A MANUAL

FOR

COMMUNITY DISPUTE SETTLEMENT

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INTRODUCTION

"The notion that most people want blackrobed judges, well-dressed lawyers and fine paneled courtrooms as the setting to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly as possible. The harsh truth is that, if we do not devise substitutes for the courtroom process, and do not do it rather quickly, we may well be on our way to a society over-run with lawyers."

Chief Justice Warren Burger

Conflict among individuals, communities and nations appears throughout man's recorded history. Since conflict can be constructive, what distinguishes a society is not the absence of conflict; rather, it is the methods used to resolve disputes. When these methods don't exist, or when they are so inaccessible that the average individual cannot--or will not-- use them, every member of that society ultimately suffers.

In the past, informal dispute settlement has taken place through churches, extended families, tribal elders and other types of community groups. In the United States today, many of these systems continue to function effectively in small, rural communities.

However, in the urban areas of the country, the influence of these groups has weakened or disappeared. As a result, more and more people are turning to the courts in an effort to get their problems resolved. They are often unhappy with the results.

Informal dispute settlement is obviously not a new idea. In communities across the country, mediation and arbitration are being offered in an attempt to reintroduce these time-tested, effective alternatives into urban society.

Today, many mediation and arbitration programs are operating around the country, dealing with a wide variety of disputes, including landlord/tenant problems, consumer/business disputes, family conflicts and neighborhood grievances.

Although these programs differ in many respects, they all rely upon the skill and energy of individual volunteers -- members of the community who serve as impartial third parties in community disputes. It is not a task to be undertaken lightly.

However, the role of a neutral mediator or arbitrator can be a highly rewarding form of community service. Few volunteer positions demand the degree of training, skill and professionalism required of the neutral, yet in the words of the American Arbitration Association:

> ". . .it may truly be said that private activities offer few outlets for the exercise of talent and good judgment for the public good to equal those available to the arbitrator (or mediator)."

It is for the volunteer neutral that this manual is written.

It is to the thousands of volunteer mediators and arbitrators across the country who serve as "peacemakers" that this manual is dedicated.

CHAPTER I

DEFINITIONS

As with any specialized functions, dispute settlement has developed its own language (jargon). To simplify this manual, we've attempted to keep the technical terms at a minimum; however, in some cases that just isn't possible.

The following are some of the terms you'll encounter in this manual and your training. Rather than list these terms alphabetically, we've grouped them under what we believe are logical sub-categories.

The Process

Conciliation -- a process where two or more disputants get together to try and work out an acceptable settlement of their problem, normally without the help of a third party.

Mediation -- A process where two or more disputants get together in the presence of a neutral third party, to try and work out their differences. The key to mediation is compromise, and the neutral's role is to assist (or persuade) the parties to come to a voluntary settlement of their problem.

Arbitration -- A process where two parties select (or agree upon) a third party who will listen to both sides of the story and will issue a decision which will be final and binding on the disputants. Arbitration is normally conducted under a state law, and it does not normally take place unless efforts at mediation have failed to resolve the problem.

"Med/Arb" -- A process that combines both mediation and arbitration. Normally, the disputants select a third party who will attempt to mediate a settlement of the dispute. However, the parties agree, in advance, that if the mediation should prove unsuccessful, the third party will issue a legally binding decision.

A simple rule of thumb is to remember that mediation recommends a settlement; arbitration decides.

The People

Arbitrator -- The individual, appointed by the parties, under certain rules and laws, to hear all sides of the story and issue a decision.

Mediator -- The individual (or individuals) who conduct a mediation. In most cases, a single mediator handles a case. However, some programs (and some individual cases) may require more than one mediator.

Neutral -- An unbiased third party involved in the process. Normally, this term is applied to the mediator or arbitrator and the tribunal.

Parties -- (also referred to as "disputants") Those individuals most directly involved in the dispute. While the "parties" are normally two individuals (e.g. a husband and wife, or two neighbors or a businessman and customer) it is not unusual to find several parties involved in a dispute (e.g. a landlord and several tenants, a number of neighbors, etc.)

Tribunal -- (also called "administrative agency" or "program sponsor") A term which sounds more imposing than it really is. Essentially, a "tribunal" is the individual or organization which brings everybody together for a hearing. A "tribunal" can be something as simple as a single volunteer working out of a home or as complex as an agency with a staff of 25. The tribunal helps the parties understand the process, assists in appointing the neutral, makes sure everybody knows when and where to be for the hearing and follows things up after the hearing is over.

The Result

Award -- An award is the technical term for an arbitrator's decision. It is the legal document which tells the parties what to do.

Settlement
Agreement -- The result of a successful mediation hearing. This is a document, usually signed by all disputants and the mediator, which spells out exactly what everyone agreed to do to resolve the dispute. In "med/arb" hearings, where the mediator has the legal power to act as an arbitrator, a settlement agreement may be written on an "award form" and signed by the neutral. Then, if either party fails to live up to their agreement, the decision may be enforced in a court.

There are, of course, many other terms which will arise during the course of your training. However, there is one particularly important one which all neutrals should remember:

Intimidator -- A mediator, arbitrator or tribunal staff member who becomes so fond of these terms that (s)he uses them as often as possible, particularly with disputants. A neutral -- whose role is to facilitate communciation and understanding--should use these terms as little as possible when working with parties to a dispute.

