

BASIC MEDIATION TRAINING

September 9, 10, 11, 17, 18, 2020



Dispute Resolution Center
Austin, Texas



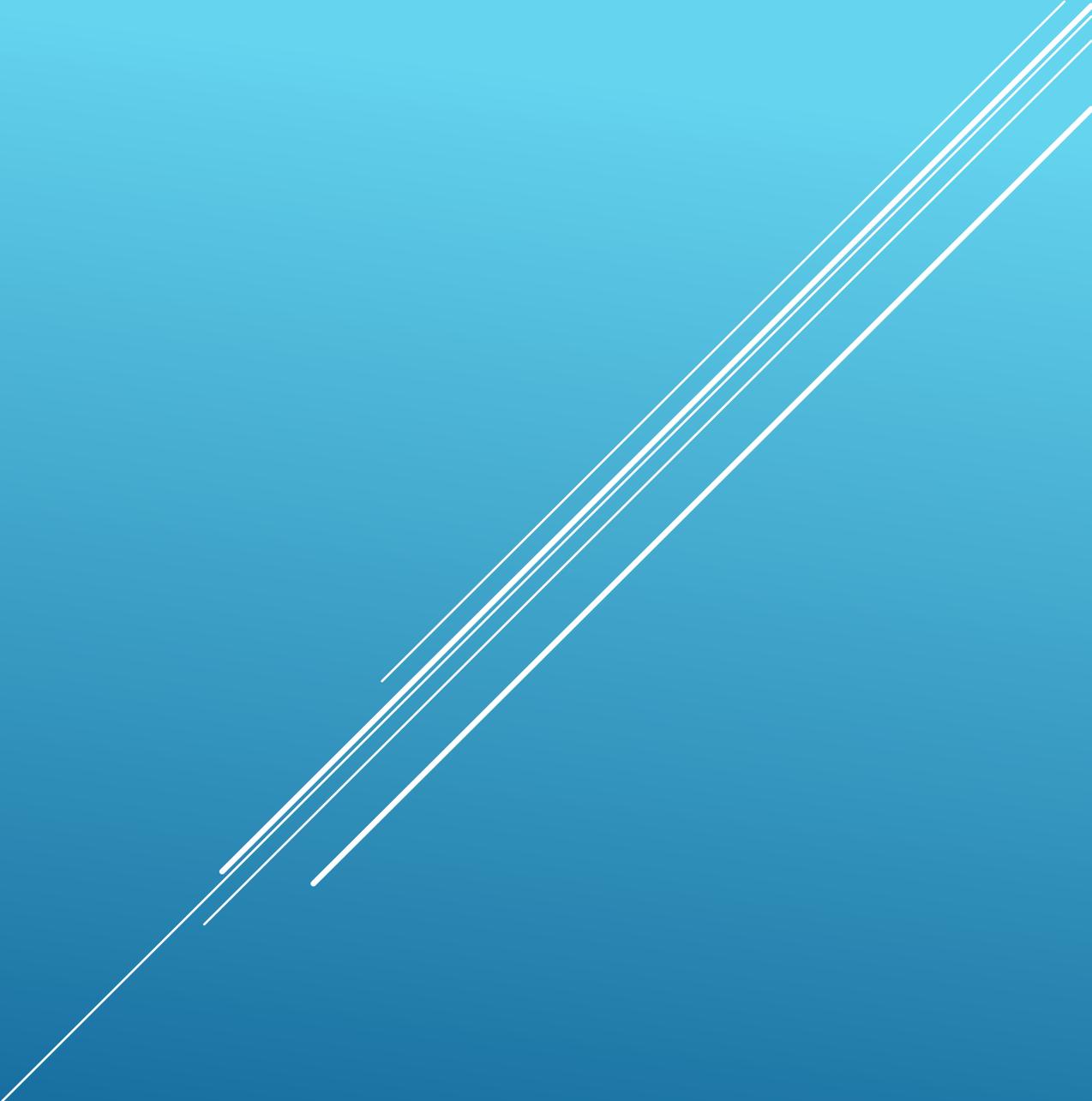
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BASIC MEDIATION TRAINING

Walter A. Wright, J.D., LL.M.

Levey & Wright, P.C.

Austin, Texas

A series of several parallel white lines of varying thicknesses, slanted diagonally from the bottom left towards the top right, set against a blue gradient background.

- I. Overview, Introductions, Expectations
- II. History of Alternative Dispute Resolution
- III. Texas ADR Procedures Act
- IV. Conflict Resolution Styles
- v. Principled Negotiation: Getting to Yes
- vi. Principled Negotiation: Getting Past No
- vii. Two Role Plays/One Exercise

I. OVERVIEW, INTRODUCTIONS, EXPECTATIONS

Plan for Day One

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TRAINING PARTICIPANTS

I. OVERVIEW, INTRODUCTIONS, EXPECTATIONS

Introductions of Course Participants

- ▶ Where are you from?
- ▶ Why are you taking a mediation course?

WALTER A. WRIGHT

- ▶ Native Texan, born in Corpus Christi (1953)
- ▶ Grew up in Needville, Texas (Ft. Bend County); graduated from NHS in 1971
- ▶ College: University of Houston, (B. A., 1974) (Political Science, Spanish, French)
- ▶ Law School: University of Houston (J.D., 1976)
- ▶ Graduate Law School: New York University (LL.M. in International Legal Studies, 1979)
- ▶ Attorney since 1977
- ▶ Practiced international and commercial transaction law, commercial litigation and bankruptcy litigation (1979-2014)

I. OVERVIEW, INTRODUCTIONS, EXPECTATIONS

Introduction of Instructor

WALTER A. WRIGHT

- ▶ Mediator since 1986
- ▶ As a younger mediator, mediated personal injury, commercial-litigation, family and community cases
- ▶ Since moving to Austin in 1997, have mediated mostly employment-discrimination and disability-discrimination cases, some family and community cases
- ▶ Assistant professor in Legal Studies Program at Southwest Texas State University (1997-2003)
- ▶ Associate professor in Legal Studies Program at Texas State University since 2003

I. OVERVIEW, INTRODUCTIONS, EXPECTATIONS

Introduction of Instructor

WALTER A. WRIGHT

- ▶ Special interest in Alternative Dispute Resolution in Latin America (Argentina, Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Peru, Uruguay, Venezuela)
- ▶ Special interest in cultural issues in mediation
- ▶ Service to ADR professional organizations (Texas Association of Mediators, Association of Attorney-Mediators, State Bar of Texas Alternative Dispute Resolution Section, Association for Conflict Resolution, various Texas Dispute Resolution Centers)

I. OVERVIEW, INTRODUCTIONS, EXPECTATIONS

Introduction of Instructor

I. OVERVIEW, INTRODUCTIONS, EXPECTATIONS

Expectations

- ▶ Attend forty hours of class
- ▶ Treat each other respectfully
- ▶ Participate actively in role plays
- ▶ Learn
- ▶ Have fun!



II. BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Alexis De Tocqueville, a French social philosopher, noted in the 1830s that Americans had a fondness for going to court:

“Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings.”

Democracy in America (1838)

BUT . . .

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Americans have an historic fondness for litigation



Alexis De Tocqueville

Some forms of ADR existed before European colonists appeared in the Western Hemisphere. For example:

The Iroquois Nations developed a Great League of Peace and Power to preserve peace between the five Iroquois nations of the Great Lakes region.

The Lenni Lenape (Delaware) were known as mediators and peacemakers and maintained relative peace with Europeans.

Native American tribes arbitrated internal and inter-tribal disputes.

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Before the Europeans



Some forms of ADR existed during the colonial period of the United States. For example:

During the British colonial period, the Pilgrims of Massachusetts practiced some forms of neutral evaluation and arbitration in order to maintain peace within their religious communities and avoid British courts.

European colonists, including the British, brought a strong tradition of commercial arbitration with them.

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Seventeenth Century



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BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

After gaining independence from the British, the U.S. Congress passed a Patent Law in 1790. This law authorized a system of arbitration to resolve disputes about patent applications.

Eighteenth Century



Image: Clicker-Free-Vector Images
@ Pixabay.com

George Washington included an arbitration clause in his will in 1799:

“My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants--each having the choice of one--and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States.”

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Eighteenth Century



Abraham Lincoln strongly believed in avoiding litigation by promoting negotiation. His advice to young lawyers:

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.” Abraham Lincoln, July 1850



Image: OpenClipart -Vectors
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BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Nineteenth Century

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Nineteenth Century

In 1888 and 1898, as a response to violence that occurred during laborers' strikes against several railroads, Congress authorized the arbitration of labor disputes.



Image: Wikimages @ Pixabay.com

In 1925, Congress passed the Federal Arbitration Act, which established a national public policy favoring arbitration. The law remains in effect today.



In 1935, the National Labor Relations Act encouraged the use of arbitration in labor disputes. This law also remains in effect today.



BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

First Half of the
Twentieth Century

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

In 1934, Congress established the National Mediation Board to resolve disputes in the railroad and airline sectors. This Commission still exists and administers mediations and arbitrations for the same sectors.

First Half of the
Twentieth Century

See: [National Mediation Board](#)





Congress established the Federal Mediation and Conciliation Service (FMCS) in 1947. The current mission of the FMCS includes preventing and minimizing the commercial impact of disputes among employees and their employers. It provides mediation, conciliation and arbitration services.

See: [Federal Mediation and Conciliation Service](#)

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

First Half of the
Twentieth Century

After World War II, many experts started to observe an increasing “litigation crisis” that arose from several important social and legal factors:

With the increase in the size and number of cities and suburbs, residents often did not know each other, even when they were neighbors. They tended to litigate instead of negotiate or mediate with their neighbors.



BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Second Half of the Twentieth Century





BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Second Half of the
Twentieth Century

With increases in interstate and international commerce and improvements in transportation and communication systems, the number and complexity of litigated cases grew.





Image: Amberzen @ Pixabay.com

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Many federal and state laws established new rights favoring women, minorities, workers and consumers. The beneficiaries of these new laws often attempted to enforce them through the courts.

Second Half of the Twentieth Century



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BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Second Half of the
Twentieth Century

The number of divorces increased dramatically, and courts became increasingly occupied with cases involving divorce, child custody and support, and property division.

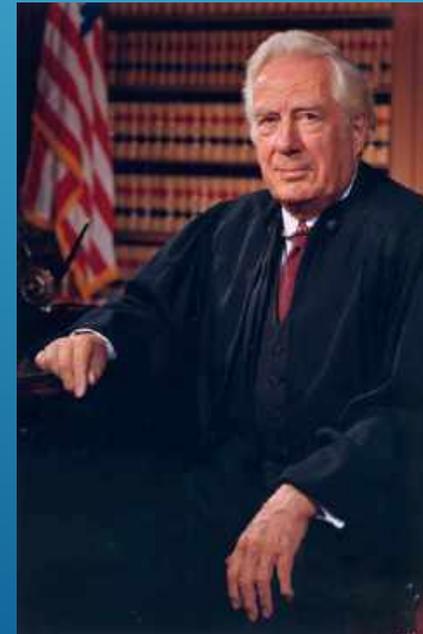


Image: Tumisu @ Pixabay.com

Concerned about increasing court congestion around the country, Warren Burger, Chief Justice of the United States Supreme Court, convened the Pound Conference in 1976. He invited some of the most famous judges, lawyers and legal scholars in the country to speak and propose possible solutions for the populace's general dissatisfaction with the administration of justice.

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Second Half of the
Twentieth Century



Warren Burger

One of the speakers at the Pound Conference, Frank Sander, a professor at Harvard Law School, proposed a possible solution that, with the passage of time, became known as the “Multi-Door Courthouse.”

Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79 (1976).



BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Second Half of the
Twentieth Century



Professor Sander understood that the U.S. justice system was not appropriate for all cases. He proposed a system for receiving and analyzing each dispute as it arrived (or before it arrived) at the courthouse.

He recommended:

- ▶ dividing dispute-resolution process into “mediational” phase followed by an “adjudicative” phase, and considering greater use of arbitration in the “adjudicative” phase
- ▶ diverting minor criminal cases to mediation
- ▶ considering a “screening-adjudication” model (e.g., neutral evaluation before proceeding to litigation or evaluation after filing of suit but before trial)
- ▶ “flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes or combination of processes:

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Second Half of the Twentieth Century



Professor Sander also mentioned the possibility of a Dispute Resolution Center that directed disputants to the process (or sequence of processes) most appropriate to each type of case. The room directory of the center might appear as follows:

- ▶ Screening Clerk Room 1
- ▶ Mediation Room 2
- ▶ Arbitration Room 3
- ▶ Fact Finding Room 4
- ▶ Malpractice Screening
 Panel Room 5
- ▶ Superior Court Room 6
- ▶ Ombudsman Room 7

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Second Half of the
Twentieth Century



BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Second Half of the Twentieth Century

Other Sander ideas:

- Organizations might develop internal dispute resolution systems
- Law schools might begin to teach methods of dispute resolution other than litigation
- Limit jury trials to certain types of cases that warrant the time and expense



Variations of Professor Sander's proposal appeared. For example, a special intake officer at each courthouse could help possible litigants analyze their cases and consider choosing one or more alternatives that each door represented. The idea is that many people will choose alternatives to litigation, save time and money, and preserve relationships with their counterparts.

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Second Half of the Twentieth Century



Communication



Negotiation



Mediation



Trial



Arbitration

Neutral Evaluation



What became known as Professor Sander's "Multi-Door Courthouse" proposal was the most influential idea that resulted from the Pound Conference. This proposal was the seed from which the modern ADR movement grew. The Texas ADR Procedures Act is a variation on that proposal.

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Second Half of the Twentieth Century



In San Francisco in 1976, community activists established what is now the oldest, longest-running public conflict resolution center in the United States: Community Boards. Today, the organization “serves 1,500+ San Francisco residents, nonprofits and businesses a year and offers its dispute resolution services in English, Spanish, Mandarin, and Cantonese.”

<http://communityboards.org/>



Image: Alexas_Fotos @Pixabay.com

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Second Half of the
Twentieth Century

In 1980, the first Texas community dispute resolution center opened in Houston.



Dispute Resolution Center
HARRIS COUNTY

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Second Half of the
Twentieth Century

Other community dispute resolution centers opened within quick succession of the one in Houston: Dallas (1980), Fort Worth (1982), Austin (1983), San Antonio (1984). Today there are 18 community dispute resolution centers in Texas.

https://law.utexas.edu/cppdr/resources/adr_drcs.php

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Second Half of the
Twentieth Century &
Twenty-First Century



Currently, the United States Government and all States have accepted some form of Multi-Door Courthouse system as proposed by Professor Sander in 1976.

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Twenty-First Century



TEXAS MEDIATOR
CREDENTIALING
ASSOCIATION

Florida State Courts



UNITED STATES
INSTITUTE OF PEACE



Today, important national organizations dedicate themselves to mediation and other forms of Alternative Dispute Resolution, including:

- ▶ Association for Conflict Resolution
- ▶ Association of Attorney-Mediators
- ▶ American Bar Association Dispute Resolution Section
- ▶ American Arbitration Association
- ▶ Academy of Family Mediators
- ▶ National Association for Community Mediation

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Twenty-First Century



Likewise, in Texas, various statewide organizations dedicate themselves to mediation and other forms of Alternative Dispute Resolution, including:

- ▶ Texas Association of Mediators (TAM)
- ▶ Texas Mediator Credentialing Association (TMCA)
- ▶ Texas Mediation Trainers Roundtable (TMTR)
- ▶ State Bar of Texas ADR Section (SBOT/ADR)
- ▶ Center for Public Policy Dispute Resolution (CPPDR) at the University of Texas School of Law

BRIEF HISTORY OF ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Twenty-First Century





III. TEXAS ADR PROCEDURES ACT



In 1987, the Texas Legislature passed the Texas ADR Procedures Act. Many people worked on the law, but three of the most important people were Judge Frank G. Evans, Senator Cyndi Taylor Krier and Professor Edward F. Sherman. The law was an adaptation of Frank Sander's Multi-Door Courthouse concept.

