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COMMUNICATION AND STRATEGIES IN THE MEDIATION OF DISPUTES

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ABSTRACT

Traditional methods of resolving disputes have given way to a less formal method, namely mediation. Utilizing a process that takes into account the substantive, procedural, and emotional/psychological needs of the participants provides greater levels of satisfaction than more traditional means. Some states even mandate mediation before complainants go before a judge or jury. This article describes effective and ineffective strategies and tactics of professional communicators who play the role of mediator. For example, as the amount of time talking by the mediator decreases, the likelihood of a mediated and enduring settlement increases. Gender differences in mediation suggested more women than men mediated an effective settlement which worked, or had a long-lasting effect. Female mediators closed more binding settlements, though both male and female mediators reached initial settlements. This article also provides guidelines for a specific pattern to follow in the process of mediation.

The various forms of dispute resolution include arbitration and mediation. From a historical perspective, the best-known use of arbitration as a means of resolving

conflict occurred in collective bargaining between labor and management. Much used a decade ago, arbitration presented a number of problems including rules litigation, which enabled lawyers to manipulate and delay the system [1]. In mediation, however, the disputing parties decide on the method of dispute resolution by talking through their differences. The greatest boost to the visibility of mediation to solve grievances occurred as a result of the efforts of Brett and Goldberg, who studied conflict resolution in the coal mining industry [2]. The use of mediation for community, marital, judicial, family, environmental, marketplace, and landlord-tenant disputes enables people to avoid the use of the court system to resolve conflicts. Nevertheless, attorney consultation provides negotiators in a mediation process with legal protection in a mediation agreement [3].

Mediation acts as a form of conflict resolution that involves a third party who facilitates settlement discussions between two or more disputing parties. Effective mediation produces results agreeable to both sides of a dispute. "Unlike arbitration, mediation imposes no binding decision, does not prevent later recourse to the courts, and focuses on a process rather than a result." When individuals reach an impasse, or fail to negotiate effectively, a mediator enables them to improve their communication and move toward a negotiated settlement of their own making. Folberg and Taylor emphasized the role of mediation as a self-empowering process because the parties involved take the responsibility for making decisions that affect their own lives [5]. Disputants look to a mediator to manage the conflict, bring creative problem solving to the table, improve communication between the parties, act ethically and impartially, and provide expertise in the mediation process. The mediation process comprises at least three individuals (the mediator and two negotiators, each representing opposing sides) and the mediator's relationship with each negotiator.

Consequently, the outcome of the mediation can be said to result from the personal characteristics of each person, the interpersonal relationships of the participants, and the situational factors [6]. The mediator hopes the two negotiators will reach agreement, and this acts as the mediator's primary goal.

MEDIATOR COMMUNICATION EFFECTIVENESS

Wall believed skilled mediators must communicate effectively [6]. Competent mediators need to create a relaxed environment to enable disputants to think creatively without feeling threatened. They need to enable weaker communicators to be heard and stifle overbearing communicators from bluffing the other party. Mediators must elicit shared responsibility in concession making, agreement seeking, and creative problem solving between the negotiators. Araki suggested an effective mediator must possess the following attributes (s/he):

- is confident and has a strong character
- has a good understanding of the mediation process
- is able to write up effective agreements

- has leadership qualities
- is directive
- is responsible
- is caring
- is a good listener and knows how to ask questions [7, p. 55].

Adversarial individuals who participate in mediated agreements report higher levels of satisfaction with the process than those who choose traditional adversarial dispute settlement avenues (such as going to court) [8]. The communication behaviors of mediators and disputants play a large part in the success or failure of these cases. The role of communication in the mediation process involves facilitating an accurate exchange of information between disputants. Researchers and practitioners claim mediators help improve communication by identifying and/or assisting individuals to change counterproductive communication patterns, establish trust between the disputants, clarifying communication, and facilitating and encouraging open and direct communication [9-14]. Diez identified three types of discourse work involved in mediation: *coherence work* (linking concepts together to make sense of the story), *distance work* (controlling relational immediacy, psychological distance, role distance, and social distance), and *structuring work* (organizing the interaction to provide information in "turns at talk" [15]. Successful and unsuccessful mediators' approaches to communication appear to differ.

Werner believed communication behaviors between successful and unsuccessful mediators could be distinguished [16]. The role of an effective mediator evidences improved communication, identifies and/or changes communication patterns of disputants, establishes trust between the two parties, clarifies unclear communication, and facilitates and encourages open and direct communication [5, 9-14, 17-20]. Slaikeu, Culler, Pearson, and Thoennes found successful mediators spent less time identifying behavioral prescriptions, explaining mediation, and making or requesting disclosures of feelings, and more time discussing possible solutions and terms of the final agreement [21]. They also praised negotiation behaviors, made recommendation statements, and offered suggestions significantly more than did unsuccessful mediators [21]. In other words, they promoted cooperation between disputants, creating an atmosphere where open communication and information sharing occurred, urging disputants to look for areas of agreement and helped them search for mutually acceptable solutions [22].

