

Welcome to the Austin DRC 40-hour Mediation Training!



Diane M Harvey, LCSW, TMCA CAM
With
Clay Avery, JD, BBA
Michelle Edwards, PhD

Austin Dispute Resolution Center 40-hour Mediation Training – Day 1

- ❖ Welcome and Introductions
- ❖ Conflict
- ❖ ADR History
- ❖ Mediation Overview
- ❖ Role of the Mediator
- ❖ Ethics

Elements of Conflict

- ❖ Resources
- ❖ Processes
- ❖ Psychological Needs
- ❖ Values

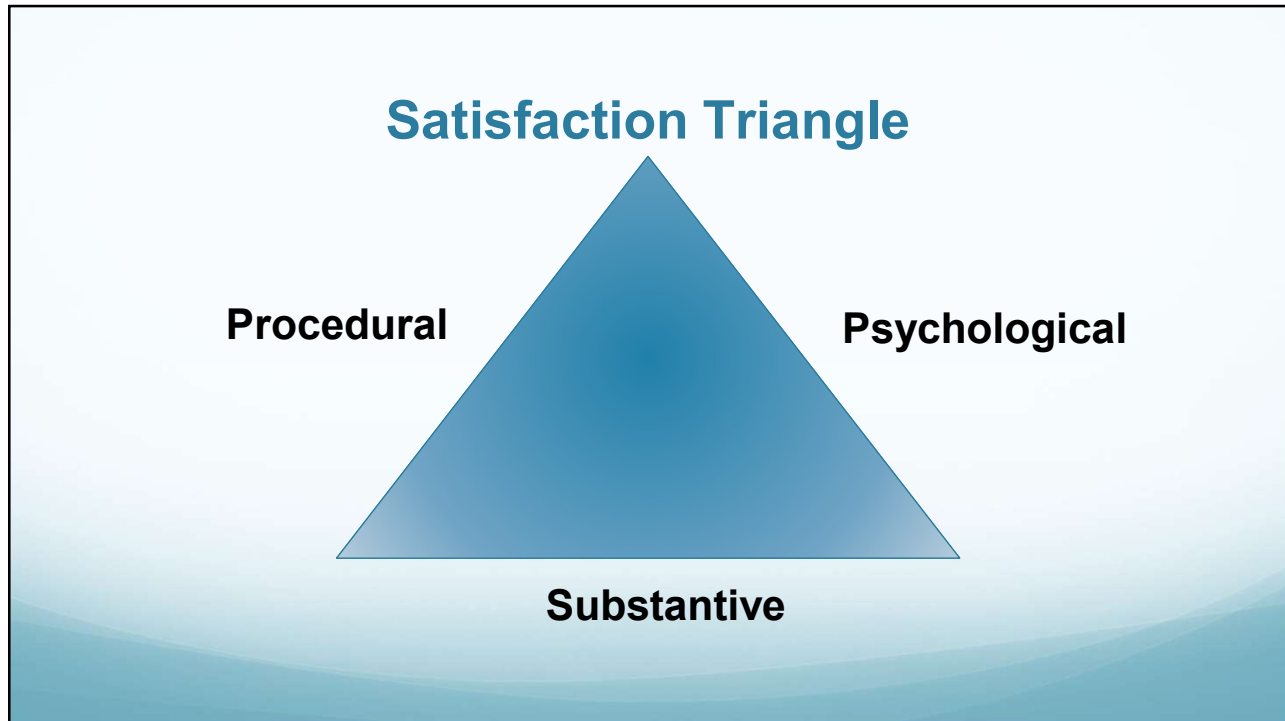
Methods of Conflict Resolution

Power	Rights	Interests
Coerced Decision Making	Third Party Considers the Viewpoint of Each Side and Then Decides	Parties Control the Decision
Strikes Embargos Non-Violent Direct Action Voting	Litigation Arbitration Administrative Hearings	Collaborative Negotiation Mediation Group Consensus-Building

Interest-Based Negotiation

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





Personal Style Preferences

1.	5	2	3	= 10
2.	3	3	4	= 10
3.	2	2	6	= 10
4.				= 10
5.				= 10
6.				= 10
7.				= 10
8.				= 10
9.				= 10
	Column 1 total	Column 2 total	Column 3 total	Total = 90