See: [Texas ADR Procedures Act](#)

III. TEXAS ADR PROCEDURES ACT

Key Players in Passing
the Law



The law, found at Chapter 154 of the Texas Civil Practice and Remedies Code, establishes an important public policy:

It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.

(Section 154.002)

III. TEXAS ADR PROCEDURES ACT

Public Policy



It is the responsibility of all trial and appellate courts and their court administrators to carry out the policy under Section 154.002.

(Section 154.003)



III. TEXAS ADR PROCEDURES ACT

Implementing the
Public Policy



(a) A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure including:

(1) an alternative dispute resolution system established under Chapter 26, Acts of the 68th Legislature, Regular Session, 1983 (Article 2372aa, Vernon's Texas Civil Statutes);

(2) a dispute resolution organization; or

(3) a nonjudicial and informally conducted forum for the voluntary settlement of citizens' disputes through the intervention of an impartial third party, including those alternative dispute resolution procedures described under this subchapter.

(b) The court shall confer with the parties in the determination of the most appropriate alternative dispute resolution procedure.

(Section 154.021)

III. TEXAS ADR PROCEDURES ACT

Referral of Pending Disputes



III. TEXAS ADR PROCEDURES ACT

(a) If a court determines that a pending dispute is appropriate for referral under Section 154.021, the court shall notify the parties of its determination.

(b) Any party may, within 10 days after receiving the notice under Subsection (a), file a written objection to the referral.

(c) If the court finds that there is a reasonable basis for an objection filed under Subsection (b), the court may not refer the dispute under Section 154.021.

(Section 154.022)

Notice and Objection to Referral



III. TEXAS ADR PROCEDURES ACT

(a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.

(b) A mediator may not impose his own judgment on the issues for that of the parties.

(c) Mediation includes victim-offender mediation by the Texas Department of Criminal Justice described in Article 56.13, Code of Criminal Procedure.

(Section 154.023)

Mediation



(a) A mini-trial is conducted under an agreement of the parties.

(b) Each party and counsel for the party present the position of the party, either before selected representatives for each party or before an impartial third party, to define the issues and develop a basis for realistic settlement negotiations.

(c) The impartial third party may issue an advisory opinion regarding the merits of the case.

(d) The advisory opinion is not binding on the parties unless the parties agree that it is binding and enter into a written settlement agreement.

(Section 154.024)

III. TEXAS ADR PROCEDURES ACT

Mini-Trial



(a) A moderated settlement conference is a forum for case evaluation and realistic settlement negotiations.

(b) Each party and counsel for the party present the position of the party before a panel of impartial third parties.

(c) The panel may issue an advisory opinion regarding the liability or damages of the parties or both.

(d) The advisory opinion is not binding on the parties.

(Section 154.025)

III. TEXAS ADR PROCEDURES ACT

Moderated Settlement Conference



(a) A summary jury trial is a forum for early case evaluation and development of realistic settlement negotiations.

(b) Each party and counsel for the party present the position of the party before a panel of jurors.

(c) The number of jurors on the panel is six unless the parties agree otherwise.

(d) The panel may issue an advisory opinion regarding the liability or damages of the parties or both.

(e) The advisory opinion is not binding on the parties.

(Section 154.026)

III. TEXAS ADR PROCEDURES ACT

Summary Jury Trial



III. TEXAS ADR PROCEDURES ACT

(a) Nonbinding arbitration is a forum in which each party and counsel for the party present the position of the party before an impartial third party, who renders a specific award.

(b) If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation. If the parties do not stipulate in advance that the award is binding, the award is not binding and serves only as a basis for the parties' further settlement negotiations.

(Section 154.027)

Nonbinding
Arbitration



III. TEXAS ADR PROCEDURES ACT

Mediation following
application for
expedited foreclosure



► (a) A citation for expedited foreclosure may be served in the manner provided by Rule 106 or 736, Texas Rules of Civil Procedure. Following the filing of a response to an application for an expedited foreclosure proceeding under Rule 736.5, Texas Rules of Civil Procedure, a court may, in the court's discretion, conduct a hearing to determine whether to order mediation.

► (Section 154.028)

This provision of the statute is a special provision, added in 2013, for non-judicial foreclosures of home equity loans and reverse mortgages.

(a) If a court refers a pending dispute for resolution by an alternative dispute resolution procedure under Section 154.021, the court may appoint an impartial third party to facilitate the procedure.

(b) The court may appoint a third party who is agreed on by the parties if the person qualifies for appointment under this subchapter.

(c) The court may appoint more than one third party under this section.

(Section 154.051)

III. TEXAS ADR PROCEDURES ACT

Appointment of Impartial Third Party



(a) Except as provided by Subsections (b) and (c), to qualify for an appointment as an impartial third party . . . , a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment.

(b) To qualify for an appointment as an impartial third party . . . in a dispute relating to the parent-child relationship, a person must complete the training required by Subsection (a) and an additional 24 hours of training in the fields of family dynamics, child development, and family law, including a minimum of four hours of family violence dynamics training developed in consultation with a statewide family violence advocacy organization.

(c) In appropriate circumstances, a court may in its discretion appoint a person as an impartial third party who does not qualify under Subsection (a) or (b) if the court bases its appointment on legal or other professional training or experience in particular dispute resolution processes.

III. TEXAS ADR PROCEDURES ACT

Qualifications of Impartial Third Party



(a) A person appointed to facilitate an alternative dispute resolution procedure . . . shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.

(b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.

(c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.

(d) Each participant, including the impartial third party, to an alternative dispute resolution procedure is subject to the requirements of Subchapter B, Chapter 261, Family Code, and Subchapter C, Chapter 48, Human Resources Code.

(Section 154.053)

III. TEXAS ADR PROCEDURES ACT

Standards and Duties of Impartial Third Parties



III. TEXAS ADR PROCEDURES ACT

(a) The court may set a reasonable fee for the services of an impartial third party appointed under this subchapter.

(b) Unless the parties agree to a method of payment, the court shall tax the fee for the services of an impartial third party as other costs of suit.

(Section 154.054)

Compensation of Impartial Third Party



(a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter or under Chapter 152 relating to an alternative dispute resolution system established by counties, or appointed by the parties whether before or after the institution of formal judicial proceedings, who is a volunteer and who does not act with wanton and willful disregard of the rights, safety, or property of another, is immune from civil liability for any act or omission within the course and scope of his or her duties or functions as an impartial third party. For purposes of this section, a volunteer impartial third party is a person who does not receive compensation in excess of reimbursement for expenses incurred or a stipend intended as reimbursement for expenses incurred.

(b) This section neither applies to nor is it intended to enlarge or diminish any rights or immunities enjoyed by an arbitrator participating in a binding arbitration pursuant to any applicable statute or treaty.

(Section 154.055)

III. TEXAS ADR PROCEDURES ACT

Qualified Immunity of Impartial Third Party



(a) If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.

(b) The court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case.

(c) A settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent decree.

(Section 154.071)

III. TEXAS ADR PROCEDURES ACT

Effect of Written Settlement Agreement



(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

(Section 154.073)

III. TEXAS ADR PROCEDURES ACT

Confidentiality of Certain Records and Communications



(e) If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

(f) This section does not affect the duty to report abuse or neglect under Subchapter B, Chapter 261, Family Code, and abuse, exploitation, or neglect under Subchapter C, Chapter 48, Human Resources Code.

(g) This section applies to a victim-offender mediation by the Texas Department of Criminal Justice as described in Article 56.13, Code of Criminal Procedure.

(Section 154.073)

III. TEXAS ADR PROCEDURES ACT

Confidentiality of Certain Records and Communications



REPORTING ABUSE AND NEGLECT IN TEXAS

III. TEXAS ADR PROCEDURES ACT

Texas Abuse/Neglect Hotline:

1-800-252-5400

or website:

<https://www.txabusehotline.org>*External Link*

Use the hotline to report abuse, neglect, or exploitation of children, the elderly, or people with disabilities. Use the website only if the situation does not require an emergency response.

Confidentiality of
Certain Records and
Communications



REPORTING ABUSE AND NEGLECT IN TEXAS

III. TEXAS ADR PROCEDURES ACT

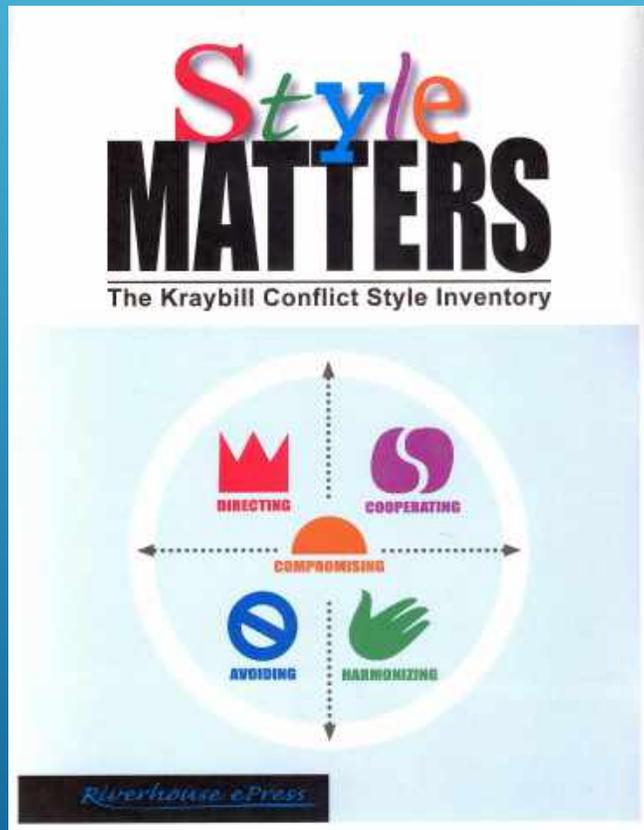
When filing your report it is helpful to have personal information for everyone involved, including their:

- ▶ names,
- ▶ ages/birthdates,
- ▶ addresses,
- ▶ phone numbers,
- ▶ Social Security numbers

Confidentiality of Certain Records and Communications



IV. CONFLICT RESOLUTION STYLES



Kraybill Conflict Style Inventory



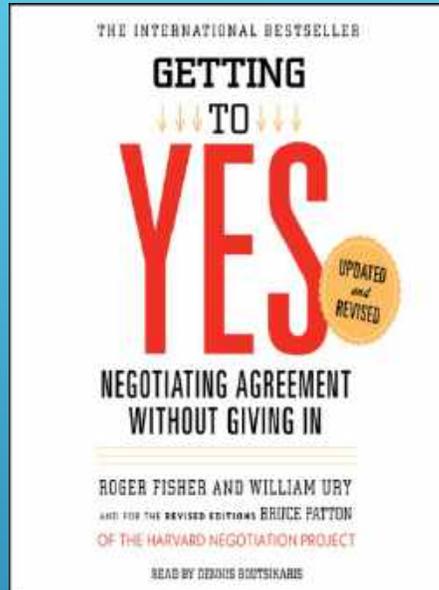
V. PRINCIPLED
NEGOTIATION:
GETTING TO YES

THE UGLI ORANGES



Negotiation Role Play
No. 1





V. PRINCIPLED NEGOTIATION: GETTING TO YES



Harvard Negotiation
Project



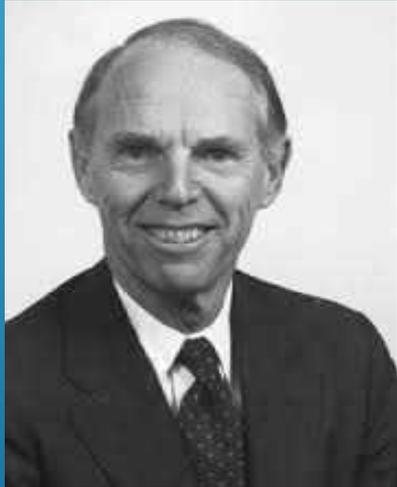
Popularization of Research derived
from the Harvard Negotiation Project

First Edition 1981 (Fisher & Ury)

Second (1991) & Third (2011) Editions
(Fisher, Ury & Patton)

V. PRINCIPLED NEGOTIATION: GETTING TO YES

About the book and
authors



Roger Fisher

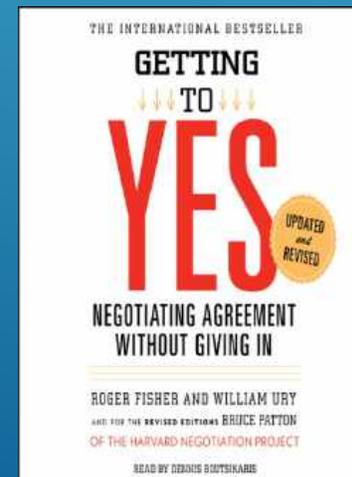


William Ury



Bruce Patton

PROGRAM ON NEGOTIATION
H A R V A R D L A W S C H O O L

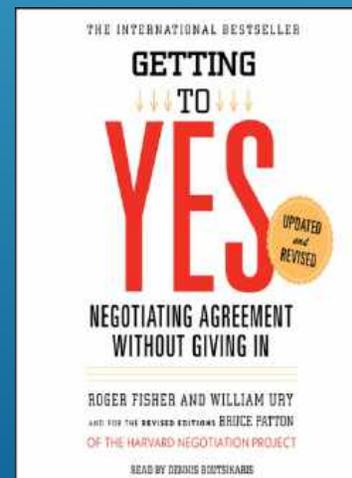




A **soft negotiator** (1) places the primary emphasis on preserving the relationship; (2) wants to avoid personal conflict and, therefore, makes concessions easily in order to reach an agreement; (3) often leaves a negotiation feeling exploited or bitter.

V. PRINCIPLED NEGOTIATION: GETTING TO YES

Types of Negotiators

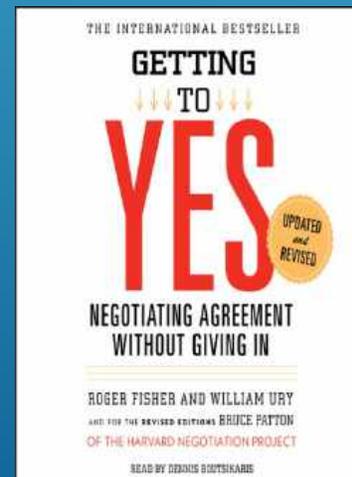




A **hard negotiator** (1) places the primary emphasis on achieving a goal; (2) considers a negotiation a contest of wills in which the person who adopts the toughest position and holds onto it the longest achieves the goal; (3) sometimes achieves the goal, but other times provokes a tough response that may exhaust resources and ruin the relationship with the other person.