CHAPTER II

COMMUNITY DISPUTE SETTLEMENT

Over the past 15 years, a wide variety of national and local, "grass-roots" programs have developed for the resolution of community disputes. It may be helpful for the volunteer mediator to understand why these programs enjoy support from both the formal legal system and individual citizens, the advantages these programs offer and the major similarities among the various programs.

Why Community Dispute Settlement?

As was mentioned in the introduction, the breakdown of many of the informal systems for dispute resolution has led the public, in ever increasing numbers, to turn to the courts (housing courts, small claims courts or criminal courts) and administrative or enforcement agencies (police, housing inspectors, attorneys general) in an effort to gain resolution. Unfortunately, there are many problems which arise when the formal system is overused. These problems include:

a) Lengthy delays -- In many areas, it is not unusual for civil court cases to take years to work their way through the system. Delays of four or more years are not unheard of. Similarly, criminal cases can involve inordinate delays. For many minor cases, justice may be delayed so long that, when finally administered, it no longer has meaning for the individual disputants.

b) Cost and Inconvenience -- Many individuals simply cannot afford the high costs of legal representation or wages lost while attending court proceedings. For others, the inconvenience (and possible hardship) of traveling to a possibly distant location for hearings presents a barrier.

c) Intimidating nature of the formal system -- A number of individuals mistrust the formal legal system. They are intimidated by confusing forms, "legalese" and sometimes cumbersome procedures.

d) Inadequate remedies -- Many disputes, particularly those between neighbors or family members, involve complex issues between the individual disputants. The courts, however, are required to deal with the civil claim or criminal incident which brought the parties into court, rather than the longstanding problems between the disputants.

Courts, attorneys and enforcement agencies recognize that the increasing caseload flowing into the formal courts system not only creates many of the problems outlined here, it also hinders the courts' ability to deal with the more serious criminal and civil cases -- cases which only the courts have the procedures and structure to resolve.

Common Features of Community Dispute Programs

(The following information has been extracted directly from a policy brief entited Neighborhood Justice Centers, prepared for the National Institute of Justice, U.S. Department of Justice, in March, 1980.)

a) Case Criteria.

Projects tend to focus on disputes occurring among individuals who have an ongoing relationship: Relatives, landlords and tenants, merchants and consumers, employers and employees or neighbors. These cases are considered most amenable to mediation/arbitration because they offer the possibility for compromise and the parties typically are interested in arriving at a joint settlement. Cases at the various projects differ substantially in the level of seriousness. New York City's Dispute Center processes misdemeanors as well as felonies occurring among acquaintances (such as felonious assualts) while most of the other projects process a range of civil complaints including consumer, landlord/tenant and domestic cases.

b) Referral Sources.

Projects receive referrals from many sources including police, prosecutors, the courts, social service agencies and individual citizens. For example, Boston's Urban Court Project receives the majority of its referrals from the local court; projects in Miami and Columbus receive the bulk of their referrals from the prosecutors office. A San Francisco program has made a major effort to solicit referrals directly from the local community. Findings from evaluations to date (in Florida and the 3 Department of Justice-sponsored sites) indicate that disputants referred by criminal justice personnel are the most likely to follow through to the hearing stage.

c) Intake Procedures.

Projects vary considerably in the degree to which they actively pursue clients once they have been referred to the project. Typically,

both the complainant and the respondent are notified by mail once a referral is received. Although the voluntary participation of both parties is desirable, in some cases, respondents in criminal disputes are informed that failure to appear may result in filing criminal charges on the complaint.

d) Resolution Technique.

Many projects attempt to settle disputes through conciliation before scheduling a formal mediation or arbitration session. Conciliation attempts may involve either telephone or letter contacts with disputants. Mediation involves attempts on the part of a neutral third party to settle a dispute through discussion and mutual agreements. By definition, a mediator does not have the power to resolve a dispute unilaterally but instead may offer suggestions and attempt to facilitate sufficient communciation among disputants to encourage a resolution. Arbitrators, on the other hand, have the authority to develop a binding agreement enforceable in the civil courts if the disputants fail to reach a settlement. Projects that employ arbitration(e.g., Rochester and New York City) attempt to mediate the dispute first and resort to imposed arbitration awards only when all mediation attempts have failed. The majority of states have modern arbitration legislation and can support projects using either mediation or arbitration. Hearings may range in length from 30 minutes to 2 hours and may use either one or a panel of mediators.

e) Project Staff.

Administrative, intake and social service staff at the various projects tend to have varied backgrounds, most commonly in the social sciences. Hearing staff have included lay citizens trained in mediation or arbitration techniques (used by projects in Boston, Rochester and New York City), law students or lawyers (typified by projects in Columbus, Ohio, and Orlando, Florida, respectively) or professional mediators including psychologists and social workers (employed by the Miami project). A small claims court mediation project in Maine has relied heavily on retired persons as dispute resolvers.

f) Hearing Staff Training. The American Arbitration Association and the Institute for Mediation and Conflict Resolution have developed rigerous training programs for mediators and arbitrators. In addition, local training resources often are available. Projects generally provide their mediators/arbitrators with 40-50 hours of training including lectures, role-playing hearings, videotaped feedback on performances and co-mediation with experienced hearing officers in actual hearing situations.

g) Follow-up Techniques

Many of the projects recontact disputants after 30 to 60 days to determine if the resolutions remain in force. If a former complainant is dissatisifed with the progress of the resolution, the respondent is typically called and encouraged to adhere to the terms of the agreement. In the arbitration projects, staff members are available to assist disputants who wish to file a civil claim in cases where the arbitration agreement has broken down. Despite this provision, disputants have rarely chosen to enforce civil awards in court.