A recent example of this method can be seen in a mediation case engaged in by J. P. Cangemi, one of the authors of this article, and a co-mediator—a university administrator from the northwestern states—in South Africa. The case involved serious allegations regarding a top administrator of an institution of higher education whereby his staff of several administrators accused him of mismanagement and misappropriation of funds. The allegations were brought to the highest authorities in the country and a subsequent investigation of the accusations took place. The investigation lasted nearly a year-and-a-half and, during this time, the top

administrator was not permitted to enter the campus—nor did he receive compensation during this period of time. Once the investigation was concluded and the allegations were found to be invalid, the need to repair the relationship among all parties was imminent for the sake of both the university's mission and its function. Substantial distrust, obviously, had developed between the two entities: the top administrator and his staff. Actually, it turned into the top administrator *versus* his staff when he returned to campus. Further, the entire campus became polarized into two camps, those who sided with the top administrator and those who sided with his staff. To say the least, the mood of the university was somber and tense, with productivity on the part of the staff, faculty, and students at a standstill. The period of time without compensation had almost ruined the top administrator financially, as well as careerwise. When the two mediators arrived on campus the relationship observed between the administrator and his staff was distant, tense, morose, distrusting, suspicious, resentful, vengeful, and hostile in a covert way. The mediators sought to repair the damage inflicted by the previous allegations and to determine what was desired by each side. The mediation started at 9:00 a.m. and terminated at 10:00 p.m. the same day: thirteen hours consecutively. At all times the focus was on the issues, compromises, and the need to demonstrate a unified group to the university community and the community at large. By focusing on the positives of each group, their mission, and placing the success of the institution in proper balance with regard to each group's respective needs, appropriate compromises were reached. By 10:00 p.m. the university had a collective group of leaders who agreed on the value of their commitment to the institution and its mission *as their highest priority,* as well as the commitment to each other. When the group left, they were relaxed, barriers had been broken, seeds of trust had been planted, and a better working relationship was imminent. The tension between the parties had dissipated substantially. Follow-up of this mediation found the parties more successfully dealing with each other, while personal animosities had been reasonably put aside.

Successful mediators spend more time discussing possible solutions and terms of final agreements than unsuccessful mediators. They direct the communication but not the content of the talks. They listen carefully without making judgments, and they avoid even the appearance of advocacy. In other words, they do not try to convey their own ideas from their own expertise, interests, or experiences, which may influence the options available to the disputants. If power between the parties appears one-sided, the mediator may bring in an advisory negotiator whose role requires exerting influence, when needed, to enable the disputants to examine the issues and options. Successful mediators articulate goals and identify hidden agendas. Walton wrote that successful mediators refereed the interaction, clarified parties' views through restatement, and encouraged interpersonal feedback [23]. Successful mediators bring out relevant issues, allow each side time to speak, identify solution options, reframe intervention as a means of maintaining control of the interaction, and often allow disputants to exit their own arguments without

closure from the mediator [24]. They work to redefine three critical relational parameters in the mediation: *control, intimacy, and trust.* They define linguistic choices to limit name calling and personal attacks, hostile word choices, placing blame, challenging communication tactics, and putting the adversary down. Donohue, Allen and Burrell found successful mediators established rules such as "Please do not interrupt" [25]. They identified roles such as "My role in this discussion is to . . ." They paraphrased and interpreted what the negotiators said, for example, "What I think I hear you saying . . ." They provided listening markers such as "Oh, I see" and "ah huh." They requested information such as opinion, evaluation, proposals, clarification, and feelings. They intervened after a disputant integrated ideas, while unsuccessful mediators intervened after a disputant attacked [25].

Rogers and Francy looked at the amount and type of communication during mediation to determine whether any relevant variables affected outcome [26]. They found in successful mediations the mediators spoke considerably *less* than either of the disputants and probed somewhat more *expressively* (feeling-related) than *instrumentally* (fact-related). *As the amount of time talking by the mediator decreased, the likelihood of a mediated and enduring settlement increased.* They also found respondents less actively involved in communication in the mediation process than complainants. In terms of satisfaction, as factual probing by the mediator increased, complainant satisfaction also increased but respondent satisfaction decreased. Eliciting the disputant's feelings appeared to result in no effect on the outcome of satisfaction for either party involved in the dispute [26]. However, extensive and uncontrolled expression of feelings could be cathartic up to a point; it has diminishing returns when negative feelings continue to conjure past events and often prohibits a constructive solution. Mediation trainees should avoid excessive direct probing of disputants' feelings and adopt indirect methods to elicit feelings. Finally, complainant satisfaction increased as the length of a session increased, while respondent satisfaction decreased. Disputants rarely entered the mediation process with a cooperative conflict style [27], and their communication exchanges often exhibited "unreliable and disruptive characteristics" [28, p. 12]. The amount of communication between disputants appeared less important than the type of interaction occurring. When the interaction took an unproductive turn, a mediator might decide to limit communication rather than expand it.

Unsuccessful mediators discovered, as a result of intervening, that after the disputants attacked one another, they attacked more often [25]. Perhaps the mediators felt the need to do something after the attack. In any case, the unsuccessful mediators found themselves in a domination struggle with the disputants as a result of intervening after attacks. Unsuccessful mediators spent more time discussing behavioral prescriptions, explaining mediation, and making requests for disputants to self-disclose. They failed to provide praise for positive negotiation behaviors, failed to make recommendation statements for proposals, and failed to make suggestions significantly less often than successful mediators [22].

Werner claimed, in unsuccessful mediations, disputants engaged in competitive or disruptive communication behaviors [16] such as: 1) attacking the other person, 2) blaming, fault-finding, accusing, 3) dominating the conversation, 4) interrupting, 5) being critical and judgmental of the other, 6) speaking for the other, and 7) making threats [13, 14, 29-34].