V. PRINCIPLED NEGOTIATION: GETTING TO YES

Types of Negotiators

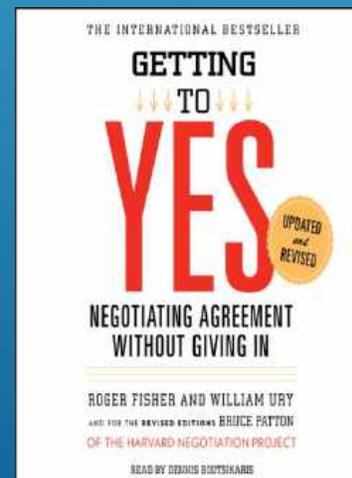


Sometimes, interest-based negotiation is called “win-win negotiation” or “principled negotiation.”

Sometimes, soft negotiation and hard negotiation are called “position-based negotiation” or “distributive negotiation.”

V. PRINCIPLED NEGOTIATION: GETTING TO YES

Types of Negotiators

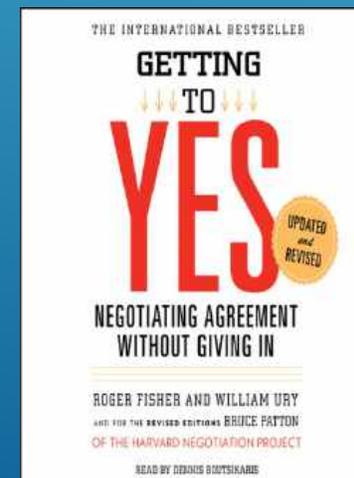


FOUR PRINCIPLES OF WIN-WIN NEGOTIATION

- ▶ Separate the people from the problem.
- ▶ Focus on interests, not positions.
- ▶ Invent options for mutual gain.
- ▶ Evaluate options with objective criteria.

V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles

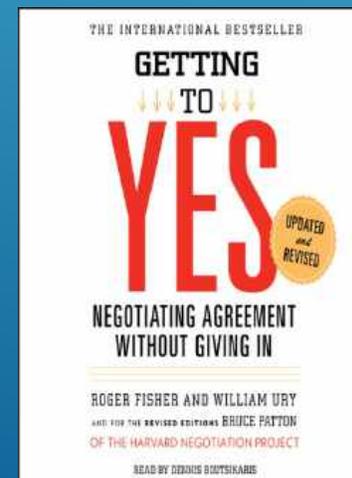


SEPARATE THE PEOPLE FROM THE PROBLEM

Every negotiator has two types of interests: the substance and the relationship. The relationship tends to get mixed up with the substance. Positional bargaining puts the substance and relationship in conflict with each other. The solution of interest-based bargaining: separate the relationship from the substance.

V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles



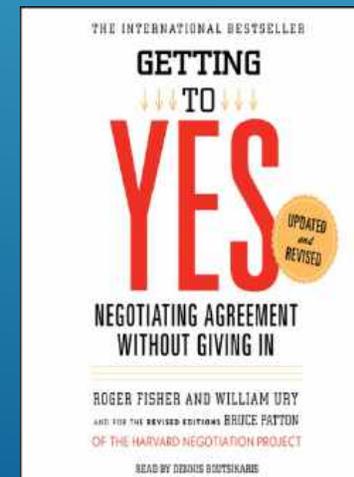
SEPARATE THE PEOPLE FROM THE PROBLEM

Suggestions about perceptions:

- ▶ put yourself in the other person's place;
- ▶ do not deduce the other person's intentions based on your own fears;
- ▶ do not blame the other person for your problem;
- ▶ discuss each other's perceptions.
- ▶ look for opportunities to act inconsistently with the other person's perceptions;
- ▶ make sure the other person participates in decision making.

V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles



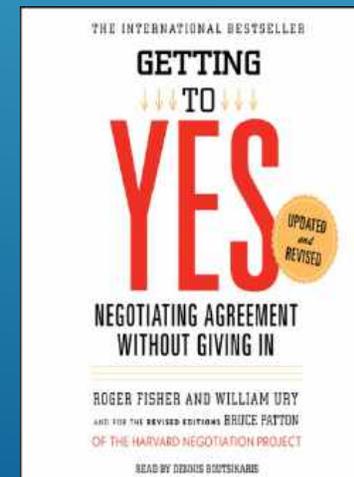
SEPARATE THE PEOPLE FROM THE PROBLEM

Suggestions for dealing with emotions:

- ▶ recognize your own emotions as well as the other person's emotions;
- ▶ make emotions explicit and acknowledge them as legitimate;
- ▶ let the other person vent emotion;
- ▶ don't react defensively to the venting;
- ▶ make a conciliatory gesture.

V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles



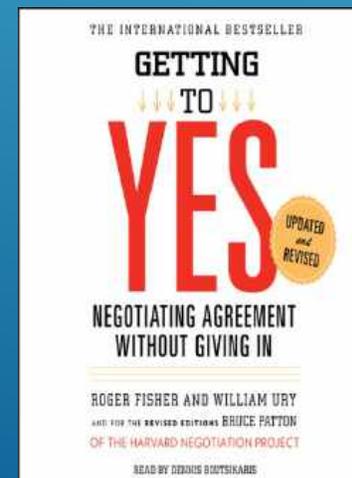
SEPARATE THE PEOPLE FROM THE PROBLEM

Suggestions for communication:

- ▶ listen actively (to understand, not to respond) and acknowledge what the other person says;
- ▶ speak to be understood;
- ▶ speak about yourself and how you feel, not about the other person.

V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles



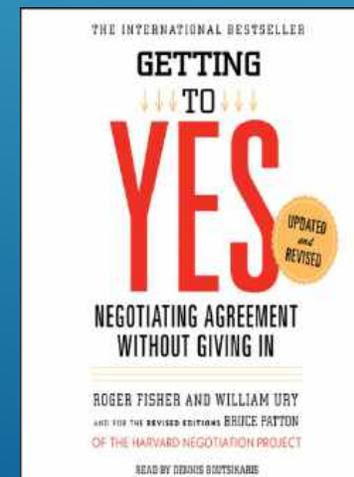
SEPARATE THE PEOPLE FROM THE PROBLEM

Suggestions for facing the problem:

- ▶ build a working relationship;
- ▶ face the problem, not the people.

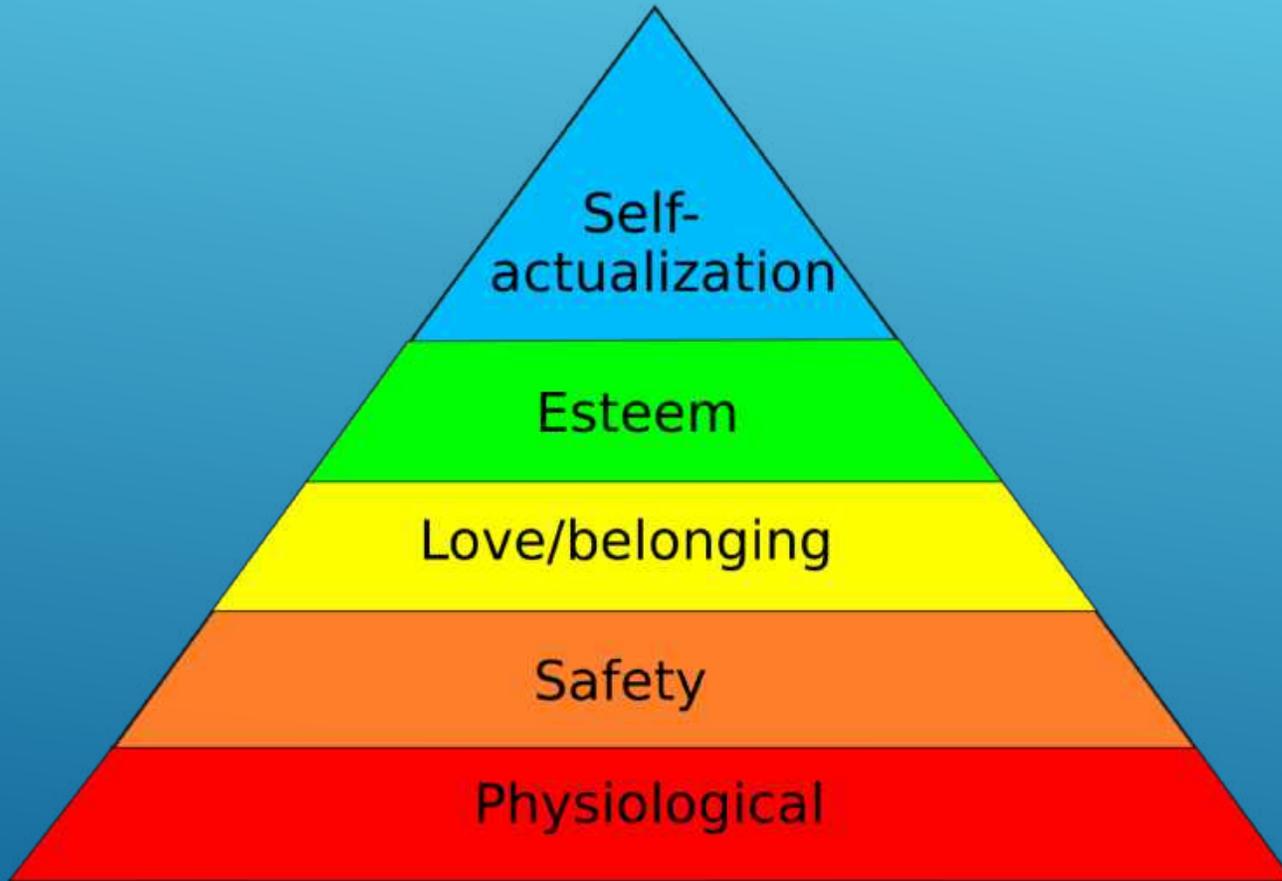
V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles



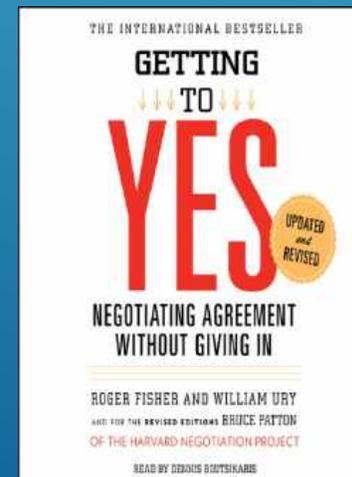
FOCUS ON INTERESTS, NOT POSITIONS

V. PRINCIPLED NEGOTIATION: GETTING TO YES



Important Principles

Maslow's Hierarchy of Needs



FOCUS ON INTERESTS, NOT POSITIONS

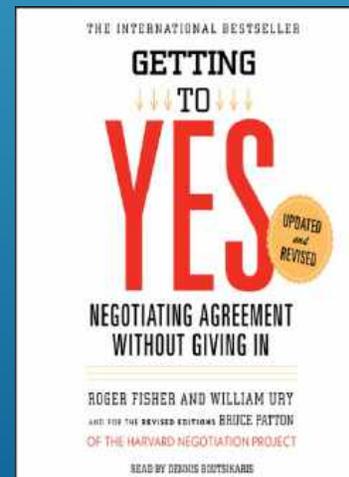
- ▶ Talk about the interests;
- ▶ Recognize your own interests as part of the problem;
- ▶ Identify the issues before proposing solutions;
- ▶ Focus on the future, not the past;
- ▶ Be concrete and flexible;
- ▶ Be hard on the issues/problems, but not the people.



Image: johnhain @ Pixabay

V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles



GENERATE OPTIONS FOR MUTUAL GAIN

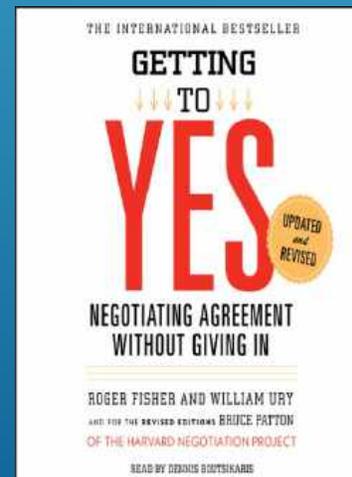
Four obstacles that inhibit the generation of options:

- ▶ premature judgment;
- ▶ searching for a single answer;
- ▶ assuming a fixed pie;
- ▶ an attitude that “solving their problem is their problem.”



V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles



GENERATE OPTIONS FOR MUTUAL GAIN

Prescription for approaching options:

- ▶ Separate.
- ▶ Invent.
- ▶ Decide.

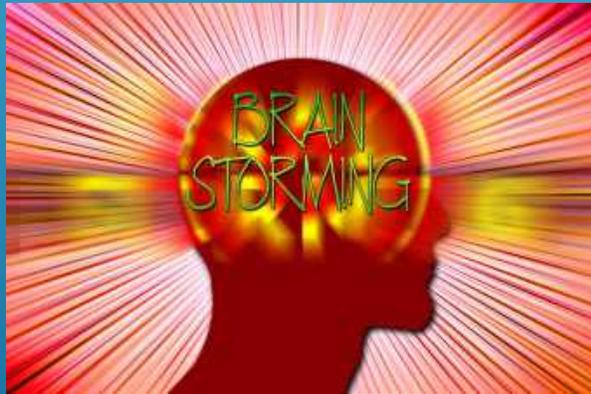
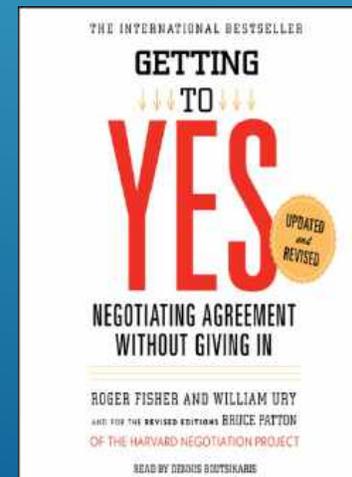


Image: Geralt @ Pixabay.com

V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles



GENERATE OPTIONS FOR MUTUAL GAIN

- ▶ *Separate*: consciously separate generating options from evaluating them;
- ▶ *Invent*: create a space for inventing options (brainstorming);
- ▶ *Decide*: evaluate the options after brainstorming.

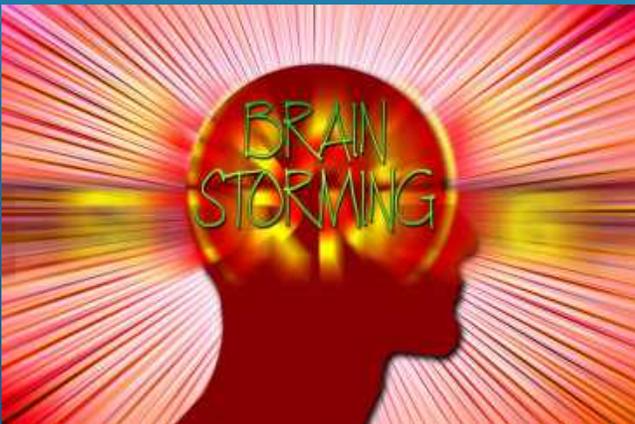
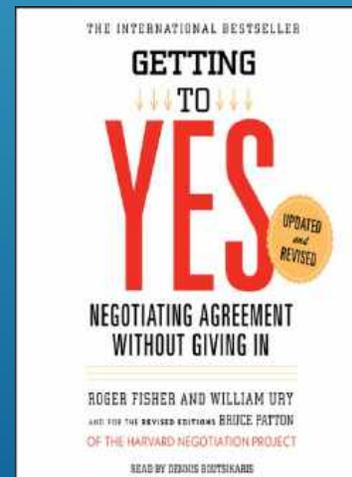


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V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles



EVALUATE OPTIONS WITH OBJECTIVE CRITERIA

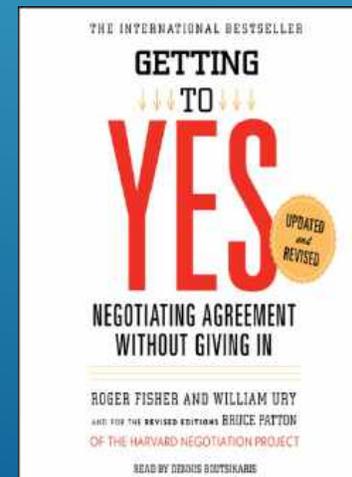
During the evaluation of options, insist on using objective criteria for evaluating them.