Personal Style Preferences in Conflict

10.	5	2	3	= 10
11.	3	3	4	= 10
12.	2	2	6	= 10
13.				= 10
14.				= 10
15.				= 10
16.				= 10
17.				= 10
18.				= 10
19.				= 10
20.				= 10
	Column 1 total	Column 2 total	Column 3 total	Total = 110

Personal Styles: Column 1

Blue (Feelers)

- Relationship-oriented
- Tool – the relationship
- Strengths – trust, intimacy, loyalty - great advocates
- Weaknesses – gullible, may excessively personalize
- Reacts most negatively to dehumanization or personal devaluation

Personal Styles: Column 2

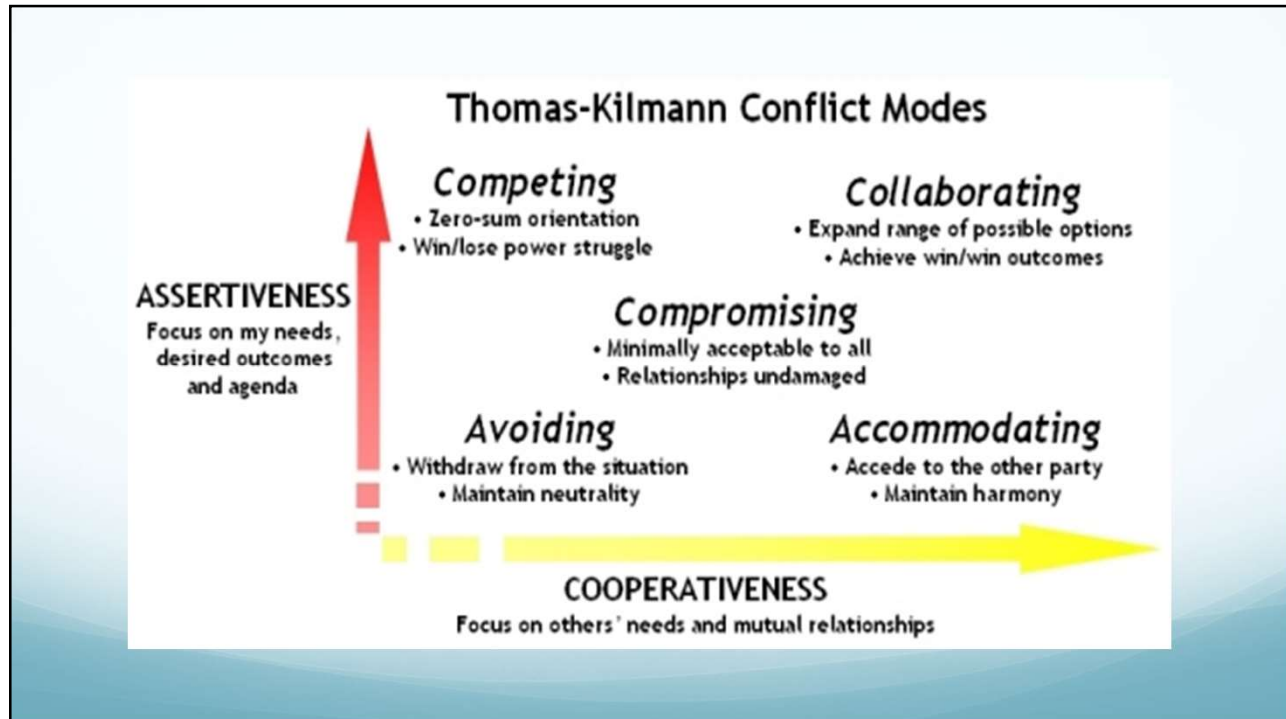
Red (Doers)

- Action-oriented
- Tool – leadership
- Strengths – leadership, getting things done, inspiring confidence – great leaders
- Weaknesses – impatient, missing details, impulsive
- Reacts most negatively to wasted time and energy

Personal Styles: Column 3

Green (Thinkers)

- Process-oriented
- Tool – information
- Strengths – fact-based, unbiased, accurate – great experts
- Weaknesses – Lose big picture, can get lost in details
- Reacts most negatively to ambiguity, information gaps

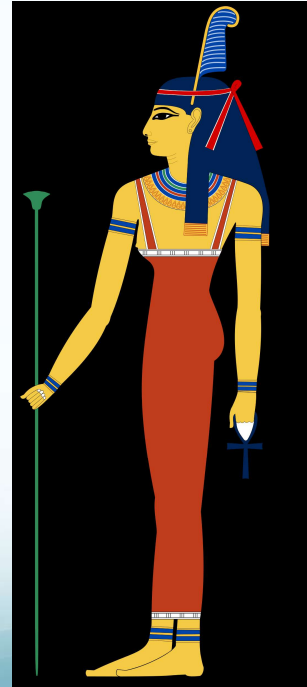


What Are the Conflict Styles?