Mediators possess an enormous amount of power in the mediation process. They can both directly and indirectly influence the negotiators through their reputation and skill and the disputants' ongoing assessment of them during the negotiation process. Kolb claimed these assessments could affect the mediators' credibility along both instrumental and expressive dimensions [35]. From the *instrumental* perspective, actions taken by the mediator, such as how s/he learned about the issues and the players, how s/he gauged priorities, and how s/he fostered movement on the disputed issues that the negotiators understood in terms of their immediate goal—a settlement—affected the mediator's credibility. From the *expressive* perspective, the symbolic messages the mediator conveyed about her/himself might be given to impress the disputants which, in the long run, could affect their credibility. For example, professional cues such as knowledge of the facts, knowledge from experience, or impressions formed from the negotiator's business attire, room arrangement, and seating order could affect their credibility [35]. Professionalism derived from the mediator's structuring devices, such as rules for interacting and then enforcing them, also help to produce an aura of trust and confidence in the mediator [25].

Mayer claimed the mediator's commitment to empower the parties actually strengthened the process [36]. In the service of procedural objectives, mediators would most likely exert influence within the framework of their role. Mayer suggested the following procedures for encouraging the development of sound, integrative decisions:

- Gaining access to relevant data and information for all parties.
- Ensuring the opportunity for each party to be heard.
- Helping parties to separate and articulate their feelings, values, perceptions, and interests and to identify all relevant interests, including those of unrepresented parties.
- Helping to develop a creative set of options which maximize the parties' individual and collective interests.
- Helping parties evaluate the options which have been identified and their alternatives to a negotiated agreement.
- Designing and assisting in the selection of the options which maximize the satisfaction of the parties.
- Formulating the selected solution in a manner which increases its chances of being mutually acceptable and anticipates, to the greatest extent possible, the potential for future misinterpretations or manipulations.
- Assisting in the design of an implementation procedure which promotes compliance and follow through [36, p. 81].

Jones reviewed communication research on mediation and found little that addressed the relational context of mediation communication [37]. Most taxonomies focused on involvement in substantive decision making and processes that established a clear flow of communication between the disputants [38]. In other words, most processes considered the "task" and not the "relational" dimensions of conflict resolution [38]. Going back to the case in South Africa, it was obvious the parties did not like each other, which diminished the possibility of a rapid mediation of the grievances and positions held by both sides. It was only after considerable time was spent in the mediation process, with the parties looking at, observing, sensing, and hearing each other that the tension began to subside. Once the mediators were able to bring about a lowered tension level, and were able to get all the disputants to listen to each other and treat each other with respect and dignity, the interpersonal relationships of the opposing groups improved. It should be noted the mediators in this case (Cangemi and a colleague—a university administrator) established rules of conduct *before the mediation took place* as a precondition for becoming involved in the grievance and the mediation process.

The root of conflict always revolves around scarce resources as people become embattled over them. During conflict of this sort, relationships often deteriorate, so it seems logical to conceive of a relational dimension to conflict resolution. The relational elements of mediation, such as trust, intimacy, and control introduce more of a short-term pragmatic perspective rather than an appreciation for dynamic development of long-term relationships [39]. In positive long-term relationships, less mediation recidivism would exist. Montgomery suggested a "dialectical" perspective to mediation as a developmental transformation [40]. She suggested the following premises of a dialectic perspective: 1) oppositional forces form the basis of all social phenomena, 2) change is constant, 3) social phenomena are defined by the relations among their characteristics rather than by the characteristics themselves, 4) dialectical tensions always exist, but people manage them [40]. Many contradictions or tensions exist in the relational communication literature: affection/instrumentality, autonomy/connection, judgment/acceptance, predictability/novelty, expressiveness/protectiveness, ideal/real, public/private, openness/closedness, continuity/discontinuity, affirmation/nonaffirmation, power/solidarity. These tensions within the context of mediation may increase or decrease as disputants move through the negotiation phases toward an agreed-upon change.

STRATEGIES AND TACTICS

The task of keeping track of what tactics achieve which outcomes in a given situation can be cognitively taxing. Consequently, mediators simplify this task by establishing schemas for the tactics they use based on the disputes they encounter and the outcomes they expect to attain. Simplifying information processing by

codifying information enables mediators to adopt a goal-oriented, strategic approach to conflict resolution [41]. Since different strategies and tactics can attain the same goals, mediators organize tactics around goal categories.

To resolve disputes mediators use four basic strategies: *integration, pressing, compensation,* and *inaction. Integration* contains a search for mutually acceptable outcomes. *Pressing* means lowering one or both parties' aspirations. *Compensating* implies offering positive benefits in exchange for concessions. *Inaction* indicates letting the parties handle the dispute by themselves [42]. Carnevale believed the choice of strategy by a mediator in different circumstances could be predicted by an interaction between the likelihood of a mutually acceptable agreement and by the mediator's concern for the parties' aspirations [43]. For example, *integrating* will occur when the mediator has a high concern for the parties' aspirations. Mediators will *press* when they do not believe agreement can be reached and they have a low concern for the parties' aspirations, or when time pressure influences the need for closure. *Compensating* will occur most often when mediators do not believe agreement can be reached but have a high concern for the parties' aspirations. *Inaction* will occur when a mediator does believe agreement can be reached and has a low concern for the parties' aspirations [43].