Image: Geralt @ Pixabay.com

V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles



EVALUATE OPTIONS WITH OBJECTIVE CRITERIA

Examples of objective criteria:

- ▶ Market value;
- ▶ Scientific findings;
- ▶ Professional criteria;
- ▶ Precedents;
- ▶ Efficiency;
- ▶ Moral criteria;
- ▶ Tradition.



V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles

BATNA

Best
Alternative to a
Negotiated
Agreement



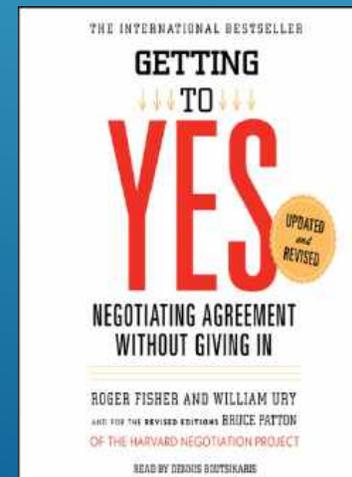
Try to reach an agreement that is
better than your BATNA.



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V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles

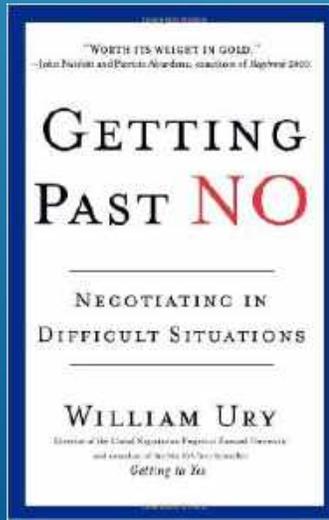




VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

- ▶ Written by William Ury
- ▶ Editions published in 1991 & 1993
- ▶ Also derived from Harvard Program on Negotiation research

Builds on Getting to
Yes

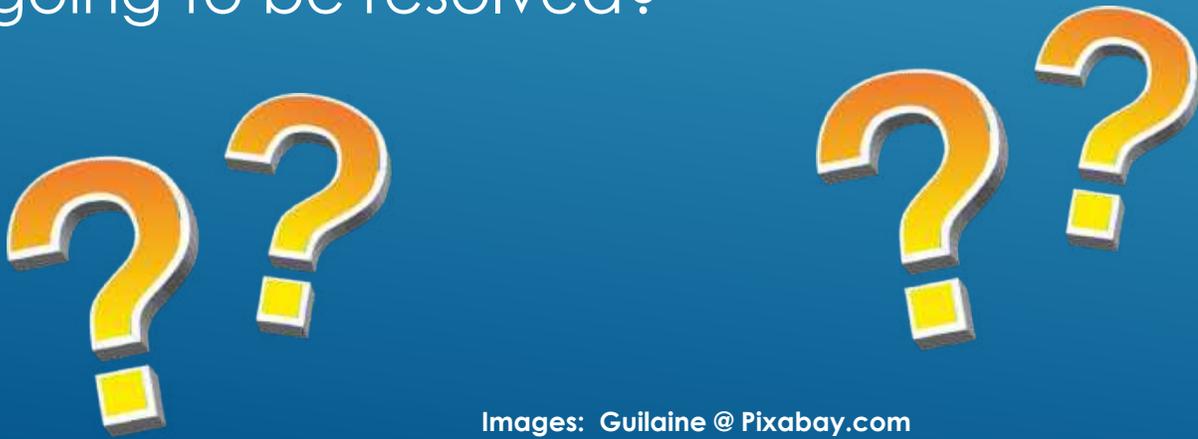


VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

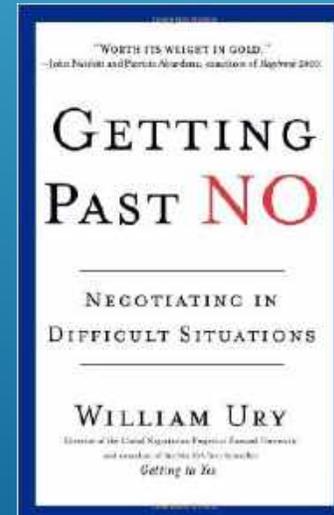
Ury wrote this book to answer questions about difficult negotiations, such as:

How can you change a confrontation into cooperation?

How can you convert problems that are going to get worse into problems that are going to be resolved?



Important Questions

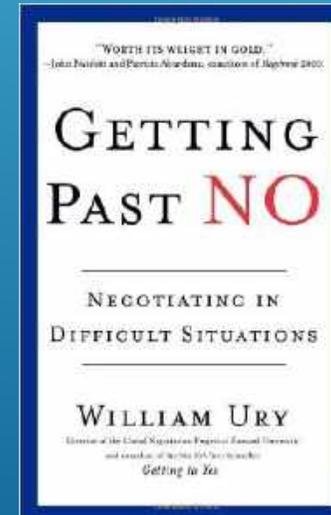


FIVE COMMON PROBLEMS FOR JOINT PROBLEM SOLVING

- ▶ Your reaction
- ▶ The other party's emotions
- ▶ The other party's position
- ▶ The other party's dissatisfaction
- ▶ The other party's greater power

VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

Important Principles

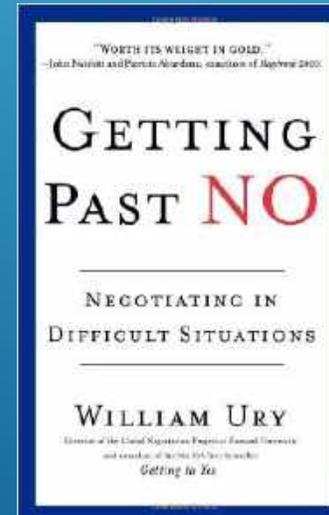


SOME STRATEGIES FOR OVERCOMING THE OBSTACLES

- ▶ Don't react: Go to the balcony
- ▶ Don't argue: Step to their side
- ▶ Don't reject: Reframe
- ▶ Don't push: Build them a golden bridge
- ▶ Don't attack: Use your own power to educate

VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

Important Principles



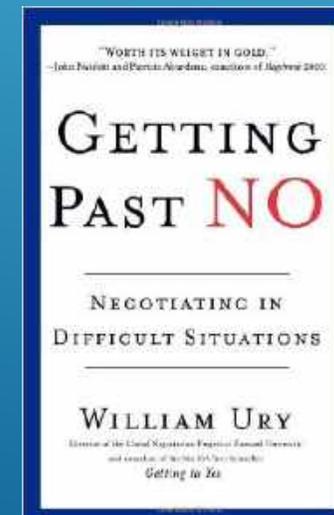
VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

DON'T REACT: GO TO THE BALCONY

- ▶ Three natural reactions: fight, flight, give in.
- ▶ Identify the game.
- ▶ Take time to think.



Important Principles



DON'T ARGUE: STEP TO THEIR SIDE

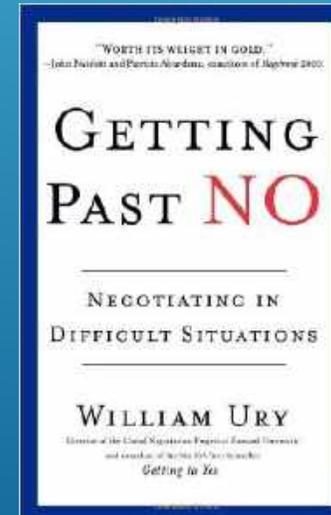
- ▶ Listen actively
- ▶ Acknowledge their point
- ▶ Acknowledge their emotions
- ▶ Agree where and when you can
- ▶ Express your opinion—without provoking
- ▶ Create a favorable climate for negotiations



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VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

Important Principles



DON'T REJECT: REFRAME

- ▶ To change the game, change the frame (e.g., we are partners in solving a problem, not opponents)
- ▶ Ask problem-solving questions: (e.g., Why? Why not? What if? What makes that fair to me?)
- ▶ Reframe tactics (treat an ultimatum as an aspiration or something to test, go around; deflect attacks; treat past mistakes and grievances as something to avoid in the future; cast the relationship as "we" instead of "you" and "me")

VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

Important Principles

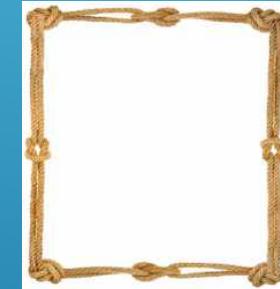
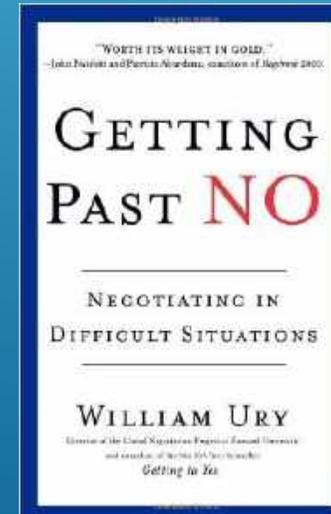


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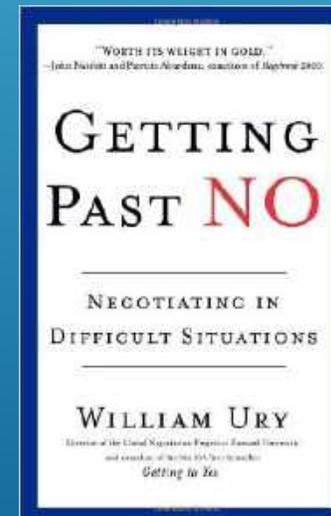
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DON'T PUSH: BUILD THEM A GOLDEN BRIDGE

VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

- ▶ Classic obstacles to an agreement: not their idea, unmet interests, fear of losing face, too much too fast
- ▶ Involve the other side: ask for and build on their ideas, ask for a constructive criticism, offer them a choice
- ▶ Satisfy unmet interests: don't dismiss them as irrational, don't overlook basic human needs, don't assume a fixed pie
- ▶ Help them save face, help write their victory speech
- ▶ Go slow to go fast, don't rush to the line

Important Principles



DON'T ATTACK: USE YOUR OWN POWER TO EDUCATE

VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

- ▶ Make the other person see the consequences of no agreement (ask reality-testing questions; demonstrate your BATNA in a non-threatening way).
- ▶ Highlight the costs of no agreement, but let the other side know there is a way out.

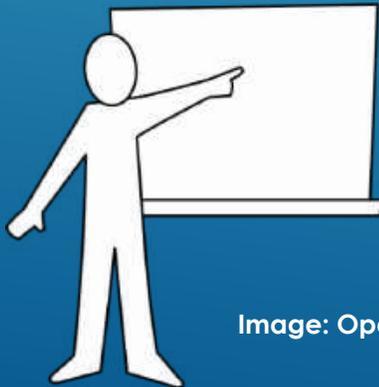
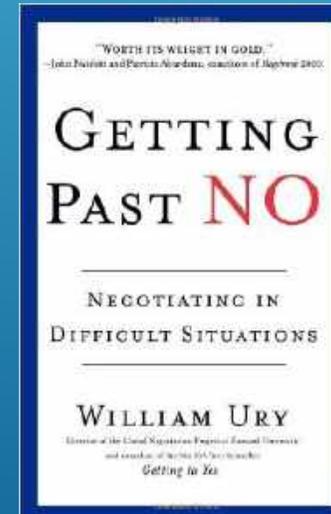


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Important Principles



DISPUTE BETWEEN TWO FRIENDS



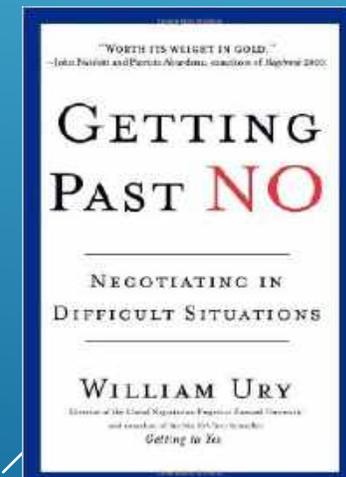
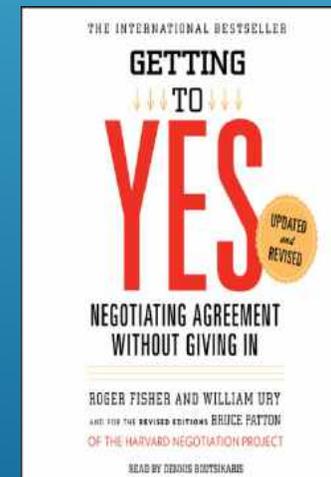
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PRINCIPLED NEGOTIATION

Negotiation Role Play No. 2



BASIC MEDIATION TRAINING

Dispute Resolution Center
Austin, Texas

DAY ONE CONCLUDED!



DRC
Dispute Resolution Center
www.austindrc.org

- I. Overview, Plan for the Day
- II. Mediation Goals and Mediation Models
- III. Texas Mediator Credentialing Association
- IV. Mediation Intake and Preparation for Mediation
- v. Mediator's Introduction
- vi. Parties' Opening Statements/Uninterrupted Time
- vii. Parties' Two-Way Exchange
- viii. Active Listening, Information Gathering and Trust Building
- ix. Questions and Using them Well
- x. One Demonstration, Three Exercises

I. OVERVIEW

Plan for Day Two

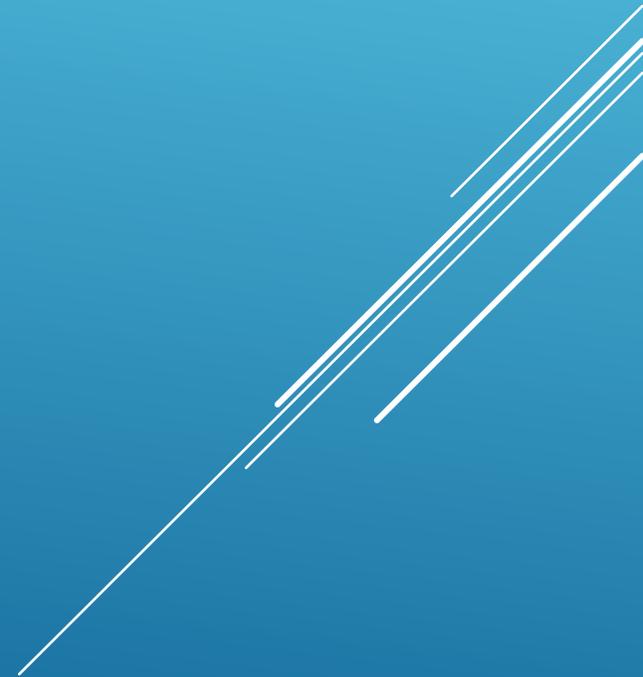




Image: ZIPNON @ Pixabay.com

II. MEDIATION GOALS AND MEDIATION MODELS

BASED UPON WHAT YOU KNOW ABOUT MEDIATION SO FAR, WHAT DO YOU BELIEVE THE GOALS OF MEDIATION SHOULD BE?

