.

E. The middle game - what should mediator be trying to do in the subsequent rounds of caucusing?

1. Begin moving the parties from rehashing the past (who did what to whom) to reshaping the future (how do we resolve this problem)

2. Begin moving the parties from positional bargaining and posturing to interest based bargaining (what are their real interest and needs)

a. Explore the difference between the positions and postures they and their attorneys assert and their real personal, business, professional and economic interests

b. Have each party discuss what they think the other parties' real interests are, as distinguished from their asserted positions and posturing

c. This is often the first real breakthrough - finding out that the real interests of multiple parties might be reconcilable, and that it has nothing to do with whose asserted positions are right or wrong

3. Begin having the parties distinguish what they said they wanted, from what they really need

a. Then get them to talk about what they might be willing to give up in order to get what they really need

4. Encourage the parties to explain how they see this dispute playing out if they don't reach resolution and what they perceive to be their best outcome, i.e. their best alternative to a negotiated agreement (BATNA)

F. The closing – what should the mediator do in the late stages of caucusing?

1. Should the mediator move from facilitative to evaluative?

a. In litigated disputes, yes. The parties and their attorneys expect it; believe that is, at least in part, what the mediator is being paid for; and it is often the most effective impasse breaker

b. With non-litigated disputes, particularly multiple party non-litigated disputes, tread very cautiously. The parties don't necessarily expect or want the mediator's personal opinions, and the kind of interests and public policies at issue are generally not susceptible to objective evaluation. It is not likely to be a successful impasse breaker, and may undermine the trust the mediator has established over the prior days or weeks and bring the process to a quick end

c. With non-litigated disputes, particularly multiple party non-litigated disputes, however, it is time for the mediator to be more proactive, i.e. merging all of the information obtained throughout the entire process and trying to fashion approaches and opportunities for resolution and floating them by the various decision makers. The mediator, without becoming evaluative or directive, can be a leader, not just a messenger. The art is in making the decision makers think the ideas are their own, not the product of the mediator's evaluation, direction or decision

2. Should the mediator encourage parties similarly situated to negotiate as a group or separately?

a. The likelihood of global resolution is greater if parties similarly situated make their proposals and suggestions for decisions and resolutions as a group

b. If proposals and suggestions for decisions and resolutions are made on behalf of a group of parties similarly situated, the mediator should encourage a response to the group

c. In the event of an impasse, a party that received proposals and suggestions for decisions and resolutions from a group may want to respond to each member of a group individually, and should be encouraged to do so.

d. Similarly, in the event of an impasse, the members of a group that made proposals and suggestions for decisions and resolutions may want to submit separate proposals and suggestions for decisions and resolutions to each member of the other group individually, and should be encouraged to do so

3. If global resolution seems unlikely, the mediator should begin to explore partial or piecemeal resolution.

a. Can some parts of the dispute be resolved as to all parties?

b. Can all of the disputes between some of the parties be resolved?

(i) Separate resolutions among some of the parties may put considerable pressure on those parties holding out

c. Just because a global settlement of all disputes among all parties can not be achieved does not mean the mediation of a large multiple party non litigated disputes was a failure. The mediator should try to achieve a resolution of as much of the conflict, or as many of the sub conflicts, as possible. Such partial resolutions, and the ideas they generated and collaborative efforts that produced them, often set the stage for a subsequent resolution of the balance.

d. When most of the dispute can be resolved, but there are specific issues about which there is no agreement, consider a settlement that resolves all but those specific issues, and submits them to some other decision making process, like a vote or the selection of some third party arbitrator to break the impasse and make a decision for the group that will be binding

(i) ideally, the arbitration submission can be carefully crafted to produce a speedy and cost effective process

4. Should the mediator ever meet with the parties in either a joint session or separate caucuses without their attorneys being present?

a. Often mediators suspect that the attorneys are putting on a show for their clients. Sometimes, however, it appears the clients are putting on their own show for their own attorneys, and the mediator senses that the parties may be far more receptive to conciliatory and collaborative bargaining if they could do so without feeling it would be some sign of weakness in front of, or betrayal of, their own counsel

b. If the mediator has a prior relationship with the attorney and has gained the attorney's trust over time, it is not too difficult to arrange a meeting with a party without counsel, or even a joint session with multiple parties without their counsel

c. Sometimes the mediator can ask to meet first with the attorney alone, then with the client alone, and then together, and it helps flush out useful information about everyone's real interests as distinguished from their positions and negotiating postures

d. Sometimes the attorneys actually suggest such a meeting

e. It is not advisable to ever meet with the parties alone without first having obtained their attorney's consent

f. If the mediator is going to meet with the parties without their counsel present, the mediator should remain facilitative and not evaluative, not pressure the parties in any way, and refrain from giving any legal or policy making advice or criticizing a party's attorney in any way. It is really an information gathering and trust building caucus. It can be very effective it getting past certain impasses that result from the particular dynamics that sometimes come to exist between the attorneys and their own clients over time.