Advantages of Community Dispute Settlement

A well-run community dispute project offers a number of advantages over the traditional court system. According to the National Institute of Justice study, these benefits include:

a) Rapid Case Processing.

Project evaluations report that cases usually receive hearings within 7 - 15 days of initial referral. Court processing of comparable cases is often reported to require 10 weeks or longer.

b) Increased Access.

Access to justice is improved, since projects do not (normally) charge for services, do not require lawyers, hold hearings at times convenient to all parties to the dispute (including nights and weekends) and often provide multilingual staffs to serve non-English speaking disputants.

c) Improved Process.

Mediation and arbitration methods offer the opportunity to explore the disputants' underlying relationships and conflicts -- a process not often possible in the traditional court setting, but important to the resolution of the dispute.

d) Effective, Fair Hearings.

Only limited data are available on client perceptions of Neighborhood Justice Center dispute processing. Composite data from an evaluation of three . . .funded projects in Atlanta, Kansas City and Los Angeles show that 84 percent of over 1,000 disputants interviewed expressed satisfaction with the mediation process.

-- 88 percent expressed satisfaction with the mediator.

-- 88 percent expressed satisfaction with the overall experience at the Neighborhood Justice Center; and

-- 73 percent stated that they would return to the Neighborhood Justice Center for similar problems in the future.

CHAPTER III

TYPES OF PROGRAMS

While informal mediation and arbitration programs have been in operation around the country for over a decade (some for much longer periods of time), it is important for the neutral to understand that most of these programs are still considered as test projects from which hard data and tentative conclusions are only beginning to emerge.

Perhaps one day someone will conclude that there is "a best way" to handle the variety of minor disputes currently entering these programs. However, we doubt that will ever happen.

From the initial studies that have been done, it would appear that no single program -- no one method -- works "best" under all conditions, in all communities, for all purposes.

Diversity has been the greatest strength of these various experimental programs, and it is likely that the most successful on-going programs in local communities will be those which offer a variety of options tailored to fit the unique needs of the users.

We believe it is important, therefore, for the neutral-in-training to have some familiarity with the various types of programs and issues involved in the informal dispute settlement movement.

Public and Private Sponsorship

One element of true diversity among the various community dispute programs is sponsorship.

Some programs are funded and staffed on a statewide level. New Jersey, as an example, has established a dispute settlement office within state government which offers services in community dispute resolution, informal resolution of prison inmate grievances and mediation of disputes involving environmental issues.

Other programs are publically sponsored on a local level. A local court, for example, may fund and staff an informal grievance mechanism to resolve disputes which enter the criminal courts system through the warrant clerk's office.

Some programs are administered by private organizations, but receive all or part of their funding from public agencies. For example, a private group may receive a part of its funding from community memberships, but may offer a program to mediate school truancy cases under a contract with the local family court.

Still other programs are both privately sponsored and funded. Better Business Bureau consumer arbitration programs, programs of some local trial lawyer and bar associations and local church groups (among others), are examples. These programs fund themselves through memberships, private corporate and foundation grants and direct community support.

At the farthest extreme from a state-sponsored program are those few projects which are so integrated into their communities that questions of sponsorship or funding are immaterial. Such programs may be found in relatively tight-knit groups in which certain individuals are commonly acknowledged as "problem solvers". An an example, tenants in a senior citizen project may naturally gravitate to a few individuals when they have a problem or a grievance. These individuals may be trained in the techniques of mediation and will simply continue to perform their problem-solving role more effectively. Such programs, where they exist, do not utilize central offices or staff, nor do they maintain formal records, so the question of funding is immaterial. In a society which often places a premium on statistics, these programs are often overlooked. However, where the conditions for such a project exist -- and are nurtured -- such truly "grassroots" programs may be among the most effective of all.

Degree of "Linkage" to Formal Justice System

As the various programs differ in the nature of their sponsorship, they differ, too, in the degree of their linkage to the formal justice system. These "linkages" may be divided into the following general categories:

Court linkage -- Under such an arrangement, the community dispute project accepts cases referred from the courts system after a criminal or civil claim has been filed. In many of these cases, the complaining party is given the option of having the case heard either by the court or by the community dispute program. If the complaining party elects to use the informal mechanism, the other party is notified that the criminal or civil case will proceed before a judge unless the other party agrees to use the informal system. The argument against the court linkage is that it contains the highest degree of "coersion"; however, it does significantly reduce the courts' caseload, and both parties are generally well pleased with the results of the informal hearing -- regardless of the manner in which they entered the system.

Police linkage -- Under these arrangements, individuals are referred to the informal system after they have made a formal complaint to the police, but before any formal charges are filed. In such

situations, police officers normally advise the complaining party to seek the assistance of the informal mechanism. The mechanism then seeks to obtain the voluntary consent of both parties for a mediation hearing. While some referrals by police are more formal than others (depending upon the program), it is usually viewed as less coercive than court referral; too, it offers police officers a viable option when they are confronted with a potentially serious neighborhood problem, but have no legal authority to take any action.

