BASIC MEDIATION TRAINING

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

Dispute Resolution Center
Austin, Texas

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2015-2020
BASIC MEDIATION TRAINING

Walter A. Wright, J.D., LL.M.
Levey & Wright, P.C.
Austin, Texas
I. OVERVIEW, INTRODUCTIONS, EXPECTATIONS

Plan for Day One

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

TRAINING PARTICIPANTS

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

Introductions of Course Participants
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
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)
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.
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.
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.
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.”
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
In 1888 and 1898, as a response to violence that occurred during laborers’ strikes against several railroads, Congress authorized the arbitration of labor disputes.
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.
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.

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
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.
With increases in interstate and international commerce and improvements in transportation and communication systems, the number and complexity of litigated cases grew.
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.
The number of divorces increased dramatically, and courts became increasingly occupied with cases involving divorce, child custody and support, and property division.
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.
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.”

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

https://law.utexas.edu/cppdr/resources/adr_drcs.php
Currently, the United States Government and all States have accepted some form of Multi-Door Courthouse system as proposed by Professor Sander in 1976.
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
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
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
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

Implementing the 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)
(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)
(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)
Mediation

(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)
III. TEXAS ADR PROCEDURES ACT

Mini-Trial

(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)
(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)
(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)
(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)
(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.
III. TEXAS ADR PROCEDURES ACT

Appointment of Impartial Third Party

(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)
(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.
(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

Compensation of Impartial Third Party

(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)
(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)
(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)
(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)
(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)
REPORTING ABUSE AND NEGLECT IN TEXAS

Texas Abuse/Neglect Hotline:
1-800-252-5400

or website:
https://www.txabusehotline.org

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.
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
IV. CONFLICT RESOLUTION STYLES

Kraybill Conflict Style Inventory
V. PRINCIPLED NEGOTIATION: GETTING TO YES

Negotiation Role Play
No. 1

THE UGLI ORANGES
V. PRINCIPLED NEGOTIATION: GETTING TO YES
V. PRINCIPLED NEGOTIATION: GETTING TO YES

About the book and authors

Roger Fisher  William Ury  Bruce Patton
V. PRINCIPLED NEGOTIATION: GETTING TO YES

Types of Negotiators

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.
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.
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.”
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.
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

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.

Important Principles
SEPARATE THE PEOPLE FROM THE PROBLEM

V. PRINCIPLED NEGOTIATION: GETTING TO YES

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.

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.

Important Principles
SEPARATE THE PEOPLE FROM THE PROBLEM

Suggestions for facing the problem:

- build a working relationship;
- face the problem, not the people.
FOCUS ON INTERESTS, NOT POSITIONS

Maslow’s Hierarchy of Needs

V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles

Image: FireflySixtySeven@Pixabay.com
FOCUS ON INTERESTS, NOT POSITIONS

To reach an acceptable resolution, attempt to reconcile the interests, not the positions. Often, behind opposing positions are shared and compatible interests, as well as others that are opposed or in conflict.
FOCUS ON INTERESTS, NOT POSITIONS

- To identify interests, ask “Why?” or “Why not?”
- Listen well to the answers to the questions.
- Recognize that each party has multiple interests.
- Remember 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.
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

GENERATE OPTIONS FOR MUTUAL GAIN

Prescription for approaching options:

- Separate.
- Invent.
- Decide.

Image: Geralt @ Pixabay.com

Important Principles
V. PRINCIPLED NEGOTIATION: GETTING TO YES

**Important Principles**

- **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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**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.
EVALUATE OPTIONS WITH OBJECTIVE CRITERIA

During the evaluation of options, insist on using objective criteria for evaluating them.
V. PRINCIPLED NEGOTIATION: GETTING TO YES

EVALUATE OPTIONS WITH OBJECTIVE CRITERIA

Important Principles

Examples of objective criteria:

- Market value;
- Scientific findings;
- Professional criteria;
- Precedents;
- Efficiency;
- Moral criteria;
- Tradition.
V. PRINCIPLED NEGOTIATION: GETTING TO YES