- Collaborating – win/win
- Competing – authoritative
- Avoiding – non-confrontational
- Accommodating – gives in
- Compromising – middle-ground

“The pharaoh was the son of Re, the Sun God, and the earthly incarnation of the god Horus. He mediated between the gods and all people living on Earth. It was the divine responsibility of the pharaoh to uphold the concept of maat, or universal order, and live by its principles.

*from the Ramses II exhibit
Ramses II became pharaoh ~1279 BC*



“To give a satisfactory decision as to the truth it is necessary to be rather an arbitrator than a party to the dispute.”



- Aristotle, 300 BC

Ancient Uses of Dispute Resolution

Ancient References

- Ancient Greece – intermediaries used, called proxenetas
- Crete – 12th century BC on - “sasmos” used to negotiate vendettas
- Roman Civilization – recognized mediation
- India – 500 BC, used arbitration (panchayat)
- Western Zhou Dynasty – 100 BC, established post of mediator

"Blue Jay noticed that bear had not said a thing. Finally, Blue Jay asked bear why was she so silent and bear replied, 'I'm listening and learning. I don't need to talk; I already know what I know.'"



-Native American Wisdom

Jamie Sams, *Earth Medicine*, 28 (Harper San Francisco) (1994)

The History of American Dispute Resolution

Native American

- Conciliatory peacemaking
- Sacred justice

Colonial Groups

- Community needed for protection, survival
- Group needs more important than individual
- Negative impression of legal profession
- Mediation and other informal means to settle disputes

The History of American Dispute Resolution

By Late 1600s

- Transition from Collectivist to Individualist society
- Commerce and industry led to need for commercial laws
- Competitiveness > Cooperation
- Overt conflict increased, litigation took greater role
- New immigrant groups still used mediation rather than “foreign” legal system.



“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.”

*- Abraham Lincoln, 1850,
recognizing ADR*

The History of American Dispute Resolution

Labor Relations Movement

- Continuing growth of industry
- Need for conflict resolution to prevent strikes
- Beginning late 1800s, acts passed to provide for mediation and arbitration
- 1913 – Department of Labor created to mediate disputes quickly
- 1926 – American Arbitration Association (AAA) established

“The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.”