Social Service Agency Linkages

Here, various social agencies may recommend that a party or parties seek the assistance of the dispute settlement mechanism. The mechanism will seek to obtain the voluntary participation of both parties.

Linkages between the mechanism and social service agencies often flow in both directions. A social service agency may be assisting a client with a long-term problem but may recognize that settlement of an immediate grievance must first take place. If the social service agency does not have an internal mechanism for the resolution of such a grievance, the matter may be referred to the dispute settlement program.

Similarly, a mediator or arbitrator may, during the course of a hearing, recognize a long-term problem with which one or both clients must deal. Most dispute mechanisms will encourage and assist parties in obtaining more extensive assistance through referral to social service agencies.

Direct Public Contact

Here, the mechanism encourages the "person-on-the-street" to utilize the mechanism when he or she becomes involved in a dispute. Community knowledge of the program is accomplished through feature stories on radio and television and in newspapers, handouts available in various public locations and "word-of-mouth" from other users.

Advantages of this approach are that it involves the least contact with the formal justice system, the lowest level of coersion and -- when successful -- enables the dispute settlement mechanism to become involved in the dispute in its earliest stages, before a dispute becomes a more serious offense.

Most dispute settlement programs utilize a combination of linkages. Some programs, however, discourage direct "walk-in" traffic as a result of an overwhelming caseload of referrals from the courts system. Other programs have minimized their linkages to the formal system in order to better service the residents of their particular neighborhood with the least amount of coersion.

The nature and extent of the program's linkages, as with other program elements, depends upon the types of disputes the program handles and the needs of the community the program serves.

Types of Programs Offered to the Public

Mediation Programs. Some dispute settlement programs confine their activities exclusively to the mediation of disputes. The neutrals sole function is to help the disputing parties arrive at their own settlement of their dispute. The neutral has no authority to direct the parties' actions, and if a voluntary agreement cannot be worked out, the mediator must remove him(her)self from the dispute.

The advantages of a mediated settlement are obvious. The parties to the dispute have the complete and final say over the contents of any settlement agreement. Since the settlement must be agreed to by all parties -- and cannot be imposed upon them -- the agreement is more likely to be honored. Finally, the parties may be more open with the mediator, since they recognize that he/she cannot use any admissions or confessions to impose a settlement.

A major drawback of mediation, however, arises when the mediator and the parties are unable to work out a voluntary settlement. If the matter was referred to the mechanism from the court, it must be returned. After spending a considerable amount of time with the mediator, the parties must now appear in court, and the case will be heard again. Those who favor imposing a settlement in such cases argue that the neutral has had a considerably longer time to explore the underlying causes of the dispute than a judge will have; the neutral is, therefore, in a better position to impose a settlement that will treat these underlying problems. It is also argued that, to avoid the sense of "failure" that comes when a mediation appears unsuccessful, the neutral may be tempted to fashion a "settlement agreement" which treats several minor issues, but does not resolve the major problem over which the parties are unwilling to settle.

Mediation works best in situations where certain conditions are present. First, the parties should be a part of some form of continuing relationship. In such cases, the parties desire to resolve the immediate problem, either because they want to continue their relationship (a couple in a basically satisfying marriage), or because circumstances dictate that the relationship must continue (two tenants who wish to continue to live in the same apartment building).

Second, the parties to a mediation should be in relatively equal bargaining positions. If one of the parties "holds all the cards" and refuses to give any up, a mediated settlement is unlikely.

Finally, both parties must come to the realization, at some point before a settlement can be reached, that a mutual problem exists. While it is not necessary that both parties have the same perception of the problem or that both parties agree that a problem exists when they enter the mediation, a settlement is unlikely when one party clings to the notion that no problem exists at all.

Some programs use a single mediator to hear each dispute, others use two neutrals (a process referred to as "co-mediation"). In some circumstances, a panel of several mediators may be used to resolve complex disputes involving a number of parties.

Arbitration Programs. Some programs offer specialized services exclusively in arbitration. While many of these programs provide for some form of mediation -- often by staff members -- in the early stages of a dispute, a formal face-to-face hearing before a neutral does not take place until the parties have entered a legal agreement to submit their dispute to a neutral and to be legally bound to the neutral's decision.

In some programs, the parties agree to the appointment of an arbitrator, while in other programs, the parties select an arbitrator from a list of several possible neutrals.

In all programs, the arbitrator functions under the authority of state law and the specific written agreement of the parties to the dispute. The arbitrator's decision is enforceable in court, and it is extremely difficult to appeal a decision once it has been rendered.

Arbitration is not a substitute for mediation; it is an alternative to the courts. Traditional arbitration theory holds that an arbitrator should, under no circumstances, involve him or her self in any negotiations between the parties, nor should he/she attempt to assist in mediating a settlement -- even when the parties seem very close to an agreement. The reason for this is that the arbitrator must remain absolutely neutral throughout the proceeding. According to the classical theory, arbitrators who attempt to mediate may, in the course of their efforts, compromise their absolute neutrality. If the mediation attempt should prove unsuccessful and a decision must be rendered, the losing party might argue that the award should be set aside due to the arbitrator's "bias".