Important Principles

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

BATNA

Best Alternative to a Negotiated Agreement

Image: Clker-Free-Vector-Images @ Pixabay.com
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
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?
VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

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

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

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
VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

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

Important Principles
VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

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"")

Important Principles

Image: Deedsters @ Pixabay.com

Image: Alexander Lesnisky/Alles @ Pixabay.com
DON’T PUSH: BUILD THEM A GOLDEN BRIDGE

VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

Important Principles

- 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
VI. PRINCIPLED NEGOTIATION: GETTING PAST NO

Important Principles

- 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.
DISPUTE BETWEEN TWO FRIENDS

PRINCIPLED NEGOTIATION

Negotiation Role Play No. 2
BASIC MEDIATION TRAINING

Dispute Resolution Center
Austin, Texas

DAY ONE CONCLUDED!
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

Plan for Day Two
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?
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
II. MEDIATION GOALS AND MEDIATION MODELS

DEMONSTRATION OF MEDIATION

Demonstration
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)
IV. MEDIATION INTAKE AND PREPARATION FOR MEDIATION

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

Intake
IV. MEDIATION INTAKE AND PREPARATION FOR MEDIATION

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

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

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”)

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
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)
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
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
V. MEDIATOR’S INTRODUCTION

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

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
EXERCISE:
PREPARE AND PRACTICE YOUR MEDIATOR’S INTRODUCTION

Establishing the Foundation for the Process
VI. PARTIES' OPENING STATEMENTS/UNINTERRUPTED TIME

The parties explain the dispute from their perspectives

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

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

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

The parties achieve a better understanding of each other

VII. PARTIES’ TWO-WAY EXCHANGE
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.
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.
ACTIVE LISTENING

Common reasons for not listening well:

- Internal Distractions (e.g., work issues, family issues, deadlines).
- External Distractions (e.g., noise, telephones, interruptions).

Important Skills
VIII. ACTIVE LISTENING, INFORMATION GATHERING AND TRUST BUILDING

Important Skills

**Common reasons for not listening well:**

- Fatigue.

- 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).
ACTIVE LISTENING, INFORMATION GATHERING AND TRUST BUILDING

Important Skills

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

Techniques for listening actively:

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

Techniques for listening actively:

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

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).
ACTIVE LISTENING

Techniques for listening actively:

Try to ask the parties appropriate questions.

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

Important Skills
ACTIVE LISTENING

Techniques for listening actively:

Keep an open and receptive mind.

Avoid judgement.
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.
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

Image: Gerd Altmann/Geralt @ Pixabay.com
VIII. ACTIVE LISTENING, INFORMATION GATHERING AND TRUST BUILDING

EXERCISE: ACTIVE LISTENING AND INFORMATION GATHERING

Important Skills
IX. QUESTIONS AND USING THEM WELL

Important Skills

**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: Guilaine @ Pixabay

Image: paulbr75 @ Pixabay.com
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.
 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”).

IX. QUESTIONS AND USING THEM WELL

Important Skills

Image: Peggy_Marco @ Pixabay.com

Image: Guilaine @ Pixabay
IX. QUESTIONS AND USING THEM WELL

TYPES OF QUESTIONS

**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.

Not recommended in mediation.
IX. QUESTIONS AND USING THEM WELL

Important Skills

CHARACTERISTICS OF GOOD QUESTIONS

- 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
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
Dispute Resolution Center
Austin, Texas

DAY TWO CONCLUDED!
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
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
Mediation Role Play
No. 1

DISPUTE BETWEEN NEIGHBORS

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

Image: white-lady0 @ Pixabay.com
III. CLARIFYING INTERESTS AND ISSUES WHILE MAINTAINING TRUST

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

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.
TIPS FOR CLARIFICATION OF INTERESTS AND ISSUES

- 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.

III. CLARIFYING INTERESTS AND ISSUES WHILE MAINTAINING TRUST

Please correct me if I’m wrong, but . . .
TIPS FOR CLARIFICATION OF INTERESTS AND ISSUES

- 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.