Goals



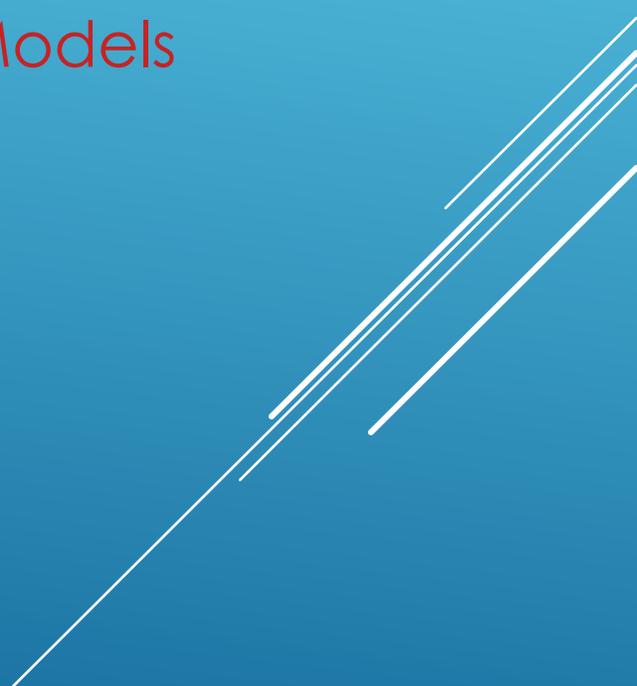
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II. MEDIATION GOALS AND MEDIATION MODELS

WE WILL NOW REVIEW THE FOLLOWING HANDOUTS:

- ▶ Spectrum of Mediation Models
- ▶ The Conference Mediation Model
- ▶ Integrating *Getting to Yes* and *Getting Past No* into the Mediation Model

Mediation Models

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II. MEDIATION GOALS AND MEDIATION MODELS

DEMONSTRATION OF MEDIATION



Demonstration

III. TEXAS MEDIATOR CREDENTIALING ASSOCIATION

WE WILL NOW REVIEW THE FOLLOWING HANDOUT:

Standards of Practice and Code of Ethics of
Texas Mediator Credentialing Association

- ▶ TMCA Standard 1 (Mediation Defined)
- ▶ TMCA Standard 2 (Mediator Conduct)
- ▶ TMCA Standard 8 (Confidentiality)
- ▶ TMCA Standard 9 (Impartiality)

Ethics



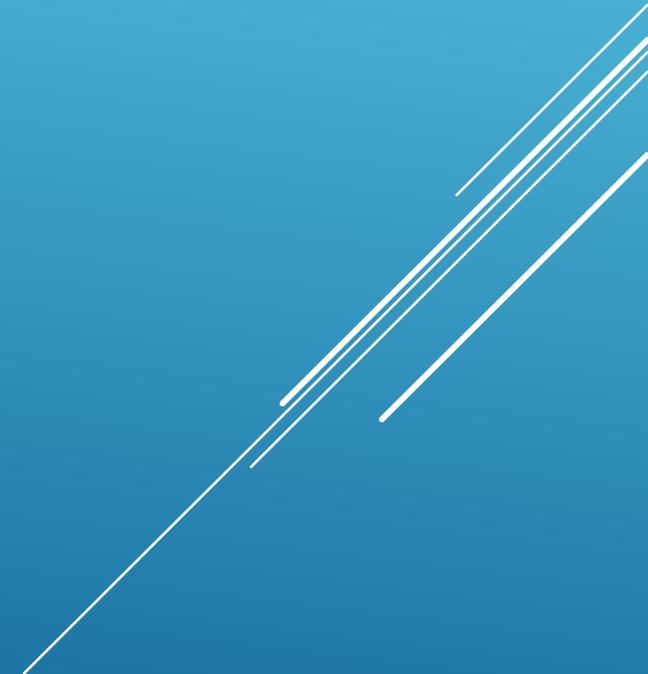
TYPES OF MEDIATION INTAKE

1. Intake by you or your office staff

- ▶ Use an intake form (two samples are on your flash drive under “WAW Private Practice Forms”)
- ▶ Tailor the intake form to your type of practice
- ▶ At a minimum, find out the names and contact information for the parties and their representatives, any special needs they may have (disability, diet), and the nature of the dispute
- ▶ If the case is a litigated case, or one poised for litigation, also find out about the parties’ claims and defenses, the relief they seek, the status of discovery, the status of settlement proposals, and the obstacles to settlement
- ▶ If the case is a complex litigated case, consider asking for a lengthier pre-mediation position statement
- ▶ Make sure the parties or their attorneys have agreed to your fees and know when you expect to be paid

IV. MEDIATION INTAKE AND PREPARATION FOR MEDIATION

Intake



TYPES OF MEDIATION INTAKE

2. Intake by someone else (a DRC, a state or federal agency, a human resources office):

- ▶ The DRC, agency or other office will (or should) have its own intake process and its own intake form; you probably will receive a copy of the completed intake form
- ▶ The completed intake form usually will contain the names and contact information for the parties and their representatives, but sometimes the information is outdated; if you obtain updated contact information for someone, let the DRC, agency or other office know about it
- ▶ The intake form should let you know about any party's special needs, but don't be afraid to inquire if you suspect special needs exist
- ▶ If the case is complex, consider asking for a lengthier pre-mediation position statement, so long as the request doesn't conflict with a policy of the DRC, agency or other office

IV. MEDIATION INTAKE AND PREPARATION FOR MEDIATION

Intake

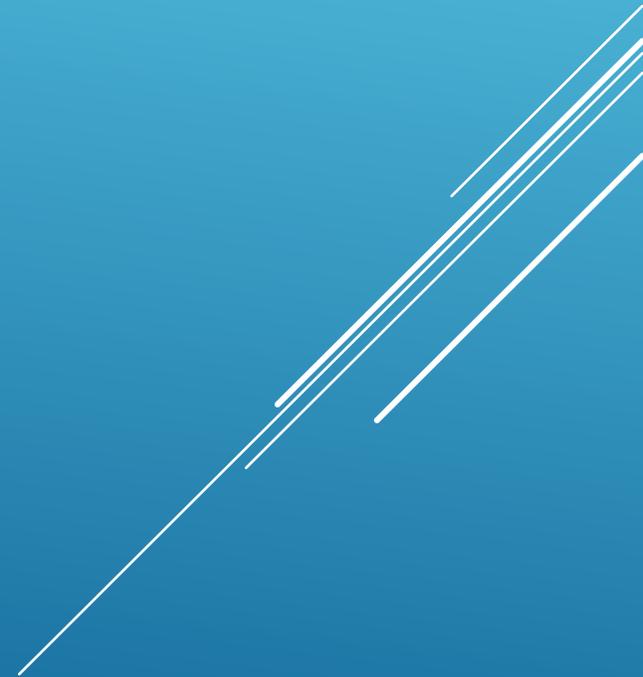


FOR BOTH TYPES OF INTAKE

- ▶ If possible, speak in person with the parties or their attorneys prior to the mediation to evaluate whether the dispute is really appropriate and ready for mediation
- ▶ Use the intake interactions to educate parties and their attorneys about mediation and best practices
- ▶ Screen for violence
- ▶ Agree on location, date and time of mediation
- ▶ Find out whether any participant will have a time constraint

IV. MEDIATION INTAKE AND PREPARATION FOR MEDIATION

Intake

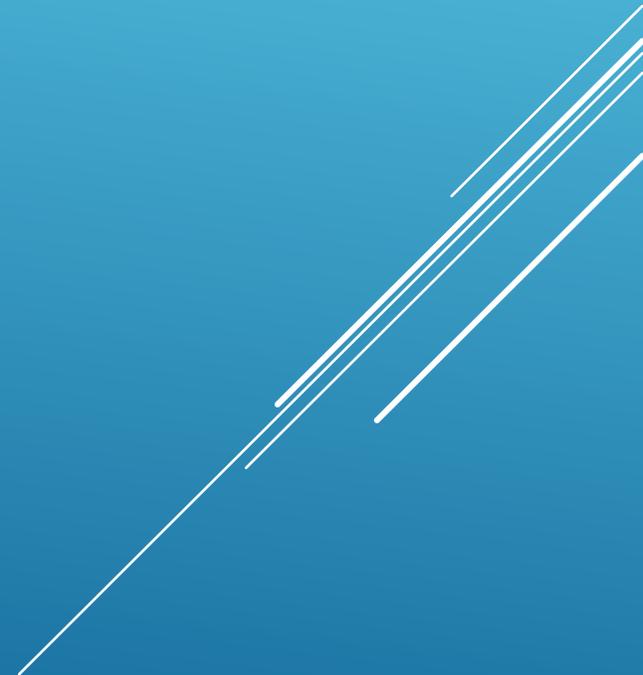


FOR BOTH TYPES OF INTAKE

- ▶ Find out who will attend for each side, and let all sides know who will attend (negotiate about disputed attendees)
- ▶ Find out who else might need to know about a postponement or cancellation of the mediation; you don't want people to show up expecting a mediation if there will be none that day
- ▶ Confirm the mediation (sample confirmation letters are on your flash drive under "WAW Private Practice Forms")
- ▶ With the confirmation letter, send the parties or their attorneys an intake form to complete and an agreement to mediate or rules for mediation (sample intake forms and rules for mediation are on your flash drive under "WAW Private Practice Forms")

IV. MEDIATION INTAKE AND PREPARATION FOR MEDIATION

Intake



IV. MEDIATION INTAKE AND PREPARATION FOR MEDIATION

APPLICABLE TO BOTH TYPES OF INTAKE

- ▶ What people say or write during intake is not necessarily complete or true
- ▶ No matter how well you perform intake, people may still surprise you

Intake



IV. MEDIATION INTAKE AND PREPARATION FOR MEDIATION

ETHICAL CONSIDERATIONS AT INTAKE

- ▶ TMCA Standard 3 (Mediation Costs)
- ▶ TMCA Standard 4 (Disclosure of Possible Conflicts of Interest)
- ▶ TMCA Standard 5 (Mediator Qualifications)
- ▶ TMCA Standard 6 (The Mediation Process)
- ▶ TMCA Standard 7 (Convening the Mediation)

Intake

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TO-DO LIST FOR MEDIATION PREPARATION

- ▶ Ensure the mediation space is appropriate (especially important if you will not mediate in your own space)
- ▶ Arrive at the mediation space early to set it up
- ▶ Arrange tables and chairs in an appropriate configuration
- ▶ Create an appearance of equal treatment by ensuring that all chairs, writing pads, pens, etc. are the same for everyone
- ▶ Consider whether you want to bring an easel and easel paper, tissue (if tears are likely), games, snacks
- ▶ If you do not have a cell phone with a calendar and a calculator, bring a calendar and a calculator

IV. MEDIATION INTAKE AND PREPARATION FOR MEDIATION

Preparation for Mediation

TO-DO LIST FOR MEDIATION PREPARATION

- ▶ Consider whether the parties should be in the same room or separate rooms prior to the first joint session
- ▶ If the parties will be in separate rooms before the first joint session, make sure someone guides the parties and their representatives to their separate rooms
- ▶ If possible, meet with each side privately before the mediation begins
 - ▶ Determine whether there are any last-minute issues or concerns
 - ▶ Obtain signatures of parties and their representatives on agreement to mediate/rules for mediation, if you have not already done so
 - ▶ Obtain payment of your fees, if you have not done so already (if you have a secretary, the secretary may handle this sometimes delicate matter)

IV. MEDIATION INTAKE AND PREPARATION FOR MEDIATION

Preparation for Mediation



CONTENTS OF A MEDIATOR'S INTRODUCTION

- ▶ Welcome parties (and party representatives, if applicable)
- ▶ Introduce self
- ▶ Explain purpose/goals of mediation
- ▶ Explain mediator's role
- ▶ Explain the steps of the process
 - ▶ Initial statements/uninterrupted time
 - ▶ Two-way exchange
 - ▶ Clarification of issues/concerns
 - ▶ Identification of interests
 - ▶ Generation of options
 - ▶ Evaluation of options
 - ▶ Caucus
 - ▶ Agreement making
 - ▶ Closure

V. MEDIATOR'S INTRODUCTION

Establishing the Foundation for the Process



CONTENTS OF A MEDIATOR'S INTRODUCTION

- ▶ Explain confidentiality of process
- ▶ Explain statutory exceptions to confidentiality
- ▶ Explain any of your own exceptions to confidentiality
- ▶ Reiterate any possible conflicts of interest
- ▶ Obtain oral agreement to rules and process (written agreement should have been signed by now)
- ▶ Address any questions/concerns about rules and/or process
- ▶ Obtain agreement to/acceptance of you as the mediator

V. MEDIATOR'S INTRODUCTION

Establishing the
Foundation for the
Process



V. MEDIATOR'S INTRODUCTION

EXERCISE: PREPARE AND PRACTICE YOUR MEDIATOR'S INTRODUCTION



Establishing the
Foundation for the
Process

HOW THE OPENING STATEMENTS WORK

- ▶ Customarily, the person who contacted the DRC or filed a complaint with the agency or other office speaks first, but this point is subject to negotiation during the mediator's introduction
- ▶ The first party (or the party's representative) explains the dispute from that party's perspective
- ▶ The second party (or the party's representative) explains the dispute from that party's perspective
- ▶ Each party usually has at least one opportunity to supplement an opening statement

VI. PARTIES' OPENING STATEMENTS/ UNINTERRUPTED TIME

The parties explain the dispute from their perspectives



WHAT SHOULD THE MEDIATOR DO DURING THE OPENING STATEMENTS?

- ▶ Listen actively
- ▶ Try to determine each party's issues/concerns
- ▶ Try to identify the interests that underlie each party's issues/concerns
- ▶ Observe and enforce the no-interruption rule
- ▶ Observe and enforce any other rules to which the parties have agreed

VI. PARTIES' OPENING STATEMENTS/ UNINTERRUPTED TIME

The parties explain the dispute from their perspectives

HOW THE TWO-WAY EXCHANGE WORKS

- ▶ Sometimes, the two-way exchange flows seamlessly from the initial statements
- ▶ Other times, the parties may be less comfortable with the process, so the mediator invites the two-way exchange
- ▶ The exchange is a free-flowing conversation; the no-interruption rule need not apply, unless one party starts to dominate the other in the conversation
- ▶ The exchange provides the parties the opportunity to exchange information, ask questions, and understand each other better

VII. PARTIES' TWO-WAY EXCHANGE

The parties achieve a better understanding of each other



WHAT SHOULD THE MEDIATOR DO DURING THE TWO-WAY EXCHANGE?

- ▶ If necessary, jump-start the exchange by inviting the parties to ask questions and exchange information
- ▶ Continue to listen actively
- ▶ Continue to try to determine each party's issues/concerns
- ▶ Continue to try to identify the interests that underlie each party's issues/concerns
- ▶ Enforce the no-interruption rule if the conversation becomes one-sided
- ▶ Observe and enforce any other rules to which the parties have agreed

VII. PARTIES' TWO-WAY EXCHANGE

The parties achieve a better understanding of each other



ACTIVE LISTENING

A way of listening:

- ▶ to understand the other person, not to contest what the other person says;
- ▶ that demonstrates interest in the other person's concerns.

It is one of the important skills for interest-based negotiation mentioned in *Getting to Yes* and *Getting Past No*.