The advantages of arbitration most frequently cited are that it is usually considerably faster than court action, that the arbitrator has a good deal of freedom to examine all aspects of the case, that the arbitrator -- unlike a judge -- can direct the performance of actions as well as the payment of money and that the absence of strict rules of courtroom procedure and evidence encourage a more informal atmosphere and a greater degree of participation by the parties.

A major drawback of arbitration, however, is that the parties must accept the decision, regardless of their opinion of its fairness. A mediated settlement, on the other hand, cannot be reached unless both parties are reasonably convinced that the proposed settlement is fair.

Some arbitration programs use a single arbitrator to decide individual cases; others utilize a panel of three arbitrators. When more than one arbitrator is involved in a case, a majority usually decide the matter.

Med/Arb Programs. This approach, while considered unusual according to classical dispute settlement theory, appears to be gaining acceptance when applied to the resolution of community/neighborhood-type disputes.

Under this system, neutrals are trained to serve both as mediators and as arbitrators. The parties enter the mechanism with the understanding that the neutral will attempt to mediate a settlement of their problem; however, if that proves impossible, the neutral will render a decision in the matter.

On the surface, this would appear to be an approach that satisfies the objections of those who find fault with programs which offer either mediation or arbitration exclusively. For those who find fault with mediation's helplessness in the face of uncompromising parties, med/arb offers a binding decision. To those who fault arbitration for its unwillingness to seek mutual agreement to a settlement, med/arb offers an active mediation step.

However, med/arb, too, draws its share of criticism. Those who question this approach point out that mediation is a subtle, often time-consuming art. There may be many points during an ultimately successful mediation where the parties appear to be far apart and voluntary settlement unlikely. A neutral with the authority of an arbitrator may be very tempted to take the "easy way out" -- declaring the mediation at an impasse and issuing a decision. This option is not available in programs which rely exclusively on mediation, the critics point out, and this absence of an option forces the mediator to continue his or her efforts.

Other critics of med/arb point out that the arbitrator's authority may encourage the neutral to fall into that all-too-human pitfall of "doing good against people". According to this argument, the parties may be close to an agreement -- one which is acceptable to the parties, but which offends the neutral's sense of justice. The arbitrator's authority may allow the neutral to manipulate the hearing into an impasse, then issue an arbitration decision which, in the neutral's opinion is more "just". The problem, as the critic points out, is that while the arbitrator may walk away from the case at its conclusion, the parties must live with the decision. The less authority the neutral has, the argument goes, the better for the parties and the process.

As with the other two formats, med/arb may use a single neutral to hear cases or a panel. If the process leads to an arbitration decision, a majority of the panel must concur.

Summary. Each of the three approaches outlined here has its obvious drawbacks. The criticisms leveled against each are, to varying degrees, quite valid.

Yet if informal dispute programs are to exist, communities must make a number of basic decisions among admittedly imperfect systems.

Those programs which are likely to be most successful over the long haul will probably be those which attempt to offer a range of

possible alternatives to the disputants and attempt to tailor the procedure in the specific case to the unique circumstances of the parties and their dispute.

Types of Disputes Which Are Handled in Programs

What follows is intended to give the neutral-in-training some idea of the kinds of disputes which various programs are currently handling.

Minor Criminal Disputes -- One neighbor charges another with assault. The court will decide whether the defendant is or is not guilty of the specific charge. A community dispute neutral may discover that the assault is the culmination of a long-festering dispute over the neighbors' use of a common driveway between their houses. The settlement agreement will treat not only the assault charge, but will probably contain provisions concerning the use of the drive.

Consumer/Business Disputes -- A neighborhood handy-man and home owner are arguing over a roofing job. The homeowner won't pay for the job until he feels it is properly done; the handy-man will do no more work until he is paid for what had already been done. The settlement agreement will attempt to resolve these issues in a manner which will allow the parties to continue their relationship.

Landlord/Tenant Disputes -- Following a break-in of her apartment, a tenant attempts to contact her landlord about replacement of the door locks destroyed during the robbery. Since the landlord is out-of-town for the week, the tenant has the locks replaced by a local locksmith. The landlord refuses to pay the bill, and the tenant threatens to sue. Prior to the incident, the two parties enjoyed a good relationship. A settlement agreement would treat the problem of payment for the locks and might also contain provisions governing the parties future behavior when problems arise in the absence of the landlord.

While these are only a few examples of the types of disputes which enter community dispute programs, they are among the most common. Each of the major categories outlined above can have many related "side issues" which have a significant bearing on the case. Here are two examples:

"Affairs of the heart" -- Assume that, in each of the examples listed above, the two parties to the dispute were formerly married to each other. Does that color your perception of the case? What different types of issues might emerge during the course of the hearing?

"Racial Issues" -- Examine the three cases again. This time assume that, in each case, the parties are of different races and each holds biases and stereotypes about the other. Does the nature of the dispute change? Might it change the way in which you approach the hearing? What, if any, differences might you expect to see in a settlement agreement?

What type of disputes enter an informal dispute settlement program? Nearly any type of conflict in which the parties have a desire to settle, wish to avoid protracted litigation and want to participate in the process of resolution. Most will involve side issues which would seldom be raised -- and seldom treated -- in a court decision.

CHAPTER IV

THE TRIBUNAL

Literally, a tribunal is a court or forum for justice. A community dispute tribunal is that -- and considerably more. It is the organization which administers the overall program.