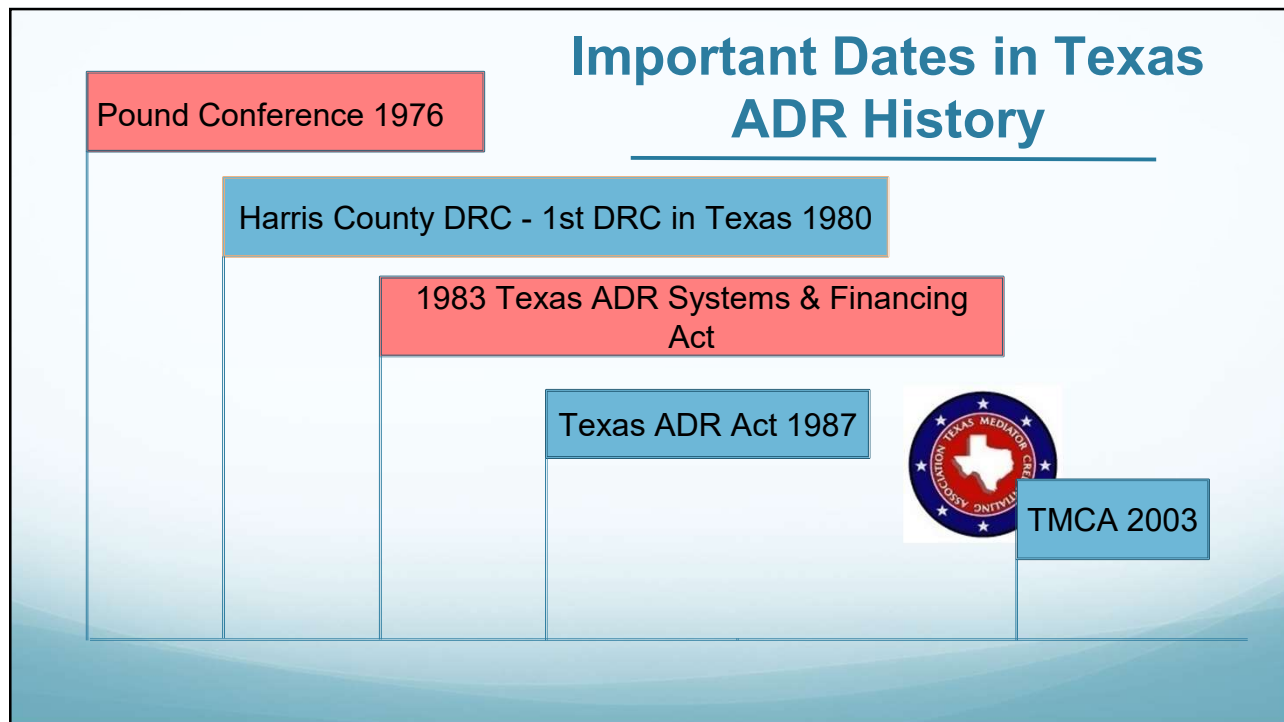


- Sandra Day O'Connor

The History of American Dispute Resolution

“Modern” Movement

- 1964 – Civil Rights Act
- 1960s – AAA set up pilot mediation programs
- 1970s – AAA established DRCs in PA and NY
- 1972 – Society of Professionals in Dispute Resolution (SPIDR) created (now ACR)
- 1976 – Pound Conference
- 1976 – Neighborhood Justice Centers (NJC) and Dispute Resolution Centers (DRC) piloted around the country



Texas ADR Statute: What Do You Know?

Texas Civil Practice & Remedies Code, Sec. 154.002

“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.”

Added by Acts 1987, 70th Leg., Ch. 1121, Sec. 1, Eff. June 20th, 1987

Mediation

- A Facilitated Process
- Voluntary
- Self-determined
- Informed
- Informal
- Confidential

Confidentiality

Required by Statute:

- ❖ Civil Practice and Remedies Code, Ch. 154.053

Exceptions to Confidentiality:

- ❖ Texas Family Code, Subchapter B, Section 261.101, mandated reporting for evidence of abuse or neglect to a child, elder (65 or older), or disabled person.

Mediation Styles



<u>Transformative</u>	<u>***Facilitative***</u>	<u>Evaluative</u>
<p>Priorities are empowerment, recognition, and transformation.</p> <p>Mediator guides process determined by parties. Joint sessions.</p> <p>Mediators specifically trained in transformative model.</p>	<p>Priorities are self-determination, improved communication, and resolution.</p> <p>Mediator guides process. Joint sessions with caucus as needed or caucus with some joint sessions.</p> <p>Trained mediators from all backgrounds.</p>	<p>Priorities are swift settlement, legal fairness.</p> <p>Mediator controls the process. Heavily weighted towards use of caucus.</p> <p>More common with attorneys involved and using attorney-mediators.</p>

Attorneys in Mediation

Roles

- Emotional support
- Legal guidance
- Child advocate
- Power balance

Modes of Representation

- Attend as primary negotiator
- Attend as support
- Be available during mediation
- Review draft agreement prior to party's signature

“Generally, parties benefit from the joint session because it informs. It gives definition to their concerns. It creates a feeling of direct participation and ownership of the process.”