VIII. ACTIVE LISTENING, INFORMATION GATHERING AND TRUST BUILDING

Important Skills

ACTIVE LISTENING

In a mediation, active listening is an opportunity:

- ▶ to understand the parties' issues, concerns and interests
- ▶ identify the parties' emotions
- ▶ to establish a relationship with the parties
- ▶ build trust with the parties

Active listening establishes a positive atmosphere for the mediation and sets an example for the parties and their representatives.

VIII. ACTIVE LISTENING, INFORMATION GATHERING AND TRUST BUILDING

Important Skills



ACTIVE LISTENING

VIII. ACTIVE LISTENING, INFORMATION GATHERING AND TRUST BUILDING

Common reasons for not listening well:

- ▶ Fatigue.



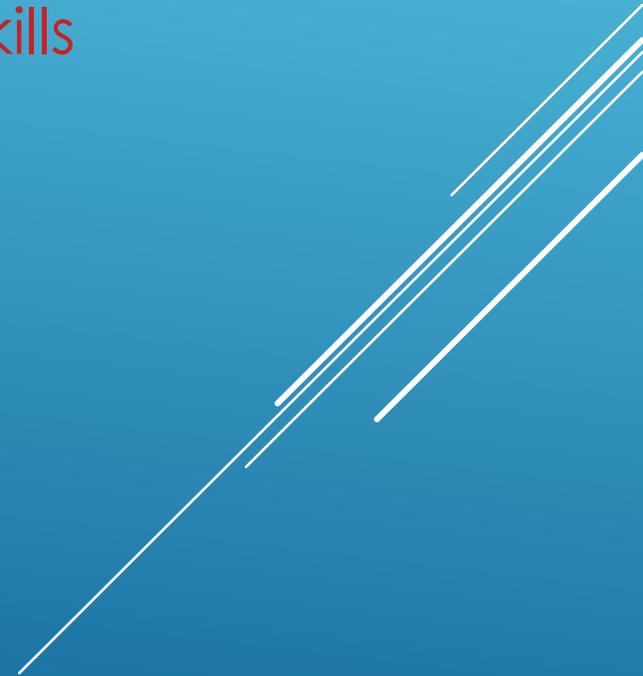
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- ▶ We can think more quickly than others can speak (we think at 600-700 words per minute, but we speak at about 150 words per minute).



Image: Gerd Altmann/Geralt @ Pixabay.com

Important Skills



ACTIVE LISTENING

Techniques for listening actively:

Review the file the night before the mediation.

Give your brain the opportunity to work creatively on any potential problems/issues overnight.



ACTIVE LISTENING,
INFORMATION
GATHERING AND
TRUST BUILDING

Important Skills

ACTIVE LISTENING

Techniques for listening actively:

Get plenty of sleep the night before the mediation. Sleep for eight hours, if possible.



Image: creozavr@pixabay.com

VIII. ACTIVE LISTENING,
INFORMATION
GATHERING AND
TRUST BUILDING

Important Skills

ACTIVE LISTENING

Techniques for listening actively:

Turn off internal distractions. Create a space of about 15 to 30 minutes before the mediation to focus exclusively on the upcoming session. Review the available information about the issues. Don't accept phone calls or read e-mail messages. Don't visit Facebook or Twitter.

VIII. ACTIVE LISTENING, INFORMATION GATHERING AND TRUST BUILDING

Important Skills



ACTIVE LISTENING

Techniques for listening actively:

Turn off and keep out external distractions.

Turn off all the telephones and computers (yours and those in the room where you will meet). Plan the mediation in a quiet room where there will be no interruptions. Put a sign on the door of the room that says “Private Meeting Inside.”

VIII. ACTIVE LISTENING, INFORMATION GATHERING AND TRUST BUILDING

Important Skills



ACTIVE LISTENING

VIII. ACTIVE LISTENING, INFORMATION GATHERING AND TRUST BUILDING

Techniques for listening actively:

During the mediation, look at the participants and listen to their stories, explanations and points of view.



Important Skills

ACTIVE LISTENING

VIII. ACTIVE LISTENING, INFORMATION GATHERING AND TRUST BUILDING

Techniques for listening actively:

Observe the parties' body language. Active note taking can cause you to miss much of the body language, which is about 55% of communication (perhaps more).



Important Skills

ACTIVE LISTENING

Techniques for listening actively:

Try to ask the parties appropriate questions.



Image: Guilaine @ Pixabay.com

Summarize the stories, explanations and perspectives of the parties in neutral, non-accusatory language.



Image: Deedster @
Pixabay.com

VIII. ACTIVE LISTENING, INFORMATION GATHERING AND TRUST BUILDING

Important Skills

INFORMATION GATHERING

Techniques for information gathering:

- ▶ Encourage parties to exchange information with each other and the mediator before and during mediation session
- ▶ Listen actively, especially during parties' opening statements, parties' two-way exchanges, and your private meetings with parties
- ▶ Take limited notes during the mediation session (or explain you need lots of notes)
- ▶ Ask good questions, especially at stage of clarifying issues and concerns and during private meetings with parties

VIII. ACTIVE LISTENING, INFORMATION GATHERING AND TRUST BUILDING

Important Skills



TRUST BUILDING

Techniques for building trust:

- ▶ Listen actively at every stage of the mediation
- ▶ Ask respectful questions
- ▶ Show a genuine interest in understanding the parties' dispute and helping them resolve it
- ▶ Live in their world when you meet privately with them; suspend your disbelief
- ▶ Keep every promise you make
- ▶ Guard confidentiality and maintain impartiality as if your life depended on it

VIII. ACTIVE LISTENING, INFORMATION GATHERING AND TRUST BUILDING

Important Skills



Image: Gerd Altmann/Geralt @ Pixabay.com



VIII. ACTIVE LISTENING, INFORMATION GATHERING AND TRUST BUILDING

EXERCISE: ACTIVE LISTENING AND INFORMATION GATHERING

Important Skills



TYPES OF QUESTIONS

Open questions (for example, “What can you tell me about the accident?”). The recipient of the question has much freedom to formulate a response (often a narrative). An open question encourages the recipient’s active participation.



Image: paulbr75 @ Pixabay.com

IX. QUESTIONS AND USING THEM WELL

Important Skills



Image: Guilaine @ Pixabay

TYPES OF QUESTIONS

Closed questions (for example, “*What color is the car?*”). The recipient of the question has less liberty to formulate a response. A closed question asks for details and limits the scope of the response.



IX. QUESTIONS AND USING THEM WELL

Important Skills



Image: Guilaine @ Pixabay

TYPES OF QUESTIONS

“Yes or No” Questions (for example, “Was the car red?”). The recipient of the question has even less liberty to formulate a response. A “yes or no” question limits the response to “yes” or “no” (or “perhaps”).



Image: Peggy_Marco @ Pixabay.com

IX. QUESTIONS AND USING THEM WELL

Important Skills



Image: Guilaine @ Pixabay

TYPES OF QUESTIONS

IX. QUESTIONS AND USING THEM WELL

Leading Questions (for example, “When did you steal my red car?”). Although the leading question is in the form of a question, it contains an assertion or accusation. It is likely to elicit a defensive response from the recipient.

Important Skills

Not recommended in mediation.



CHARACTERISTICS OF GOOD QUESTIONS

IX. QUESTIONS AND USING THEM WELL

- ▶ When possible, they start as open-ended, then narrow to closed and yes-or-no
- ▶ They do not imply mediator judgement
- ▶ They convey a genuine interest in the parties' issues, information and perspectives
- ▶ They encourage reflection
- ▶ They invite parties to consider new ideas and perspectives
- ▶ They invite parties to create their own solutions

Important Skills



IX. QUESTIONS AND USING THEM WELL

CHARACTERISTICS OF GOOD QUESTIONS

- ▶ They ask for information that the parties need to continue their negotiations
- ▶ They accept the emotions involved and create a safe space for talking about and resolving emotional issues

Important Skills



IX. QUESTIONS AND USING THEM WELL

CHARACTERISTICS OF GOOD QUESTIONS

- ▶ They ask for information that the parties need to continue their negotiations
- ▶ They accept the emotions involved and create a safe space for talking about and resolving emotional issues

Important Skills





IX. QUESTIONS AND USING THEM WELL

EXERCISE: QUESTIONS

Important Skills



BASIC MEDIATION TRAINING

Dispute Resolution Center
Austin, Texas

DAY TWO CONCLUDED!



DRC
Dispute Resolution Center
www.austindrc.org

I. OVERVIEW

- I. Overview, Plan for the Day
- II. Co-Mediation
- III. Clarifying Issues and Interests While Maintaining Trust
- IV. Reframing Issues and Interests with Neutral Language
- v. Developing a Negotiation Agenda in Mediation
- VI. Generating and Evaluating Options
- VII. Caucusing
- VIII. Three Role Plays, Two Exercises

Plan for Day Three

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II. CO-MEDIATION

WHAT IS CO-MEDIATION?

Co-mediation is a type of mediation in which two people share the role of mediators as equals



Two heads can be better than one

II. CO-MEDIATION

WHAT ARE THE POTENTIAL BENEFITS?

- ▶ Shared responsibility for managing process
- ▶ More perspectives and ideas
- ▶ Balance (of genders, races, ethnicities, ages)
- ▶ Two collaborative models for the participants

Two heads can be better than one



II. CO-MEDIATION

WHAT ARE THE POTENTIAL RISKS?

- ▶ Two mediators with incompatible styles
- ▶ Lack of coordination/cooperation between mediators (poor communication)
- ▶ Dispute between mediators

Two heads can be better than one

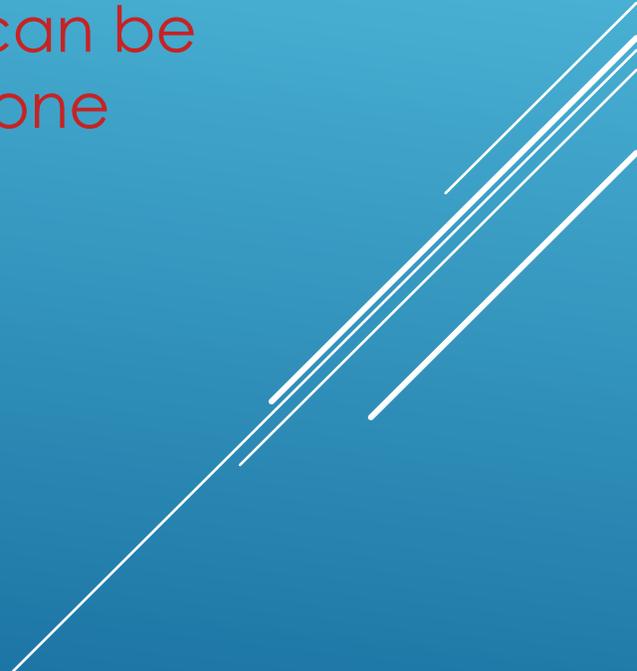


II. CO-MEDIATION

TIPS FOR CO-MEDIATORS

- ▶ Meet (or at least talk) before mediating; discuss and compare your mediator styles
- ▶ Develop a plan for sharing responsibility throughout the process
- ▶ Model cooperation, mutual respect and equality
- ▶ Develop signals (for expressing disagreement, need for breaks, need for mediator-to-mediator discussions)
- ▶ Debrief afterwards (what worked? what could improve?)

Two heads can be better than one

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DISPUTE BETWEEN NEIGHBORS

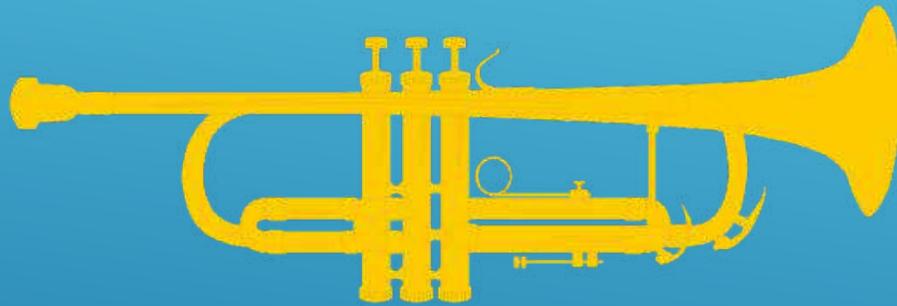


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Mediation Role Play
No. 1



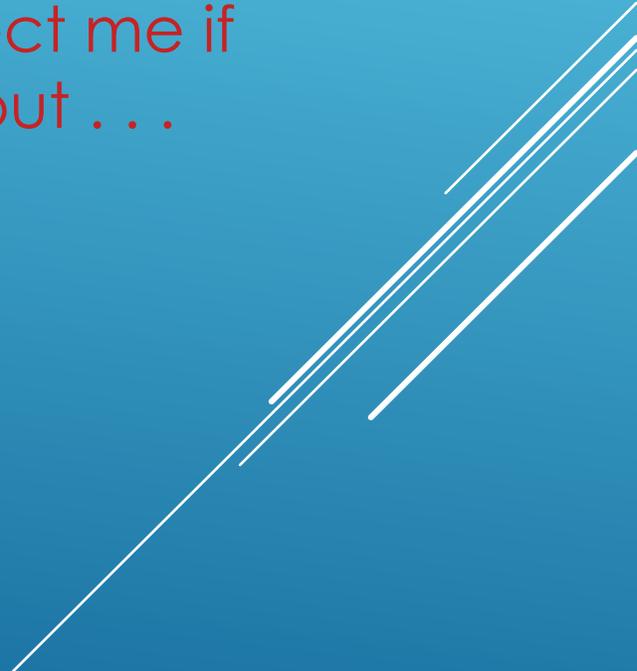
Image: white-lady0 @ Pixabay.com

TIPS FOR CLARIFICATION OF INTERESTS AND ISSUES

- ▶ During the parties' opening statements and their two-way exchange, listen actively and take limited notes about what their interests and issues seem to be
- ▶ When the parties seem to have exhausted their two-way exchange (usually by looking to you for help), it is time for you to step in, summarize what you've heard from each party, and clarify your understanding of each party's issues and concerns.
- ▶ Before summarizing issues, try to point out any common interests you have detected

III. CLARIFYING INTERESTS AND ISSUES WHILE MAINTAINING TRUST

Please correct me if I'm wrong, but . . .

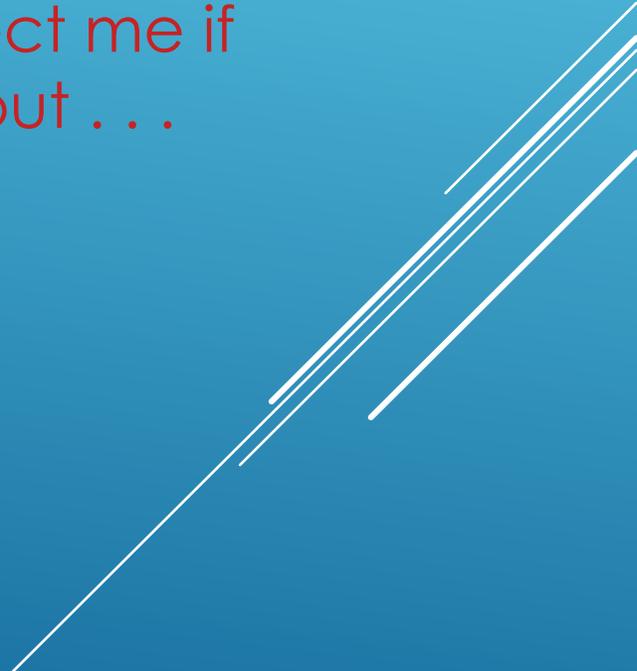
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TIPS FOR CLARIFICATION OF INTERESTS AND ISSUES

III. CLARIFYING INTERESTS AND ISSUES WHILE MAINTAINING TRUST

- ▶ Say something like, “Please correct me if I’m wrong, Party A, but you seem to be saying that . . . , and you seem to be concerned about . . . and Did I state your concerns correctly? Did I miss any concern that you would like to discuss here today?” (Note: Whether you decide to name the underlying interests is something you will have to decide at the time.)
- ▶ After you clarify Party A’s issues and concerns, do the same for Party B.