Kressel and Pruitt updated a well-known taxonomy of mediation, identifying three basic types of tactics: *reflexive, substantive,* and *contextual* [44, 45]. *Reflexive tactics* orient mediators to the dispute and create a foundation for their mediation activities. *Substantive* tactics deal directly with the issues in the dispute. *Contextual* tactics deal with conflict resolution processes that enable the parties to discover an acceptable solution [44, 45]. For example, when bargainers act hostile to each other, mediators use substantive tactics such as trying to change a bargainer's expectations by mentioning the costs of continued disagreement. When bargainers lacked expertise, mediators more frequently used contextual tactics such as simplifying the agenda. When bargainers brought too many issues to the table, mediators used issue-related contextual tactics such as devising a framework for issue priorities. Esser and Marriott found more satisfactory outcomes when mediators focused on *substantive* mediation [46]. Pruitt and Johnson suggested a tactic useful in impression management and face saving, such as suggestions of outcomes [47].

Carnevale and Pegnetter claimed tactics for obtaining a settlement included: 1) pointing out unrealistic positions; 2) noting the next impasse step would be no better; 3) and changing the expectations of both parties. Each of these tactics suggests something about the mediator's estimate of the party's position if the parties should resort to binding arbitration [48]. Wall and Rude found judges rated the following meditation techniques as most effective: 1) evaluating one or both cases for the attorneys; 2) analyzing the case for a lawyer; 3) pointing out to clients the strengths and weaknesses of their case; and 4) convincing an attorney of his/her distorted view of the case [49]. If mediators believed a decision could not be

reached without binding arbitration, predicting an arbitrator's decision served as the basis for further settlement discussions [50].

Shapiro, Drieghe, and Brett identified four different mediator styles based on what they thought could be done with a case, and/or what outcome possibilities existed [51]. They determined mediators engaged in deal making, shuttle diplomacy, pressuring the company, and pressuring the union. In *deal making,* the mediator tried to keep the parties together by suggesting a compromise. In using *shuttle diplomacy,* the mediator separated the parties and shuttled back and forth between them, developing in the process a concrete settlement that also resulted in compromise. When *pressuring the company* the mediator met separately with the company and privately predicted the outcome of the grievance at arbitration. This usually resulted in the company granting the grievance. In *pressuring the union,* the mediator met separately with the union and privately predicted the outcome if it should go to arbitration. This often resulted in a compromise settlement or in the union withdrawing the grievance [51].

Usually mediator strategies and tactics fall somewhere on a continuum with collaborative mediators at one end striving to meet the needs of both parties, as well as their own and competitive mediators in the middle, using their personal powers of persuasion, their clear goals, and a sophisticated understanding of the strategy of winning. At the other end of the continuum, opportunists rely on using anything to win, which includes the use of dirty tricks. Mediators can recognize dirty tricks tactics by observing certain communication behaviors. When challenges to the mediator exist, such as questioning his/her credentials or authority, or accusing the mediator of not being neutral when no reason to do so exists, a mediator might suspect a party is using dirty tricks. When one party refuses to exchange information in the early stages of mediation, its goal involves undermining the process itself . . . which the mediator might suspect as a stalling technique. When one party presents inflammatory remarks designed to degrade or unnerve the other person, his/her goal does not involve resolution, but rather undermining the other party. When one party lies or uses the mediation session to improve its preparation for a later court case, that party does not bargain in good faith. When a party resorts to these dirty tricks a mediator must be prepared to redress the power imbalance and take charge. S/He can do so by employing Smart's strategies:

- Recall the parties to the ground rules
- Refuse to back down or be intimidated
- Acquiesce when appropriate
- Finesse the move by not confronting it but by moving adroitly around it
- Use outside resources (referrals, such as attorneys, accountants, advisers)
- Control the format, agenda, and timing
- Present the parties with a choice
- Employ multiple responses
- Invoke the mediation process and the mediator's control [52, pp. 54-61].

By providing preemptive interventions, anticipating possible bad-faith moves, the mediator can regulate actions and format the mediation in such a way as to neutralize parties who attempt to use dirty tricks.

GENDER DIFFERENCES IN MEDIATION

One significant threat that may impair a mediator's perceived ability to achieve a mediated negotiation may occur as a result of gender bias [53]. Many practitioners advocate an interventionist, or highly control-oriented model of mediation, as opposed to a neutralist, facilitation approach [54]. Because an interventionist mediator must be perceived with high credibility, anything that compromises his/her credibility could affect the outcome of the mediation. Consequently, not only might disputants perceive mediators to act differently toward them (based on gender), but mediators might actually behave differently toward disputants, depending on their gender.

Burrell, Donohue, and Allen discovered female mediators behaved in a more controlling fashion, but disputants perceived them as *less* controlling [55]. Male mediators were less controlling, but disputants perceived them as *more* controlling [55]. Consequently, as professional female mediators pursue an interventionist strategy with as much fervor as their male counterparts, disputants potentially will perceive them as *less* in charge of the interaction.

Wall and Dewhurst examined gender differences in the use of formulations [56]. *Formulations* include reframing, paraphrasing, and summarizing [57]. The function of formulations comprises control over the mediation process [58]. To avoid misinterpretation, formulations clarify meanings, delete information, transform, preserve the relevant features of the conversation, or soften or minimize the use of harsh language. They may also launch a new topic, switch the conversation from one speaker to the next, reframe an utterance into a proposed solution, force a party to look carefully at statements, emphasize points of agreement or disagreement, provide commentary on the conversational situation, and serve to manage roles. Wall and Dewhurst found resolved mediations used more formulations than unresolved mediations [56]. Men and women mediators displayed significant differences in the types of formulations they used. *Women* used more formulations that attempted to *clarify* what a disputant said, and *male* mediators used more formulations designed to *control* and direct the mediation [56]. These findings appear relatively consistent with gender stereotypical expectations of male/female behavior.