-Eric Galton and Tracy Allen

Don't Torch the Joint Session, Dispute Resolution Magazine, Fall 2014

Personal Bias Exercise



1



2



3



4



5



6



Mediator

- ✓ Process Facilitator
- ✓ Trainer/Educator
- ✓ Impartial
- ✓ Neutral
- ✓ Competent
- ✓ Committed to Integrity of the Process

Conflict Role Comparison

	Mediator	Arbitrator	Judge
Process facilitator	✓	✓	✓
Neutral and Impartial	✓	✓	✓
No decision-making authority	✓		
Identifies interests	✓		
Promotes empowerment in agreement	✓		

Mediators

Do

- Listen
- Ask Questions
- Summarize
- Reframe
- Use Silence
- Manage Flow
- Help Parties Save Face

Don't

- Argue
- Judge
- Make Decisions
- Assess Blame
- Coerce
- React Emotionally
- Make Assumptions

Co-Mediation

Pros

- Expanded insight
- Enhances sense of fairness/neutrality
- Support
- Skill and confidence building
- Modeling collaboration
- Shared responsibility

Cons

- Requires patience
- Time needed prior to mediation
- Potential increase in cost
- Incompatible styles/orientations
- Unfamiliarity among disputants
- Might misread other mediator's cues

TMCA Standards and Code of Ethics

1. Mediation Defined

- Private process
- Impartial mediator encourages and facilitates communication.
- No decision making

2. Mediator Conduct

- Protect the integrity and confidentiality of entire process from first contact onward.

TMCA Standards and Code of Ethics

3. Mediation Costs

- Explain all fees.
- No contingent fee
- In appropriate cases, consider reduced fee or pro bono.

4. Disclosure of Possible Conflicts

- Full disclosure of any conflict of interest
- All parties must agree on mediator.

TMCA Standards and Code of Ethics

5. Mediator Qualifications

- Inform the participants of the mediator's qualifications and experience.

6. The Mediation Process

- Explain the rules and procedures pertaining to the mediation process.

TMCA Standards and Code of Ethics

7. Convening the Mediation

- Convene when all parties are present.
- Ensure that all have negotiation authority.
- Provide enough time for productive mediation.

8. Confidentiality

- Privileged and confidential
- Exceptions: mandatory reporting or party request

TMCA Standards and Code of Ethics

9. Impartiality

- Impartial toward all parties

10. Disclosure and Exchange of Information

- Encourage the disclosure of information.
- Assist in considering the benefits, risks, and the alternatives available to them.

11. Professional Advice

- No legal or other professional advice to the parties

TMCA Standards and Code of Ethics

12. No Judicial Action Taken

- Do not subsequently serve in any judicial or quasi-judicial capacity in matters that are the subject of the mediation.

13. Termination of Mediation Session

- Stop mediation if case is inappropriate for mediation.
- Stop mediation if parties are unable to participate fully.

TMCA Standards and Code of Ethics

14. Agreements in Writing

- Encourage the parties to reduce all settlement agreements to writing.

15. Mediator's Relationship with the Judiciary

- Avoid the appearance of impropriety in the mediator's relationship with a member of the judiciary or the court staff with regard to appointments or referrals to mediation.

Austin Dispute Resolution Center

40-hour Mediation Training – Day 2

- ❖ Pre-mediation Activities
- ❖ Stages of Mediation Process
- ❖ Introductory Remarks
- ❖ Initial Statements
- ❖ Mediator Skills
 - Listening
 - Asking Questions
 - Neutral Language
 - Acknowledging Feelings
 - Identifying Interests

Pre-Mediation

- DRC vs. Private Practice Mediations
- Initial Contact
- Intake/Consultation
 - Information for the Mediator
 - Information for the Participants
- Evaluating the Case for Mediation
- Preparing for Mediation

Mediation Process

Introductory Remarks
Initial Statements
Information Gathering
Problem Identification
Option Generation
Bargaining and Negotiating
Agreement Writing
Closing

Introductory Remarks

Goals

- Establish a climate of safety and fairness.
- Establish expectations for the process.
- Convey mediator's competence and control of the process.
- Establish ground rules.

Initial Statements

Goals

- Set the stage and tone for the mediation.
- Allow early participation by the disputants.
- Give the disputants uninterrupted time.

Information Gathering

Goals

- Give disputants a thorough opportunity to exchange information.
- Give the mediator opportunities to help identify interests.

Problem Identification

Goals

- Clarify interests on both sides.
- Encourage joint problem solving.
- Agree on a goal statement(s) that will be the focus of the remainder of the mediation.
- Orient parties to the future.

Option Generation

Goals

- Develop as many options as possible.
- Promote creative thinking and energy.
- Provide a “criticism-free” zone for thinking outside the box.
- Increase buy-in and commitment to solutions.