Please correct me if I’m wrong, but . . .

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TIPS FOR CLARIFICATION OF INTERESTS AND ISSUES

III. CLARIFYING INTERESTS AND ISSUES WHILE MAINTAINING TRUST

Please correct me if I'm wrong, but . . .

- ▶ If you have done a good job of active listening and note taking, the parties will agree with your clarifications, which should strengthen their trust in you.
- ▶ Don't worry if the parties correct your understanding of the issues or let you know that you missed one. Accept their corrections humbly and gracefully, and you will strengthen their trust in you.
- ▶ A good mediator does not attempt to prove that he or she is the smartest person in the room. A good mediator tries to make the parties feel smart and to empower them to resolve their own issues.

TIPS FOR REFRAMING ISSUES WITH NEUTRAL LANGUAGE

Often, parties use harsh and accusatory language when they are providing their perspectives about a case. When it is the mediator's time to clarify issues, concerns and interests, the mediator generally will choose not to use the same harsh and accusatory language. Instead, the mediator will:

- ▶ Use “softer” language than the parties have used
- ▶ Express each party's perspective with “neutral” language that contains no judgment
- ▶ Rather than give the specifics of the issues, “globalize” them with general language

VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

Important Principles

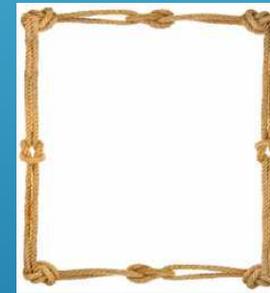


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IV. REFRAMING ISSUES AND INTERESTS WITH NEUTRAL LANGUAGE

ETHICAL CONSIDERATIONS WHEN REFRAMING ISSUES AND INTERESTS

- ▶ TMCA Standard 1 (Mediation Defined)
- ▶ TMCA Standard 2 (Mediator Conduct)
- ▶ TMCA Standard 9 (Impartiality)

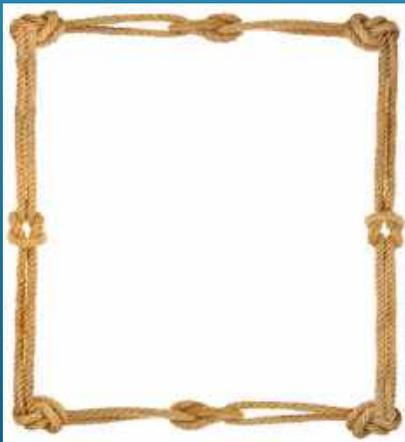
Soften, Neutralize and
Globalize

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IV. REFRAMING ISSUES AND INTERESTS WITH NEUTRAL LANGUAGE

EXERCISE: REFRAMING ISSUES AND INTERESTS WITH NEUTRAL LANGUAGE

Soften, Neutralize and
Globalize



ESTABLISHING A ROADMAP FOR THE NEGOTIATION

- ▶ After the parties agree on the issues and concerns to discuss, they will need to decide upon an order for the discussion
- ▶ Often, the order is not controversial (e.g., liability issues before damages or other remedies)
- ▶ Sometimes, however, the parties may disagree on what's more important (e.g., one divorcing parent wants to discuss conservatorship and support of the children first, but the other divorcing parent wants to discuss property issues first)

V. DEVELOPING A NEGOTIATION AGENDA IN MEDIATION

Determine the order of issues to discuss



TIPS FOR ESTABLISHING A ROADMAP FOR THE NEGOTIATION

- ▶ Relax, these things usually work themselves out; the order of discussion is just another issue to negotiate; parties rarely reach an impasse over this issue
- ▶ If the order of discussion does become a serious issue, consider caucusing with the parties to see if there is some hidden agenda or hidden emotional component; discuss what will happen if the mediation reaches an impasse over this issue
- ▶ Consider allowing each party to discuss its preferred issue first, and see what happens

V. DEVELOPING A NEGOTIATION AGENDA IN MEDIATION

Determine the order of issues to discuss



DISPUTE BETWEEN MERCHANT AND CUSTOMER (BOTH BUSINESS OWNERS)



Mediation Role Play
No. 2

VI. GENERATING AND EVALUATING OPTIONS

GENERATION OF OPTIONS

- ▶ Set the stage for generation of options by emphasizing it is a “criticism-free zone.” The purpose of this step of the process is to generate options, not to criticize them
- ▶ Invite each party to propose one or two options for resolution of an issue
- ▶ Enforce the no-criticism rule; otherwise, the parties may fail to generate a full set of options.



Brainstorming

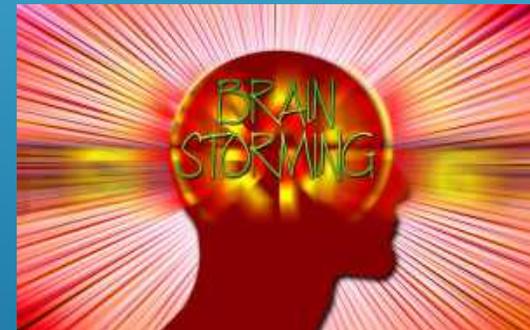


Image: Gerd Altmann/Geralt @ Pixabay.com

GENERATION OF OPTIONS

- ▶ If the parties get stuck, ask them if they have known (or heard about) other people who have had similar issues and resolved them; if the answer is yes, ask how the other people resolved their issues
- ▶ If the parties still cannot generate any options, ask each of them to write down the names of three people they know (or know about) who are good problem solvers. Taking turns, ask each party for the name of one of the people and what that person might propose as an option for resolution. Keep going until you have 6 new options (3 per party).

VI. GENERATING AND EVALUATING OPTIONS

Brainstorming

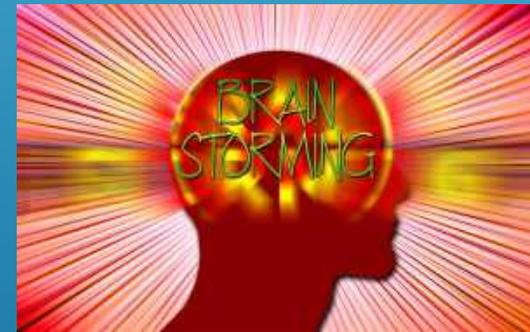


Image: Gerd Altmann/Geralt @ Pixabay.com

EVALUATION OF OPTIONS

After you have multiple options, evaluate them with objective criteria (per *Getting to Yes*)

VI. GENERATING AND EVALUATING OPTIONS

- ▶ Market value;
- ▶ Scientific findings;
- ▶ Professional criteria;
- ▶ Precedents;
- ▶ Efficiency;
- ▶ Moral criteria;
- ▶ Tradition.



Evaluating



VISION
How to do more with less
Accountability
Evaluation of Performance
Collaboration to leverage
Knowledge/experience in
other parts of the university
Interdisciplinary
Emphasize Adaptability
Evaluate who enters & leaves
program in future

VI. GENERATING AND EVALUATING OPTIONS

EXERCISE: GENERATING OPTIONS/BRAINSTORMING

Brainstorming



Image: Gerd Altmann/Geralt @ Pixabay.com

WHEN TO CAUCUS?

- ▶ When you suspect the parties have information they are unwilling to share in joint session
- ▶ When emotions run high (emotional hijacking)
- ▶ When it appears an impasse is approaching; face-to-face negotiation is not working
- ▶ When a party asks to meet privately

VII. CAUCUSING

*Private Meetings for
Information
Gathering, Reflection
and Creativity*



WHAT TO DO IN CAUCUS?

- ▶ Begin by reminding the parties that the confidentiality rules apply to caucuses; you will not disclose anything that arises in caucus with the other side unless the disclosing party authorizes you to do so (subject to the exceptions you set out in your mediator's introduction)
- ▶ Make a note to yourself that you must keep this promise; don't meet with the other side until you know what you are permitted to discuss there

VII. CAUCUSING

*Private Meetings for
Information
Gathering, Reflection
and Creativity*



WHAT TO DO IN CAUCUS?

Gather information:

- ▶ Ask the party if there is anything the party would like to share that he/she did not share in the joint session
- ▶ Ask the party questions that you thought might be too delicate to ask in joint session
- ▶ If the party lacks information, caucus time is a good time to try to obtain it; ask the party to attempt to obtain it while you meet with the other side

VII. CAUCUSING

Private Meetings for
Information
Gathering, Reflection
and Creativity



WHAT TO DO IN CAUCUS?

Encourage reflection:

- ▶ Ask the party or the party's attorney about the 3 strongest points of the party's case
- ▶ Ask the party or the party's attorney about the 3 strongest weaknesses of the party's case
- ▶ If the party has an attorney, ask the attorney what the range of outcomes would be at trial
- ▶ Ask the party or the party's attorney what the other party likely expects as an outcome

VII. CAUCUSING

Private Meetings for
Information
Gathering, Reflection
and Creativity



WHAT TO DO IN CAUCUS?

Encourage reflection:

- ▶ In later caucuses, ask about:
 - ▶ the party's alternatives if the dispute does not resolve in mediation and how the party views those alternatives (i.e., more or less favorable than what the other party is offering?) (BATNA)
 - ▶ the other party's alternatives if the dispute does not resolve in mediation and how the party views those alternatives (WATNA)

VII. CAUCUSING

Private Meetings for
Information
Gathering, Reflection
and Creativity



WHAT TO DO IN CAUCUS?

VII. CAUCUSING

Encourage reflection:

- ▶ In later caucuses, ask about (for litigated cases or cases headed to litigation):
 - ▶ the time likely required to get to trial
 - ▶ the likely additional costs of going to trial
 - ▶ the range of likely outcomes at trial

Private Meetings for
Information
Gathering, Reflection
and Creativity



VII. CAUCUSING

WHAT TO DO IN CAUCUS?

Encourage reflection:

- ▶ Ask whether, in view of the answers to the earlier questions, the party would like to continue negotiation; if the answer is yes, ask what the party's next proposal will be

Private Meetings for
Information
Gathering, Reflection
and Creativity



WHAT TO DO IN CAUCUS?

Encourage creativity:

- ▶ Remind the parties they can often craft resolutions that a court cannot award
- ▶ Go over each party's perception of the other party's interests, and ask whether there is a creative way to resolve that interest

VII. CAUCUSING

Private Meetings for
Information
Gathering, Reflection
and Creativity



VII. CAUCUSING

WHAT TO DO IN CAUCUS?

Close each caucus by asking the party about the things you are permitted to reveal to the other side. If you are uncertain exactly what you should say or how you should say it, rehearse a script with the party with whom you are meeting

*Private Meetings for
Information
Gathering, Reflection
and Creativity*



DISPUTE BETWEEN POLICE OFFICER AND CITIZEN

Mediation Role Play
No. 3



BASIC MEDIATION TRAINING

Dispute Resolution Center
Austin, Texas

DAY THREE CONCLUDED!



DRC
Dispute Resolution Center
www.austindrc.org

I. OVERVIEW

- I. Overview, Plan for the Day
- II. Impasse and How to Get Through It
- III. Writing Mediated Settlement Agreements
- IV. Terminating the Mediation
- v. TMCA Standards for Legal Advice and Writing Mediated Settlement Agreements
- VI. Three Role Plays

Plan for Day Four

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II. IMPASSE AND HOW TO GET THROUGH IT

WHAT IS AN IMPASSE?

“A predicament from which there is no obvious escape.”

Webster's New American Dictionary (Merriam-Webster 1995)



Image: OpenIcons @ Pixabay.com

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs

II. IMPASSE AND HOW TO GET THROUGH IT

HOW TO IDENTIFY AN IMPENDING IMPASSE?

- ▶ Parties have not found a way to resolve the dispute in full
- ▶ Parties have run out of ideas
- ▶ Parties get discouraged, talk about leaving the mediation
- ▶ Parties get emotional (e.g., frustrated, angry)

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



EMOTIONS IN AN IMPENDING IMPASSE

Emotional Cycle

- ▶ Frustration/Anger: “I knew this mediation would never work.” “I’m angry/upset because” “I told you he was in bad faith.”
- ▶ Depression/Anxiety: “Tomorrow I’m going to wake up with this problem still hanging over my head.”
- ▶ Reality Check/Examination of BATNA and WATNA
- ▶ Reason Returns: “Well, I guess I could offer”

II. IMPASSE AND HOW TO GET THROUGH IT

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



OVERALL STRATEGY FOR DEALING WITH AN IMPENDING IMPASSE

Keep the parties at the mediation long enough to pass through the entire emotional cycle. Assist them through the cycle with effective techniques.

II. IMPASSE AND HOW TO GET THROUGH IT

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



II. IMPASSE AND HOW TO GET THROUGH IT

TECHNIQUES FOR DEALING WITH AN IMPENDING IMPASSE

- ▶ Remain calm; it's not your problem
- ▶ Remember, you need to be the optimist in the room
- ▶ Be patient; try not to show your own frustration with the status of negotiations
- ▶ Speak calmly to the parties

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



TECHNIQUES FOR DEALING WITH AN IMPENDING IMPASSE

- ▶ Acknowledge the emotion (Examples: “I see you’re angry about that offer.” “I see you’re frustrated with progress so far.”)
- ▶ Normalize the occurrence of an apparent impasse in difficult negotiations (Example: “In tough cases like this one, it’s not unusual for people to think they’re deadlocked.”)

II. IMPASSE AND HOW TO GET THROUGH IT

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



TECHNIQUES FOR DEALING WITH AN IMPENDING IMPASSE

- ▶ Offer the parties a break. Give them time to “go to the balcony” and become less angry/frustrated. Remember, it takes at least 20 minutes to recover if there’s an emotional hijacking

II. IMPASSE AND HOW TO GET THROUGH IT

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



TECHNIQUES FOR DEALING WITH AN IMPENDING IMPASSE

- ▶ Encourage the parties to reflect:
 - ▶ Remind the parties of their goals for the mediation
 - ▶ Remind the parties of any progress they have made so far
 - ▶ Ask the parties what the potential benefits are of the progress they have made
 - ▶ Congratulate the parties on the hard work they have done

II. IMPASSE AND HOW TO GET THROUGH IT

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



TECHNIQUES FOR DEALING WITH AN IMPENDING IMPASSE

- ▶ Ask questions that encourage reflection (the following are in no particular order):
 - ▶ Have you seen any progress in the other side's proposals?
 - ▶ Are there any benefits to you in the other side's latest proposal? What are they?
 - ▶ Do you see a specific strategy behind the other side's current proposal?