Maxwell checked to see whether men or women brought more parties to a settlement [59]. No gender differences appeared in ability to bring parties to agreement; however, *more women than men mediated an effective settlement that worked,* or had a long-lasting effect. To put it another way, male and female mediators both reached initial settlements, but *female mediators closed more*

binding settlements [59]. Bigoness and DuBose found no differences in the way arbitrators treated men and women [60].

THE PROCESS

Mediators need to gain sufficient knowledge of the procedural skills necessary to mediate. They need to be knowledgeable of the jurisdiction of practice and maintain all standards and educational requirements. A mediator should spend time studying mediation and apprenticing with an experienced mediator before attempting to mediate a dispute. The process of mediation involves the following phases:

- Case-*Intake* Procedure
- Premediation *Preparation*
- Mediator's *Opening* Remarks
- Counsel/Parties' *Opening* Remarks
- Clarification and Synthesis of *Issues*
- The Settle—Try *Analysis*
- Facilitation of Productive *Negotiation*
- Private *Caucus* Procedure
- Reaching and Memorializing an *Agreement*

Intake

The mediator should briefly describe the mediation process, the role s/he will play, and announce privilege and confidentiality. The mediator will obtain preliminary information such as the nature and status of the dispute and the expectations of the parties. Also, the mediator will schedule an appropriate neutral location free from interruptions or distractions and provide the date/time of the mediation.

Preparation

- Obtain and review parties' written summaries
- Check conflicts of interest
- Review or research substantive issues, if needed
- Check in with parties to confirm conference:
    - Fully prepared
    - Address preliminary matters to avoid blocked negotiations
    - Persons with full authority will be present
    - Financial or other experts available to assist
    - Time reserved is sufficient to adequately mediate the case
    - Confirm location of mediation, provide directions if needed
    - Confirm logistical matters

- Provide written and executed mediation agreement before the conference and send it to the parties prior to meeting, but have the parties sign it at the table
- Send written notice of mediation conference (date, time, location) to all parties (including counsel)

Opening Remarks

The mediator's opening remarks acclimate those present to roles and processes. During this phase the mediator establishes and models the tone of the conference: calm, measured, attentive, and interesting. At this time the mediator should establish his/her ability, impartiality (freedom from favoritism in word, action, and appearance), and competence. The mediator stimulates the disputants' interest by inviting participation by all parties, then obtains the participants' commitment to the process and establishes a few simple ground rules.

During a tense, ongoing dispute between a large southern manufacturing organization and its union, J. P. Cangemi, one of the authors of this article and cited previously, was requested by *both* parties to act as a mediator and to bring both sides together. In the absence of sufficient time prior to the first meeting of the parties, no ground rules were laid out and, as a result, the behavior of both sides could only be interpreted as "base," "unacceptable," "unprofessional," and "hostile." Personal attacks accompanied by significant profane language were hurled at the mediator. The result was that the session deteriorated and the mediator dismissed the groups without having accomplished anything. Hence the mediator informed both parties he would no longer be available for such service or to receive such abuse. Shortly thereafter both parties came to him again, requesting he mediate their concerns in another meeting between the parties. He agreed on the condition *a set of ground rules* would be developed and each side would be required to abide by them. Anyone abusing the rules *would be ejected summarily from the meeting*—and the rules included the use of profane words. Both parties agreed the mediator would have authority over the meeting and could set the ground rules. Once the rules were made known to both sides and the subsequent meeting took place, not one infringement took place. On the contrary, the session was most productive. From this meeting both parties went on to work together, and productivity increased by 11 percent shortly thereafter. Prior to this settlement there had been an average of four strikes a year at the facility in question. After the mediation there was not one strike in the following six years. Obviously, mediation pays [61].

During the mediation phase the mediator should provide an environment that acts in the best interest of the parties, tests assumptions, sharpens the settle—try analysis, and develops/deploys persuasive negotiation [62]. The mediator asks for the parties' consent to act as the manager of the process, not in an authoritarian way, but as an invited neutral facilitator whose guidance and wisdom everyone present can rely upon to steady, calm, provoke, and generate creativity. Mediators

should recognize the importance of nonverbal communication (93%), recognizing that face-to-face communication will occur through various channels, especially nonverbal [63]. Mediators should become finely tuned receivers and transmitters of the subtle human signals we all give and receive. Of particular importance, good mediators must be certain they do not convey partiality through their:

- Vocal pitch, rapidity, volume, consistency
- Facial expressions
- Posture, body language, hand and head movements
- Eye movements, focus, gaze, direction changes
- Verbal intonation and inflection
- Unequal attention or lack of balanced involvement with one party or attorney
- Inappropriate humor, sarcasm, or disparaging remarks, gestures, or expressions
- A failure to have initially disclosed a relationship or other potential conflict (During this phase the mediator should outline the general structure of the mediation and gain verbal commitment to the general structure and ground rules.)

Structure:

- Seating arrangements
- Speaking order
- Clarification of central issues to be resolved
- Consideration of private caucus with each side
- Preferred approach to negotiations (propose alternative suggestions)
- Breaks
- Opportunities to confer privately

Ground Rules:

- Everyone will have full opportunity to speak
- Everyone agrees not to interrupt
- Everyone will have an opportunity to comment on what others say or to ask questions
- Everyone agrees to focus not just on the problems, but on various possible solutions.