III. CLARIFYING INTERESTS AND ISSUES WHILE MAINTAINING TRUST

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

Important Principles
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
IV. REFRAMING ISSUES AND INTERESTS WITH NEUTRAL LANGUAGE

EXERCISE: REFRAMING ISSUES AND INTERESTS WITH NEUTRAL LANGUAGE

Soften, Neutralize and Globalize
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).
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.
DISPUTE BETWEEN MERCHANT AND CUSTOMER (BOTH BUSINESS OWNERS)
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.
VI. GENERATING AND EVALUATING OPTIONS

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

- Market value;
- Scientific findings;
- Professional criteria;
- Precedents;
- Efficiency;
- Moral criteria;
- Tradition.
VI. GENERATING AND EVALUATING OPTIONS

EXERCISE: GENERATING OPTIONS/BRAINSTORMING

Brainstorming

Image: Gerd Altmann/Geralt @ Pixabay.com
VII. CAUCUSING

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
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.
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.
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
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)
WHAT TO DO IN CAUCUS?

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
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.
VII. CAUCUSING

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

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.
DISPUTE BETWEEN POLICE OFFICER AND CITIZEN

Mediation Role Play No. 3
BASIC MEDIATION TRAINING

Dispute Resolution Center
Austin, Texas

DAY THREE CONCLUDED!
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
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)

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

Image: OpenIcons © Pixabay.com
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

Image: prettysleepy @ Pixabay.com
II. IMPASSE AND HOW TO GET THROUGH IT

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 . . . .”

Dealing with Emotions/Encouraging a Serious look at BATNA and WATNA
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.

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

Image: Prawny @ Pixabay.com
II. IMPASSE AND HOW TO GET THROUGH IT

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

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.
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)
  - As the parties how the alternatives look compared to what the other side is offering

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

- 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?

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 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)

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

- 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?

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs
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
II. IMPASSE AND HOW TO GET THROUGH IT

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

Dealing with Emotions/Encouraging a Serious look at BATNAs and WATNAs
II. IMPASSE AND HOW TO GET THROUGH IT

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?
DISPUTE BETWEEN BUSINESS OWNER AND ENVIRONMENTALIST

Mediation Role Play No. 4
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)

Ethical Issues

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

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.

Documenting the Deal
III. WRITING THE MEDIATED SETTLEMENT AGREEMENT

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.

Documenting the Deal
IV. TERMINATING THE MEDIATION

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
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
DISPUTE BETWEEN EMPLOYER AND FORMER EMPLOYEE
(SEXUAL HARASSMENT CHARGE)

Mediation Role Play
No. 5
DISPUTE BETWEEN SUPERVISOR AND SUPERVISEE (WORKPLACE BULLYING)

Mediation Role Play
No. 6
BASIC MEDIATION TRAINING

Dispute Resolution Center
Austin, Texas

DAY FOUR CONCLUDED!
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
DISPUTE BETWEEN LANDLORD AND TENANT

Mediation Role Play No. 7
II. WORKING WITH ATTORNEYS IN MEDIATION

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

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

Opportunities for Collaboration

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II. WORKING WITH ATTORNEYS IN MEDIATION

Opportunities for Collaboration

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.
DISPUTE BETWEEN BUSINESS OWNER AND DISABLED CUSTOMER

Mediation Role Play No. 8
III. MISCELLANEOUS
TMCA STANDARDS

Ethical Issues

TMCA Standard 12 (Mediator’s Relationship with the Judiciary)
DISPUTE BETWEEN MERCHANT AND CUSTOMER

Mediation Role Play
No. 9
DISPUTE BETWEEN SELLERS AND BUYERS OF HOME

Mediation Role Play
No. 10
Statute?
Conflict Styles?
Principled Negotiation?
Mediation Process?
Specific Skills?
Ethics?
Anything Else?

What will you remember?
CONGRATULATIONS!

VII. CERTIFICATES

YIPEE!!

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BASIC MEDIATION TRAINING

Dispute Resolution Center
Austin, Texas

DAY FOUR CONCLUDED!
THANK YOU!

HAPPY MEDIATING!