II. IMPASSE AND HOW TO GET THROUGH IT

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



TECHNIQUES FOR DEALING WITH AN IMPENDING IMPASSE

- ▶ Encourage the parties to reflect on their BATNAs:
 - ▶ Ask the parties about their alternatives if there is no resolution of the dispute (BATNA)
 - ▶ Ask the parties about the benefits of their alternatives
 - ▶ Ask the parties about the potential costs of exercising their alternatives (time, money and relationships)
 - ▶ Ask the parties how the alternatives look compared to what the other side is offering

II. IMPASSE AND HOW TO GET THROUGH IT

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



TECHNIQUES FOR DEALING WITH AN IMPENDING IMPASSE

- ▶ Ask questions that encourage reflection about BATNAs (the following are in no particular order):
 - ▶ If it's not possible to reach an agreement today, what will your next steps be?
 - ▶ How much time will those steps take? How much will they cost? How successful are they likely to be?
 - ▶ How do your alternatives compare to what the other side has offered?

II. IMPASSE AND HOW TO GET THROUGH IT

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



TECHNIQUES FOR DEALING WITH AN IMPENDING IMPASSE

- ▶ Encourage the parties to reflect about WATNAs:
 - ▶ Ask the parties about the other side's alternatives if there is no resolution of the dispute (WATNA)
 - ▶ Ask the parties about the effects on them if the other side exercises those alternatives
 - ▶ Ask the parties about the potential costs to them if the other side exercises those alternatives (time, money and relationships)

II. IMPASSE AND HOW TO GET THROUGH IT

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



TECHNIQUES FOR DEALING WITH AN IMPENDING IMPASSE

- ▶ Ask questions that encourage reflection about WATNAs (the following are in no particular order):
 - ▶ If it's not possible to reach an agreement today, what will the other side's next steps be?
 - ▶ How could those next steps affect you?
 - ▶ Do you want the other side to take those steps?

II. IMPASSE AND HOW TO GET THROUGH IT

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



II. IMPASSE AND HOW TO GET THROUGH IT

TECHNIQUES FOR DEALING WITH AN IMPENDING IMPASSE

- ▶ Encourage the parties to reflect:
 - ▶ Ask the parties if they want to continue negotiating, in view of their BATNAs and WATNAs

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



TECHNIQUES FOR DEALING WITH AN IMPENDING IMPASSE

- ▶ Encourage additional creativity:
 - ▶ Ask the parties if they have any ideas they have not proposed so far
 - ▶ Ask the parties if they want to go back to formal brainstorming

II. IMPASSE AND HOW TO GET THROUGH IT

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



HOW TO WORK WITH EMOTIONS IN AN IMPENDING IMPASSE

- ▶ Ask questions that encourage reflection and creativity (the following are in no particular order):
 - ▶ Would you like to keep negotiating?
 - ▶ Would it be possible to formulate an attractive alternative proposal?
 - ▶ What new ideas do you have?
 - ▶ Would you like to go back to brainstorming?
 - ▶ Would you like time to think of new ideas?

II. IMPASSE AND HOW TO GET THROUGH IT

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs



DISPUTE BETWEEN BUSINESS OWNER AND ENVIRONMENTALIST

Mediation Role Play
No. 4



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ETHICAL CONSIDERATIONS ABOUT LEGAL ADVICE AND WRITING MEDIATED SETTLEMENT AGREEMENTS

- ▶ TMCA Standard 11 (Professional Advice)
- ▶ TMCA Standard 13 (Termination of Mediation Session)
- ▶ TMCA Standard 14 (Agreements in Writing)

V. TMCA STANDARDS FOR LEGAL ADVICE AND WRITING MEDIATED SETTLEMENT AGREEMENTS

Ethical Issues



WHAT TO DO DURING AGREEMENT WRITING

- ▶ Consider whether the mediator or someone else should draft the mediated settlement agreement (MSA)
- ▶ Before anyone drafts the MSA, the mediator should summarize orally what the mediator believes the terms of the agreement are; the mediator should ensure the parties agree with the mediator's understanding

III. WRITING THE MEDIATED SETTLEMENT AGREEMENT

Documenting the Deal



WHAT TO DO DURING AGREEMENT WRITING

- ▶ The oral summary of the MSA may reveal some missing deal points; negotiate them
- ▶ The mediator and the parties (and their attorneys, if present) should participate together in agreement writing
- ▶ The drafting of the agreement may reveal some missing deal points; negotiate them

III. WRITING THE MEDIATED SETTLEMENT AGREEMENT

Documenting the Deal



WHAT TO DO DURING AGREEMENT WRITING

- ▶ Goal: when the parties wake up the next morning, they should be able to read the MSA and know exactly what they are supposed to do
- ▶ Specifics about the following are essential: Who? What? When? Where? How?
- ▶ Language should be simple, clear and unambiguous
- ▶ The MSA cannot obligate people who are not parties to it
- ▶ Agreement should contemplate next steps if there is no compliance

III. WRITING THE MEDIATED SETTLEMENT AGREEMENT

Documenting the Deal



WHAT TO DO DURING AGREEMENT WRITING

- ▶ Before the parties sign the MSA, have them read it and approve it
- ▶ At a minimum, each party should leave with a copy of the MSA
- ▶ Discuss/negotiate what will happen with the original, signed MSA
 - ▶ Each party leaves with a signed original?
 - ▶ Original to be sent to or kept by someone else (DRC, government agency, HR Department)?
 - ▶ Original to be filed as a Rule 11 Agreement? If so, MSA should specify who will file it

III. WRITING THE MEDIATED SETTLEMENT AGREEMENT

Documenting the Deal



IF THE PARTIES REACH AGREEMENT

- ▶ Cordiality usually prevails
- ▶ Parties (or their lawyers) usually discuss details of MSA compliance before they leave
- ▶ In certain mediation models, mediator may be required to monitor compliance; go over details
- ▶ Parties usually want to shake hands before they leave, but not always
- ▶ If the parties don't want to see each other after signing the MSA, negotiate who leaves first, and allow sufficient time between departures

IV. TERMINATING THE MEDIATION

The end?



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IF THE PARTIES DON'T REACH AGREEMENT

- ▶ Cordiality usually prevails
- ▶ Parties (or their lawyers) usually discuss next steps (e.g., discovery, setting case for trial) before they leave
- ▶ Parties usually want to shake hands before they leave, but not always
- ▶ If the parties don't want to see each other before they leave, negotiate who leaves first, and allow sufficient time between departures

IV. TERMINATING THE MEDIATION

The end?



DISPUTE BETWEEN EMPLOYER AND FORMER EMPLOYEE (SEXUAL HARASSMENT CHARGE)



Mediation Role Play
No. 5

BASIC MEDIATION TRAINING

Dispute Resolution Center
Austin, Texas

DAY FOUR CONCLUDED!

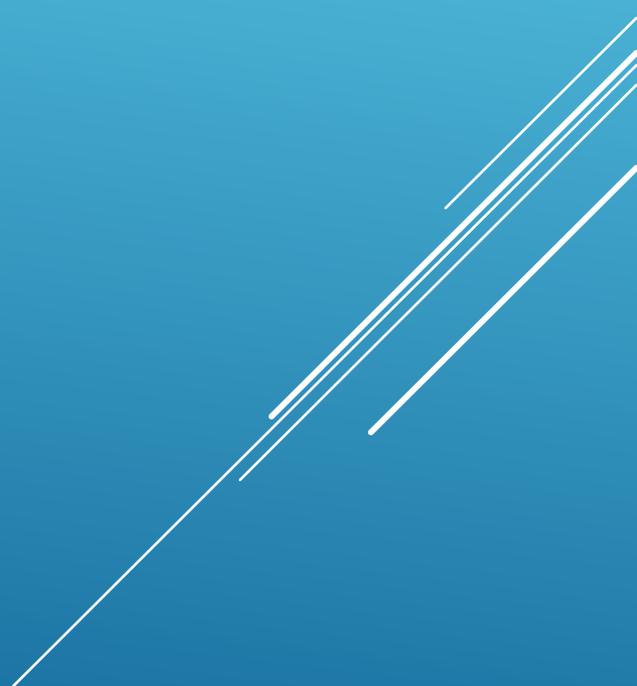


DRC
Dispute Resolution Center
www.austindrc.org

I. OVERVIEW

- I. Overview, Plan for the Day
- II. Working with Attorneys in Mediation
- III. Miscellaneous Ethical Issues
- IV. Summary of Key Learning Points
- v. Delivery of Certificates
- VI. Four Role Plays

Plan for Day Five

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DISPUTE BETWEEN LANDLORD AND TENANT

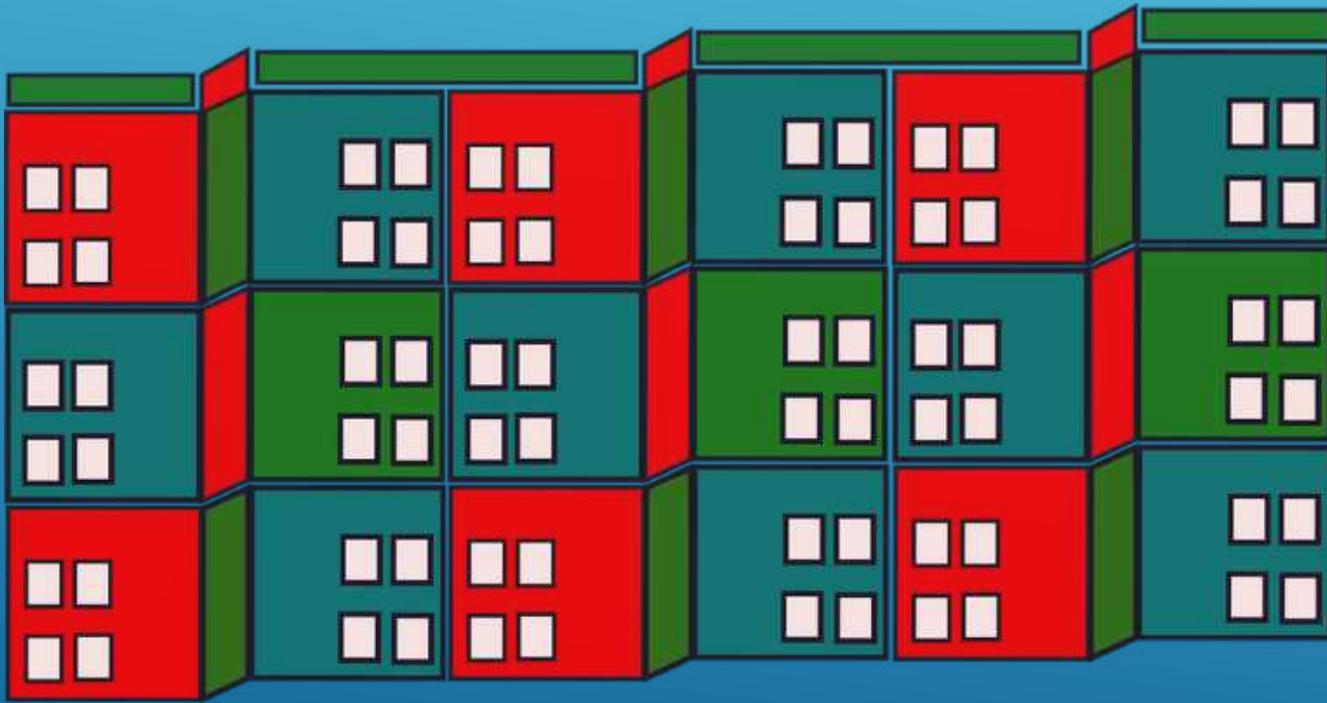


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Mediation Role Play
No. 7



Image: Gerd Altmann/Geralt @ Pixabay.com

SUGGESTIONS FOR WORKING WITH ATTORNEYS

- ▶ Remember that attorneys are human beings with their own interests and concerns
- ▶ Remember that attorneys have an ethical duty to competently represent their clients
- ▶ Assume that most attorneys are participating in mediation in good faith
- ▶ Recognize that attorneys often have their own good reasons for wanting to resolve disputes in mediation
- ▶ View attorneys as potential partners in helping the parties reach an agreement

II. WORKING WITH ATTORNEYS IN MEDIATION

Opportunities for Collaboration



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SUGGESTIONS FOR WORKING WITH ATTORNEYS

- ▶ Before mediation, use attorneys as a resource to:
 - ▶ determine the party dynamics
 - ▶ help with preparation for the mediation
 - ▶ answer your relevant questions
- ▶ During the mediation, use attorneys as a resource to:
 - ▶ provide factual information
 - ▶ clarify interests, issues and concerns
 - ▶ help with generation of options
 - ▶ help with reality testing
 - ▶ help with drafting MSAs

II. WORKING WITH ATTORNEYS IN MEDIATION

Opportunities for Collaboration



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SUGGESTIONS FOR WORKING WITH ATTORNEYS

- ▶ Before mediation, discuss with attorneys their expectations regarding joint sessions and caucuses. Listen to attorneys and discuss their reasons for not wanting joint sessions. You may wish to advocate for joint sessions, but do not insist on them.
- ▶ You may wish to engage directly with an attorney's client, but do not interfere with the relationship between the attorney and client. Clients hire attorneys for reasons of their own, and they will be inclined to follow their attorneys' recommendations about process. Attorneys will resist a mediators' efforts to override their recommendations.

II. WORKING WITH ATTORNEYS IN MEDIATION

Opportunities for Collaboration



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DISPUTE BETWEEN BUSINESS OWNER AND DISABLED CUSTOMER



Mediation Role Play
No. 8

TMCA Standard 12 (Mediator's Relationship with the Judiciary)

III. MISCELLANEOUS TMCA STANDARDS

Ethical Issues



DISPUTE BETWEEN MERCHANT AND CUSTOMER



Mediation Role Play
No. 9

DISPUTE BETWEEN SELLERS AND BUYERS OF HOME



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Image: Merio@ Pixabay.com

Mediation Role Play
No. 10



Statute?

Conflict Styles?

Principled Negotiation?

Mediation Process?

Specific Skills?

Ethics?

Anything Else?

V. KEY LEARNING POINTS

What will you remember?

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CONGRATULATIONS!

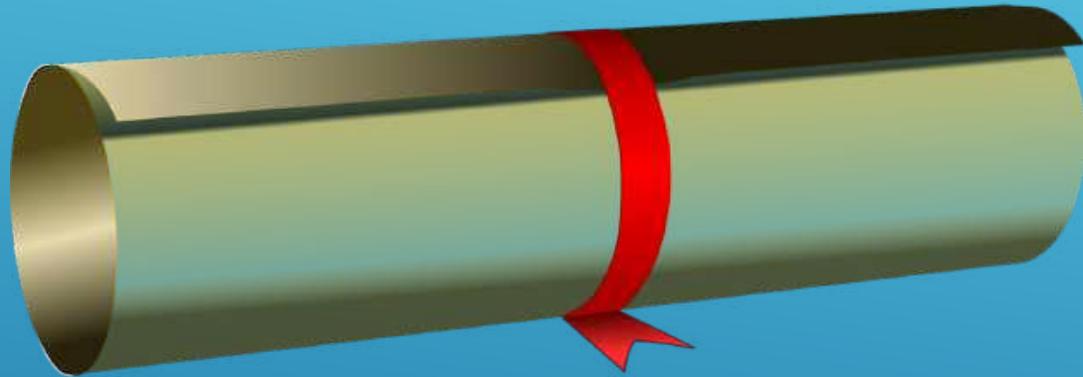


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Image: OpenClipart-Vectors @ Pixabay.com

VII. CERTIFICATES

YIPEE!!



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BASIC MEDIATION TRAINING

Dispute Resolution Center
Austin, Texas

DAY FOUR CONCLUDED!



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THANK YOU!



HAPPY MEDIATING!