Privilege and confidentiality refers to anything anyone does, says, or writes down for others that cannot later be introduced into evidence, should the case not be resolved. The privilege belongs to the parties, not the mediator. Written permission must be obtained from all present at the negotiation to disclose what someone said, or what happened during the mediation. Any partial or global settlement agreement achieved during mediation is not privileged (always reduced to written form); otherwise it would be unenforceable. All private meeting

discussions with one party or the other, during and after the mediation conference, will be kept confidential.

Counsel/Parties' Opening

This is the time each advocate gets "his/her say." The mediator allows the parties to agree on who goes first with their opening statements. After they finish, the mediator conducts a brief summary of key points, neutralizing any personal attacks and emotionally loaded words.

Clarification and Synthesis of Issues

Following everyone's opening remarks, the parties must focus on the key issues that they agree will be delegated to the presentation of fact and law in case the disputants are unable to resolve the dispute. At this time the mediator establishes the uncertainties each party has about his/her own position. Without pointing out certain misgivings about each person's position, the use of what if (open-ended) questions often helps the participants focus on the other parties' positions.

The Settle—Try Analysis

A technique best used in caucus entails the mediator crafting questions designed to help sharpen the parties' analysis to assist in their determination of what a fair settlement might really be like. To determine the likelihood of a reasonable settlement it must be compared to their only alternative . . . determination by others, who may not see, hear, understand, or agree with their sense of the case or what a fair resolution should be. Once their respective "try" analyses become the focus of discussion, some mutual reality testing, concession, and assumption testing occurs.

Facilitation of Productive Negotiation

Mediation is an extension of the negotiation process. The mediator understands principled (and unprincipled) negotiation, and the different styles people have of negotiating. The mediator can gently facilitate meaningful negotiations between the parties, utilizing four principles of human motivation:

- People usually *do* what they want to do.
- People are *less likely* to do what you want them to do if you make it hard for them.
- People are *more likely* to do what you want them to do if you make it easier for them.
- People are *more likely* to want to do that which has meaning for them [64].

The mediator has to remain neutral concerning the content of the negotiations. S/He can significantly influence the context so as to stimulate and energize the

negotiation. With sensitivity to power functions, productive communication can be fostered.

Private Caucus

Caucus is a private, confidential meeting between the mediator and each of the parties. It may be at the insistence of the mediator, or one party, or not used at all. Private meetings permit the parties to share perceptions, concerns, and "hidden agendas" with the mediator, and often become a useful tool for gaining insight into what is really driving the dispute from each side's point of view. Caucus acts as the best opportunity for the mediator to ask open-ended questions designed to assist each party in clarifying his/her analysis of what the most probable result of *not* settling might be.

Keys to effective caucus include:

- Reaffirm confidentiality
- Ask open-ended questions designed to help parties sharpen their analysis of what the trial alternative would probably produce
- Check assumptions
- Build trust, rapport
- Cost-benefit analysis
- Ask who they need to persuade of what and why.

Reaching and Memorializing an Agreement

Once the parties make agreements, the mediator must continue in the role of manager of the process. The mediator must be sure the agreement is solid and complete by reviewing the following:

- Prepare Memorandum of Settlement
- Are all the issues resolved?
- Are there any conditions for agreement based upon unknown facts? If so, can they be clarified so as to ensure the agreement is sound?
- Can the agreement conditions be met? Are they fully spelled out?
- Does everyone fully understand the agreement? (Ask for feedback)
- Who will prepare the final legal agreement? (Dangers of mediator as preparer)
- Have all parties signed the Memorandum of Settlement?
- Has everyone received a copy of the agreement?
- Is there a sense of completion with the execution of the memorandum?
- Who will be custodian of the original?

CONCLUSION

Traditional binding arbitration, once the hallmark of union disputes, has given way to a less formal method of settling disputes. In the field of employment, either

traditional manufacturing or even professional sports, many states allow or even mandate mediation into the litigation process prior to allowing disputes to go before a jury or judge. Conflict acts as the friction of life, the emotional energy disturbance resulting from a clash of opposing impulses into a mutually beneficial result . . . or the continuation of opposing impulses in an individually/mutually destructive manner. Regardless of the source of conflict, it can only reach resolution if it deals with its three faces: *substantive needs, procedural needs,* and *emotional/psychological needs* of the participants.

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REFERENCES

1. R. C. Reuben, The Lawyer Turned Peacemaker, *ABA Journal, 82* pp. 54-63, August 1996.
2. J. M. Brett and S. B. Goldberg, Wildcat Strikes in Bituminous Coal Mining, *Industrial and Labor Relations Review, 32,* pp. 467-483, 1979.
3. C. Leick, Guidelines for Mediator/Attorney Cooperation, in *Legal Issues Affecting the Practice of Mediation,* S. K. Erickson (ed.), Jossey-Bass, San Francisco, pp. 37-52, Spring 1989.
4. G. E. Cravez, Eight Mediation Myths: Comments from the Not-So-Frozen North, *Trial, 32:*6, pp. 24-27, June 1996.
5. J. Folberg and A. Taylor, *Mediation,* Jossey-Bass, San Francisco, 1984.
6. A. J. Wall, The Effects of Mediator Rewards and Suggestions Upon Negotiations, *Journal of Personality and Social Psychology, 37,* pp. 1554-1560, 1979.
7. C. T. Araki, Dispute Management in the Schools, *Mediation Quarterly, 8,* pp. 51-63, 1990.