When we use terms such as "tribunal" or "organization", we tend to think of large bureaucracies and numbers of staff people. In community dispute settlement, this is not necessarily the case. Certainly, some larger programs do require larger staff and organizations; however, a "tribunal" in a small, neighborhood program may be a single staff person or volunteer. A tribunal is not measured by the size of its staff or budget; it is measured by the tasks it performs.

A tribunal assumes responsibility for the acquisition and training of mediators and/or arbitrators, assists the parties in obtaining the neutral who will hear their case, ensures that the entire process complies with the program rules and any applicable laws, provides the parties with guidance concerning their rights and responsibilities during the hearing, gives a point of contact between the neutral and the parties during the process, reviews settlement agreements or decisions and follows up with the parties after the hearing.

A community neutral should have an understanding both of the functions of the tribunal and of the manner in which he or she was selected/appointed to hear the case.

The Submission Agreement or Demand for Dispute Settlement

The mediation or arbitration process commences when one party serves notice to the other party through the tribunal of a desire to submit an existing dispute to a neutral for resolution. When neither party has previously agreed to this form of dispute settlement, the notice is called a "submission agreement". If one or both parties have "preagreed" to informal dispute settlement, this notice is known as a "demand".

Preagreement takes place when one or both parties sign an agreement to use an informal resolution mechanism to resolve a dispute which might arise in the future.

Here is an example:

In some parts of the country, landlords (perhaps a municipal housing authority) have inserted a clause into their leases. The clause provides that -- if a dispute should arise between the landlord and tenant -- the landlord agrees to submit the dispute to a mediator or arbitrator upon the request of the tenant.

Since the number of "preagreements" are relatively small, this manual will not go into further detail about the "demand" for mediation or arbitration. It is sufficient for the neutral to know that "preagreement" does exist. When it does, one party may demand that the other submit to informal dispute settlement.

The "submission agreement" is used where there is no previous agreement to mediation or arbitration. This is certainly the case with almost all community disputes.

The dispute may be referred to the tribunal by the courts, the police, social service agencies -- or one of the parties may simply take the iniative and go directly to the tribunal for help. However the dispute finds its way to the tribunal, both parties must voluntarily agree to submit the dispute to mediation or arbitration.

The tribunal will provide the initiating party with a submission agreement, descriptive literature and a copy of the rules for the program. Normally, the tribunal will take pains to explain the process to the initiating party. The initiating party must complete and sign the submission agreement and give it (or mail it) to the tribunal.

The tribunal then contacts the other party to obtain his or her consent. Again, the program is explained and materials given or sent to the other party. If the other party does not wish to enter the program (or if the agreement is not returned within a time frame established by the rules), the initiating party is informed that the other has declined and that a hearing cannot take place. If the case was referred to the tribunal by a court, the court is notified that the case is being returned.

If the other party returns the signed agreement, the process may commence.

Who Will Hear the Case?

There are a number of different methods tribunals use to bring the parties and the neutral together. The most effective method of appointing a neutral involves the greatest degree of participation by the parties. It is assumed that the more say the parties have in selecting the neutral, the more likely they are to be satisfied with the process and honor their settlement agreement or decision.

For this reason, some tribunals provide a process in which the parties select their neutral. Here are two methods that are normally used:

The Single Neutral. After submission agreements have been signed, identical lists of possible neutrals (usually five individuals), plus brief biographical sketches, are given or sent to both parties. Each party is asked to cross off the name of any individual(s) considered unacceptable and to list in order of preference those individuals which remain. These lists are given to the tribunal.

The highest matching choice of both parties is designated as the neutral who will hear the case.

The Three-Person Panel. In some cases, the parties may request (or rules for a special program may provide) a panel of three neutrals. If these individuals are to be selected by the parties, lists of five individuals are again sent to the parties. Each party's first choice becomes part of the panel. The two neutrals selected in this manner then select a third neutral from the panel. This third individual serves as panel chairperson. If a decision must be made in a case, a majority vote decides all issues.

Agency Appointment of Neutral

The advantage of selecting neutrals is that the parties have a greater degree of participation in their case. However, a major disadvantage is that the selection process often takes time to complete. Since many community-type disputes involve an element of urgency, some programs provide for the tribunal to appoint the neutral who will hear the case. Whichever method is used (selection or appointment), the parties must understand -- and agree to -- that method before a hearing can take place.

Notice of Hearing and Appointment

Once the parties have selected a neutral (or a neutral has been appointed), the Tribunal attempts to coordinate a date, time and place for the hearing, taking into account the convenience of both the neutral and the parties.

After this initial telephone "coordination", the parties and the neutral are sent a "notice of appointment and hearing" form. This form notifies the neutral and the parties of the date, time and place of the hearing, and it provides the name of the neutral who will hear the case.

If the neutral is given the authority to issue a binding decision, he or she must sign and complete an "oath of office." Further, if the neutral is to have the authority to issue a binding decision, the notice must be mailed to the parties 8 days in advance of the date of the hearing, according to New York State law.

Review and Transmittal of Settlement Agreements or Decisions

Once a hearing date has been established and the parties notified, the tribunal may assume a variety of functions prior to the end of the case. If the neutral(s) wishes to make an inspection of a product, work performed or property involved in the dispute, the tribunal makes such arrangements according to the program rules. If the parties have any questions prior to the hearing, the tribunal attempts to answer them.