Bargaining and Negotiation

Goals

- Allow parties to evaluate and choose their best options.
- Help parties develop and make tradeoffs.
- Help parties negotiate on the basis of interests vs. positions.

Agreement Writing

Goals

- Memorialize the final agreement through documentation.
- Clarify detailed steps parties will take to resolve their dispute.
- Help parties discuss specifics of their agreement for workability and effectiveness.

Closing

Goals

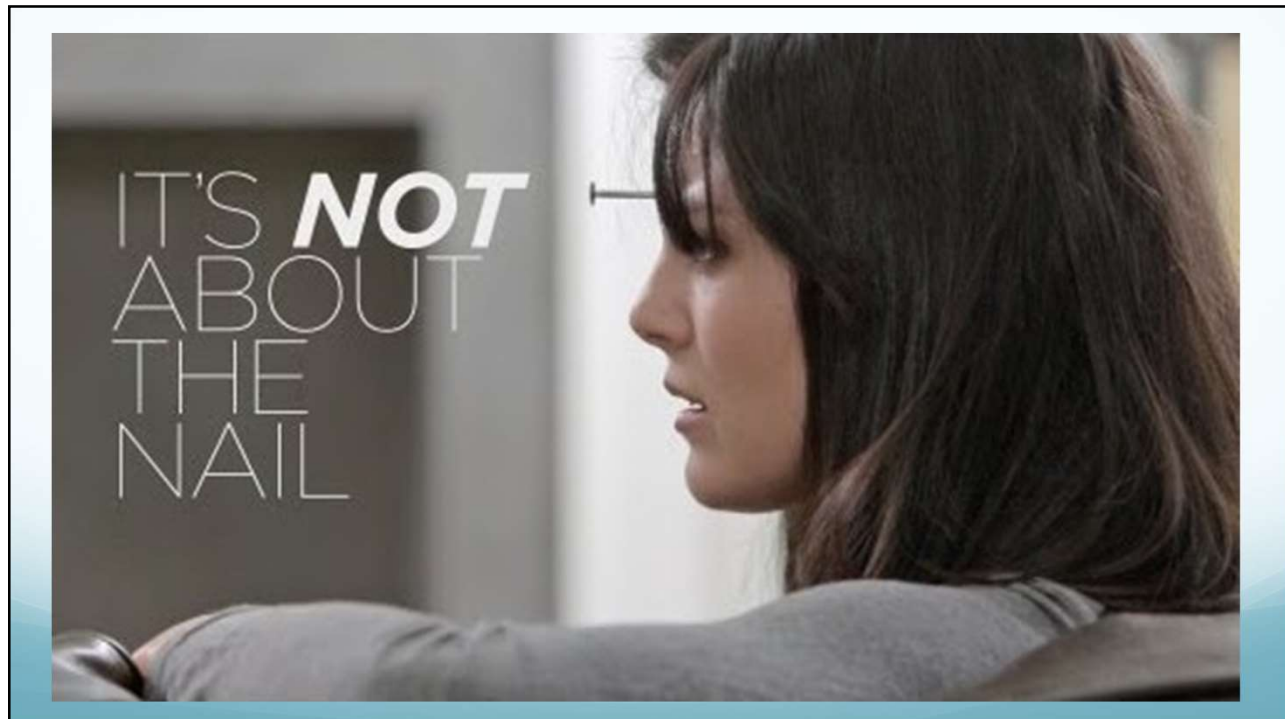
- Formalize the end of the mediation.
- Summarize results.
- Acknowledge parties.
- Obtain feedback.

Mediator Skills

- Listening
- Asking Questions
- Neutral Language
- Summarizing
- Interests vs. Positions

Listening

- Nonverbal communication
- Summarize
- Tracking
- Not evaluating
- Interests vs. Positions



Clarifying and Questioning

Characteristics of Powerful Questions

(open-ended questions vs. closed or leading)

- Nonjudgmental
- Asked from standpoint of curiosity
- Elicit insight
- Empower
- Invite creativity
- Focus on problem solving
- Elicit information the parties need from each other
- Create safe space for conversation and sharing

Neutral Language

Why use it?