8. J. Pearson and N. Thoennes, Divorce Mediation: An Overview of Research Results, *Columbia Journal of Law and Social Problems, 19:*4, pp. 451-484, 1985.
9. M. Barsky, Emotional Needs and Dysfunctional Communication as Blocks to Mediation, *Mediation Quarterly, 2,* pp. 55-65, 1983.
10. S. M. Brown, Models of Mediation, in *Divorce and Family Mediation,* J. C. Hansen and S. C. Grebe (eds.), Aspen, Rockville, Maryland, pp. 48-64, 1985.
11. J. Folberg and A. Taylor, Mediation, in *Dispute Resolution,* S. B. Goldberg, E. D. Green, and F. E. A. Sander (eds.), Little Brown, Boston, 1985.
12. J. M. Haynes, Managing Conflict: The Role of the Mediator, *Conciliation Courts Review, 18:*2, pp. 9-13, 1980.
13. A. Milne, The Nature of Divorce Disputes, in *Divorce Mediation: Theory and Practice,* J. Folberg and A. Milne (eds.), Guilford, New York, pp. 272-344, 1988.
14. J. W. Keltner, *Mediation: Toward a Civilized System of Dispute Resolution,* ERIC Clearinghouse, Urbana, Illinois, 1987.
15. M. Diez, Negotiation Competence: A Conceptualization of the Rules of Negotiation Interaction, in *Contemporary Issues in Language and Discourse Processes,* D. Ellis and W. Donohue (eds.), Lawrence Erlbaum, Hillsdale, New Jersey, pp. 223-237, 1986.
16. B. L. Werner, Mediator and Client Communicative Behaviors in Child-Custody Mediation, *Women and Language, 17:*2, pp. 21-30, Fall 1994.
17. J. M. Haynes, A Conceptual Model for the Process of Family Mediations: Implications for Training, *American Journal of Family Therapy, 10:*4, pp. 5-16, 1982.
18. H. H. Irving and M. Benjamin, Outcome Effectiveness of Conciliation Counseling: An Empirical Study, *Conciliation Courts Review, 21:*2, pp. 61-70, 1983.
19. J. A. Lemmon, *Family Mediation Practice,* Free Press, New York, 1985.
20. A. Milne, Mediation or Therapy: Which Is It? in *Divorce and Family Mediation,* J. C. Hansen and S. C. Grebe (eds.), Aspen, Rockville, Maryland, pp. 1-15, 1985.
21. K. Slaikeu, R. Culler, J. Pearson, and N. Thoennes, Process and Outcome in Divorce Mediation, *Mediation Quarterly, 10,* pp. 55-74, 1985.
22. T. S. Jones, *Breaking Up Is Hard To Do: An Exploratory Investigation of Communication Behaviors and Phases in Child-Custody Divorce Mediation, (Vols. 1 & 2),* Dissertation Abstracts International, 1985.
23. R. E. Walton, *Interpersonal Peacemaking: Confrontation and Third-Party Consultation,* Addison-Wesley, Reading, Massachusetts, 1969.
24. D. Greatbatch and R. Dingwall, Argumentative Talk in Divorce Mediation Sessions, *Sociological Review, 62:*1, pp. 151-171, February, 1997.
25. W. A. Donohue, M. Allen, and N. Burrell, Mediator Communicative Competence, *Communication Monographs, 55,* pp. 104-119, March 1988.
26. S. J. Rogers and C. Francy, Communication in Mediation: Is More Necessarily Better? *Mediation Quarterly, 22,* Jossey-Bass, San Francisco, Winter 1988.
27. S. J. Rogers, The Dynamics of Conflict Behavior in the Mediated Dispute, *Mediation Quarterly, 18,* Jossey-Bass, San Francisco, 1987.
28. M. Deutsch, Conflicts: Productive and Destructive, *Journal of Social Issues, 25:*1, pp. 7-41, 1969.
29. E. A. Beck and C. E. Beck, Improving Communication in Divorce Mediation, *Journal of Divorce, 8:*3&4, pp. 167-176, 1985.