5. When all else has failed, what about a "mediator's proposal?"

a. In litigated disputes, the mediator's proposal can be the ultimate impasse breaker

b. With non-litigated disputes, and particularly multiple party non litigated disputes, the mediator's proposal can be an effective tool to generate rethinking by various parties, and may lead to further progress, but is less likely to be an ultimate impasse breaker in and of itself, in part, because of the kinds of public and political interests usually involved

c. Probably not advisable to offer a mediator's proposal for global resolution without the consent of all parties, or for partial resolution without the consent of all the parties involved in the partial resolution

d. Probably not advisable to make a mediator's proposal if asked to do so by one or some of the parties without the agreement of the others

e. Even if requested by all parties, a mediator's proposal should probably not be given until the very end of the

process as a last ditch effort to break impasse. Once the mediator gives a mediator's proposal, for all practical purposes the mediator is finished. If it does not produce a mutual decision and resolution, the mediator will almost certainly have lost the appearance of neutrality, impartiality, credibility and trust with at least some of the parties. If it doesn't result in a resolution, the mediator should be prepared to call it a day.

6. At the end, should the mediator ever agree to arbitrate the remaining unresolved issues?

a. If parties request it?

b. Should mediator ever suggest it?

c. What about "baseball arbitration"?

VII Documentation of decisions and resolutions

A. In the litigated case the mediator should always try to end the mediation with a written enforceable settlement agreement. In the non-litigated case, documentation of the decisions and resolutions is equally desirable, but often not obtainable as a part of the mediation itself. Generally approvals of boards and legislative bodies will be required, and the very nature of the conflicts being resolved often mitigate against the parties being willing to sign some bullet point memorandum. Generally, the parties and their attorneys will require that they go back to the drawing board and craft whatever final documentation is required without the interim deal point memorandum. If the parties wish to have a written memorandum of the deal points decided or agreed upon, then the following suggestions would be apropos.

1. Although some mediators draft settlement agreements, the better practice is to require the parties and their lawyers to do so

2. Usually, a handwritten memorandum of the mediated decisions and resolutions in the form of an agreed term sheet is prepared by the lawyers and signed by all of the parties

3. The memorandum of the mediated decisions and resolutions generally provides for the incorporation of the agreed terms into formal definitive documents, and often includes a timetable for completing the formal documents

4. The memorandum of the mediated decisions and resolutions often recites that, even in the absence of the formal documents, the parties intend the memorandum of the mediated decisions and resolutions to be fully binding and enforceable

5. The memorandum of the mediated decisions and resolutions often recites that statutory or decisional authority regarding confidentiality of mediation (i.e. §12-2238, Arizona Revised Statutes) is waived with respect to the memorandum to the extent that the disclosure of the memorandum is necessary to its enforcement

6. The memorandum of the mediated decisions and resolutions often includes a provision that, in the event of any unresolved disagreement as to the form and substance of the formal documents, upon notice from either party, the disagreement is to be submitted to the mediator, who is then to act as an arbitrator, and resolve the dispute as to the form and substance of the formal documents and do so in the form of a final and binding arbitration award

(i) When such a clause is included, the mediator is almost always strictly limited to incorporating the agreed upon terms as reflected in the memorandum of the mediated decisions and resolutions into appropriate formal definitive documents, and is prohibited from changing any of the agreed terms of the decisions and resolutions

7. When institutional or legislative approval is required, the memorandum always provides that it is subject to and conditional upon such approval

(i) Often the appropriate decision makers signing the agreement are required by the terms of the memorandum of to seek such approval in good faith and with all due diligence

(ii) Sometimes the memorandum provides what is to happen if such institutional approval is not able to be obtained, i.e. return to mediation? go to binding arbitration?

(iii) With the consent of all of the parties, and with a clear understanding of the extent to which confidentiality is to be maintained, the mediator may agree to appear before or communicate with the body whose approval is required in order to support the process and the memorandum of the

mediated decisions and resolutions that resulted from the process

VIII. Conclusion. A mediator wishing to venture into the arena of non-litigated conflict should consider immersing himself or herself in the abundant literature on facilitative, and even transformative, mediation, group facilitation and deliberative democracy. The investment will pay huge dividends. One will not only learn the skills and techniques necessary to manage a wide variety of non-litigated disputes, but will acquire a whole set of additional tools to combine with their existing evaluative skills and put to good use in mediating litigated disputes as well. To be a complete mediator, one should be able to assess the conflict and determine whether it is a litigated dispute, a non-litigated dispute, or somewhere in the middle; design an appropriate process for the particular dispute; and have a sizeable array of tool to apply and the knowledge and confidence to know which to use and how to effectively use them. Some recommendations of literature in mediation, group facilitation and deliberative democracy are attached.

Recommended Literature on Mediation, Group Facilitation
and Deliberative Democracy

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Schwarz. Roger. *The Skilled Facilitator*. San Francisco: Jossey-Bass, 2002.

Winslade, John and Monk, Gerald. *Narrative Mediation: A New Approach to Conflict Resolution.* San Francisco: Jossey-Bass, 2000.

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