- To diffuse the impact of inflammatory language
- To help break down walls in communication
- To ensure that mediator is seen as impartial
- To help disputants hear complaints in different ways

Neutral Language

Strategies

- Use behavioral rather than evaluative terms.
- Frame one party's descriptions or claims in terms of their perceptions.
- Frame the concern in terms of the speaker's needs rather than in terms of the other's behavior.
- Avoid feeling words that may sound derogatory or judgmental.

Summarizing

- Remove judgmental and/or toxic language - neutralize words.
- Restate a negative in a neutral or positive way.
- Restate a thought or phrase in a way that promotes listening without triggering heavy emotions.
- Focus away from positions to underlying interests.
- BIFF – Brief Informative Firm Friendly (Bill Eddy)



Positions and Interests

Position – What do you want?

- Stated solution that parties present first (*He needs to pay me \$1000*)
- The stance one side has decided to take in a conflict
- May not consider the other party's needs

Interests – Why do you want it?

- The reasons behind the positions (*respect, fairness, financial reasons...*)
- Represent underlying needs
- Often related to deeply felt issues and have a strong emotional overlay
- What's important as opposed to what is wanted

Acknowledging Emotions

Why?

- To address psychological interests.
- To normalize the expression of emotions.
- To legitimize the importance of acknowledging emotions in the resolution of disputes.

Acknowledging Emotions

Strategies

- Listen for strong feeling words.
- Accept emotions without agreeing or sharing.
- Ask questions for clarification.
- Watch for non-verbal cues.
- Watch for escalation of emotions and diffuse.
- Enforce ground rules.
- If necessary, take a break or use individual sessions (caucus).

Introductory Remarks

Goals

- Establish a climate of safety and fairness.
- Establish expectations for the process.
- Convey mediator's competence and control of the process.
- Establish ground rules.

Introductory Remarks

Content

- Clarify names.
- Define mediation and the role of the mediator.
- Explain confidentiality and exceptions.
- Obtain agreement on ground rules.
- Answer questions.

Introductory Remarks

Delivery

- Use a conversational tone.
- Make eye contact with both parties.
- Avoid moralizing.
- Watch non-verbal communication.
- Keep it short and concise.

Initial Statements

Goals

- Set the stage for the mediation.
- Allow early participation by the disputants.
- Give the disputants uninterrupted time.

Initial Statements

Content

- Give an unbiased reason for who begins.
- Use similar, neutral language when asking for each party's statement.
- Enforce the ground rules.

Initial Statements

Delivery

- Do not show any reaction – use your best “Poker Face.”
- Do not ask questions or summarize after the first initial statement.



Austin Dispute Resolution Center

40-hour Mediation Training – Day 3

- ❖ Information Gathering
- ❖ Individual Sessions (Caucus)
- ❖ Problem Identification
- ❖ Goal Statements Based on Interests

Information Gathering

Goals

- Give disputants thorough opportunity to exchange information.
- Give the mediator opportunities to help identify interests.

Information Gathering

Content

- Listen
- Ask questions
- Acknowledge emotions
- Identify interests
- Summarize

Information Gathering

Delivery

- Do not over-control the process.
- Encourage disputants to speak to each other rather than the mediator.
- Periods of silence can be productive.
- Enforce ground rules.
- Continue until all interests are identified.

Individual Sessions (Caucus)

Goals

- De-escalate strong emotions.
- Provide opportunities to share outside of joint session not over-control the process.
- Reality test.
- Build trust.
- Save face.

Individual Sessions (Caucus)

Content

- Reiterate confidentiality of individual sessions.
- Ask questions, summarize, and clarify.
- Reality check and help parties explore their BATNA and WATNA.
- Help parties practice what they want to say in joint session.

Individual Sessions (Caucus)

Delivery

- Try to give similar amounts of time to each party
- Focus on the future.
- Clarify what can and cannot be shared with other party.
- If co-mediating, both mediators should remain together when in any meeting.

Problem Identification

Goals

- Clarify interests on both sides.
- Encourage joint problem solving.
- Agree on a goal statement(s) that will be the focus of the remainder of the mediation.
- Orient parties to the future.

Problem Identification

Content

- Common interests goal statement
- Different interests goal statement
- Common and different interests goal statement
- Do not include positions.

Problem Identification

Delivery

- Craft balanced goal statement(s).
- Check with parties for accuracy.
- Write the goal statement(s) on a chart.