30. E. N. Brown, The Emotional Context of Divorce: Implications for Mediation, in *Alternative Means of Family Dispute Resolution,* H. Davidson, L. Ray, and R. Horowitz (eds.), American Bar Association, Washington, D.C., pp. 43-49, 1982.
31. L. K. Girdner, Mediation, in *Dispute Resolution,* S. B. Goldberg, E. D. Green, and F. E. A. Sander (eds.), Little Brown, Boston, 1985.
32. J. M. Haynes, The Process of Negotiations, *Mediation Quarterly, 1,* pp. 75-92, 1983.
33. C. W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict,* Jossey-Bass, San Francisco, 1986.
34. A. Taylor, A General Theory of Divorce Mediation, in *Divorce Mediation: Theory and Practice,* J. Folberg and A. Milne (eds.), Guilford, New York, pp. 61-82, 1988.
35. D. M. Kolb, To Be a Mediator: Expressive Tactics in Mediation, *Journal of Social Issues, 41:*2, pp. 11-26, 1985.
36. B. Mayer, The Dynamics of Power in Mediation and Negotiation, *Mediation Quarterly, 16,* pp. 75-86, 1987.
37. T. S. Jones, Phase Structures in Agreement and Non-Agreement Mediation, *Communication Research, 15,* pp. 470-495, 1988.
38. J. M. Bartunek, A. A. Benton, and C. B. Keys, Third Party Intervention and the Bargaining Behavior of Group Representatives, *Journal of Conflict Resolution, 19,* pp. 532-557, 1975.
39. F. Millar, and E. Rogers, Relational Dimensions of Interpersonal Dynamics, in *Interpersonal Processes: New Directions in Communication Research,* M. Roloff and G. Miller (eds.), Sage, Newbury Park, California, pp. 117-139, 1987.
40. B. M. Montgomery, *A Dialectical Approach to Reconceptualizing Familiar and Marital Relationship Maintenance,* paper presented to the Speech Communication Association Convention, Chicago, October 1992.
41. S. E. Taylor and J. Crocker, Schematic Bases of Social Information Processing, in *Social Cognition: The Ontario Symposium 1,* E. T. Higgens, C. P. Herman, and M. P. Zanna (eds.), Erlbaum, Hillsdale, New Jersey, pp. 89-133, 1981.
42. P. J. Carnevale and R. A. Henry, Determinants of Mediator Behavior: A Test of the Strategic Choice Model, *Journal of Applied Social Psychology, 19:*6, pp. 481-498, 1989.
43. P. J. Carnevale, Mediating Disputes and Decisions in Organizations, in *Research on Negotiation in Organizations, Vol. 1,* R. J. Lewicki, V. H. Sheppard, and M. H. Bazerman (eds.), JAI Press, Greenwich, Connecticut, pp. 271-283, 1986.
44. K. Kressel and D. G. Pruitt, Themes in the Mediation of Social Conflict, *Journal of Social Issues, 41,* pp. 179-198, 1985.
45. K. Kressel and D. G. Pruitt, A Research Perspective on the Mediation of Social Conflict, in *Mediation Research: The Process and Effectiveness of Third Party Intervention,* K. Kressel and D. G. Pruitt (eds.), Jossey-Bass, San Francisco, pp. 394-435, 1989.
46. J. K. Esser and R. G. Marriott, A Comparison of the Effectiveness of Substantive and Contextual Mediation Tactics, *Journal of Applied Social Psychology, 25:*15, pp. 1340-1360, 1995.
47. D. G. Pruitt and D. F. Johnson, Mediation as an Aid to Face-Saving in Negotiation, *Journal of Personality and Social Psychology, 14,* pp. 239-246, 1970.
48. P. J. Carnevale and R. Pegnetter, The Selection of Mediation Tactics in Public Sector Disputes: A Contingency Analysis, *Journal of Social Issues, 41:*2, pp. 65-81, 1985.

49. J. A. Wall and D. E. Rude, Judicial Mediation: Techniques, Strategies, and Situational Effects, *Journal of Social Issues, 41,* pp. 47-63, 1985.
50. B. M. Brett and S. B. Goldberg, Mediator-Advisors: A New Third Party Role, in *Negotiating in Organizations,* M. H. Bazerman and R. J. Lewicki (eds.), Sage, Beverly Hills, California, pp. 165-176, 1983.
51. D. Shapiro, R. Drieghe, and J. Brett, Mediator Behavior and the Outcome of Mediation, *Journal of Social Issues, 41:*2, pp. 101-114, 1985.
52. L. Smart, Mediator Strategies for Dealing with Dirty Tricks, *Mediation Quarterly, 16,* Jossey-Bass, San Francisco, Summer 1987.
53. K. Hanisch and J. Carnevale, *Gender in Negotiation and Mediation and the Perception of Mediator Bias,* paper presented at the Academy of Management Convention, Anaheim, California, 1988.
54. S. Bernard, S. Folger, H. Weingarten, and Z. Zumeta, The Neutral Mediator: Value Dilemmas in Divorce Mediation, *Mediation Quarterly, 4,* pp. 61-67, 1984.
55. N. A. Burrell, W. A. Donohue, and M. Allen, Gender-Based Perceptual Biases in Mediation, *Communication Research, 15:*4, pp. 447-469, 1988.
56. V. D. Wall, Jr. and M. L. Dewhurst, Mediator Gender: Communication Differences in Resolved and Unresolved Mediations, *Mediation Quarterly, 9:*1, pp. 63-85, Fall 1991.
57. J. C. Heritage and D. R. Watson, Formulations as Conversational Objectives, in *Everyday Language: Studies in Ethnomethodology,* G. Psathas (ed.), Irvington, New York, 1979.
58. B. H. Sheppard, Third Party Conflict Intervention: A Procedural Framework, in *Research in Organizational Behavior,* B. W. Shaw and L. L. Cummings (eds.), JAI Press, Greenwich, Connecticut, 1984.
59. J. P. Maxwell, Mediation in the Schools: Self-Regulation, Self-Esteem, and Self-Discipline, *Mediation Quarterly, 7:*2, pp. 149-156, 1992.
60. W. J. Bigoness and P. B. DuBose, Effects of Gender on Arbitrators' Decisions. *Academy of Management Journal, 28:*2, pp. 485-491, 1985.
61. L. L. Hayes, Mediation Becomes a New Niche for Counselors, *Counseling Today,* p. 8, October 1997.
62. G. Karriss, *Negotiate to Close,* Simon & Schuster, New York, 1985.
63. A. Mehrabian, Communication Without Words, *Psychology Today,* p. 53, September 1968.
64. C. Argyris, *Integrating the Individual and the Organization,* Wiley, New York, 1964.

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