Whether or not the tribunal performs any of these functions, it assumes a major role in the process at the end of the hearing. If a settlement agreement has been reached, the tribunal may review it prior to the parties signature. If a decision has been rendered by the neutral, it will be reviewed by the tribunal to its delivery to the parties.

It is quite important for the neutral to understand that these documents will be reviewed by the tribunal. It is even more important for the neutral to understand why.

The tribunal's review of these documents is done without any reflection upon the merits of the case. Quite the contrary, it is done to ensure that the agreement does what the parties wanted it to do -- resolve the major issues between them in a manner which will not cause new problems in the future.

Conclusion

The tribunal, as can be seen, plays an important role in the entire process. Skilled, informed neutrals, however, relegate the tribunal to a minor clerical role in the process. Most tribunals enjoy this role, for it is an indication of a smoothly functioning dispute settlement program.

The remaining portion of this manual is therefore devoted to the neutral, his role in the hearing, some suggestions regarding technique and responsibilities regarding settlement agreements or decisions.

CHAPTER V

THE NEUTRAL(S)

It happens to every neutral the night before his or her first case.

The jitters. Those random little thoughts that race through your mind just before you go to sleep . . .

> "How the heck did I get myself into this? What will I do if one of the parties doesn't show up? What will I do if they do show up? Suppose I can't handle this? What happens if I can't get an agreement? Will they honor my decision? Will they think I'm biased?

It may not be a total comfort, but these thoughts -- or ones very much like them -- occur to almost every neutral prior to that moment when he or she opens the first hearing.

While no textbook or classroom training session can fully prepare the novice neutral for all the possible situations he or she may encounter, this manual -- and to a much greater degree, the training you'll receive -- will provide a solid grounding in the basics of mediation and arbitration. The "role playing" exercises, which make up a significant portion of the training, should help you feel comfortable in most of the situations you're likely to run into during a hearing.

Your Responsibilities

Some forms of community service or volunteer work require only that you be at a specific place on time. While these programs make use of volunteers, the technical aspects of their programs remain in the hands of paid, professional staff.

On the other hand, YOU, as a neutral, are the very heart of a dispute settlement program. As such, you bear a heavy responsibility for its success. Here are some of the duties you undertake when you accept this responsibility:

A) The Duty to Disclose. When you are notified of your appointment to serve in a specific case, you also accept your first obligation as a neutral -- the duty to disclose any relationship or fact which might

prejudice you in the eyes of the parties. Most rules of hearing procedure require this disclosure.

1) Why are you asked to disclose? To protect the integrity the process and to guarantee the parties a fair and impartial hearing. If you are serving as an arbitrator, an undisclosed relationship you have with one of the parties -- even one which hardly seemed worth mentioning -- might cause a judge to erase the entire decision.

2) What should you disclose? Family relationships, personal relationships, business relationships, social relationships -- in short, any contact you had, have or are likely to have with either of the parties involved in the dispute. If you are hearing a landlord/tenant dispute and -- although you do not know either party -- you are a landlord, that fact should be disclosed. There are, of course, thousands of examples. The point to remember is that you must not only be neutral in the dispute, you must appear to be neutral. Disclose any fact or relationship which, if later discovered, might cast doubt upon your neutrality.

3) Suppose I discover a relationship during the hearing? Let's suppose that you've received your notice of appointment. You've looked at the names of the parties, and you don't know either name. You arrive at the hearing and discover that you knew one of the parties under her maiden name. What do you do? Disclose the fact immediately, in front of both parties.

4) What happens after I disclose? The parties -- both of them -- may waive their right to object to the neutral. For example, in the landlord/tenant case, the parties may decide that they have no objection to the fact that you are a landlord. The hearing can then proceed.

Remember, if you wonder whether something should be disclosed -- disclose it. It is your duty to ensure that the parties -- not you -- decide whether a fact or relationship will prejudice the proceeding.

B) The Duty of Confidentiality. In many cases, one of the reasons the parties have decided to submit their dispute to you is to avoid having their problem become a matter of public record, as it would in court. You have a duty to respect the confidentiality of the hearing.

C) Direct Communication With the Parties. Neutrals are strongly discouraged from having any direct contact with either party outside the hearing without the specific consent of the other party.

In mediation, it is often necessary to meet privately with both parties so that you can freely explore possible areas of compromise and settlement. The parties understand that this will be done. By agreeing

to submit their dispute to you, they accept that you may meet privately -- during the course of the hearing -- with either or both parties.

However, if you are contacted by either party outside the hearing (either before the hearing or between hearings), you should politely -- but firmly -- refuse to discuss any aspect of the case. Instead, you should instruct the party to contact the tribunal. Most of the general questions you might receive can be answered by tribunal staff. Those questions that only you can answer can be discussed at the hearing, where your neutrality and the rights of the parties can be protected.

D) Interpreting the Rules. As you know, both parties have been given a copy of the dispute settlement rules prior to the hearing. No matter how carefully these rules are written, they may be subject to different interpretations. During the course of the case, it is your duty to interpret those rules. If you feel that the question goes beyond your expertise, you should feel perfectly comfortable in declaring a short recess in the hearing while you contact the tribunal staff for assistance.

CHAPTER VI

THE HEARING

This is what the whole process comes down to -- a meeting of the disputing parties and a neutral(s) in an effort to obtain an agreement or receive a decision. Here are some of the things you should know about the hearing:

A) The Need for a Hearing

One of the great advantages of informal dispute settlement is that it gives both parties their "day in court" at a time, date and place they've helped to pick, in an informal atmosphere which encourages a full discussion of the dispute.

While there are, of course, exceptions, a mediation cannot normally take place without a hearing.

However, if you are serving as a neutral mediator/arbitrator, you have the authority to make a decision. Most dispute settlement rules allow the parties to waive their right to an oral hearing and to submit written documents upon which you are to base your decision.

Here is an example of a case where this might occur:

> Two parties have a dispute over the terms of a contract. The entire case turns upon one phase contained in one of the contract's clauses. The two parties each believe that their case is so clear-cut that no hearing is necessary. They ask you to decide their dispute based upon a copy of the contract and their written arguments.

While it is the right of the parties to waive an oral hearing, it is your responsibility to decide whether the case can be fairly resolved without a formal hearing. If you feel you can't do so, contact the tribunal and ask that a formal hearing be scheduled.

B) The Absence of One of the Parties

The parties have agreed to submit their dispute, a date has been agreed upon and notices have been sent to all parties. You and one of the parties arrive -- the other party does not. What happens now?

If you're serving strictly as a mediator -- with no authority to decide a case -- nothing can happen without the other party.

In such cases, the tribunal will attempt to contact the absent party to find out what happened. If the absent party sincerely wishes to have the hearing, it will likely be rescheduled (provided the other party also consents). If the tribunal is unable to contact the absent party -- or if the party who appeared refuses to appear again -- the case will normally be closed.

If you're serving as a mediator/arbitrator, you should proceed with caution. Under most program rules, you may decide either to proceed with the hearing in the absence of one party or to adjourn the hearing in an attempt to establish a new date when both parties will be present. Whether to proceed or adjourn depends largely upon the circumstances of the case, and is up to your best judgment.

If you decide to proceed with the hearing, however, the absence of one party cannot be the basis for what lawyers call a "default judgment" -- a decision in favor of one party solely because the other did not appear. It remains your responsibility to decide the matter based upon the facts presented to you.

In most community disputes, we strongly believe that no hearing should be held unless both parties are present -- even if, as an arbitrator, you have the technical authority to do so. However, if you feel that the circumstances warrant a hearing -- in the absence of one party -- immediately contact the tribunal for information on how to proceed.

C. Procedures at the Hearing

We can't possibly prepare you for every situation you'll encounter at a hearing. You are present at the hearing to exercise your good judgment in mediating or deciding the parties' case -- and there will be times when you're going to have to use that good judgment to "jury rig" a procedure to get around a unique problem. However, certain procedures have proven their worth in most situations you're likely to face, and these are covered in the remaining subsections of this chapter.

Prior to the Hearing. Prepare yourself as fully as possible, for the hearing. Study the submission documents carefully; they contain a basic outline of the dispute. It is a good idea to review the program rules and this manual. You should try and arrive at the hearing site fifteen minutes or more prior to the hearing, and make sure you have all the material you'll need at the hearing with you. You'll feel a lot more comfortable if you're the first person to arrive at the hearing -- it gives you time to get your bearings and relax a bit.

A Few Brief Words on Control. As we've said, one of the major advantages of the dispute settlement process is its informality. The parties

are less intimidated, so they are more open and relaxed than they might be in court. You are able to establish a freer exchange of views and get a better understanding of all aspects of the dispute.

This informality could cause problems regarding your control of the proceedings; however, if you're aware of the problem, you can take steps to compensate.

The formal, ritualized nature of a court proceeding tends to firmly establish the judge as an authority figure fully in control of the proceedings. These trappings of authority are largely absent in a mediation or arbitration.

From our experience, it is better for the neutral to establish a firm control over the hearing at the beginning and to relax it as the hearing progresses than it is to establish a relaxed atmosphere at the outset and discover that he/she has lost control midway through it.

Here are some procedures you can use to establish control:

1) The Oath or Affirmation. An arbitrator is required to sign an oath of office prior to hearing a case. No such obligation is imposed on a mediator; however, it may be adviseable for a mediator to sign a document affirming that he or she will fairly and impartially assist the parties in attempting to resolve their dispute.

Even though you may sign this agreement prior to the hearing, it can help establish control in the proceeding if you read the oath or affirmation to the parties and sign it in their presence. If the hearing is taking place at the tribunal offices, you may ask a tribunal staff member to administer the oath or affirmation to you.

2) Your Opening Statement. This accomplishes several purposes. It introduces you, informs the parties, establishes the ground rules and sets a necessary degree of formality. Here are some of the things you should cover:

a) A welcome and introduction -- introduce yourself to the parties, and make sure that all parties present at the hearing either know one another or are introduced.

b) An explanation of the program -- it's not necessary to get long-winded here, but it's a good idea to briefly explain why the program exists.

c) Your role -- If you're serving as a mediator, explain your function clearly and concisely. If you're acting as a mediator/arbitrator, explain to the parties (even though the tribunal has previously done this) the serious nature of the proceeding. You're there to try and help the parties work out their own settlement, but if they are unsuccessful, they have agreed to let you decide the matter and be bound by your decision.

d) The confidentiality of the proceeding -- You should cover two points here. First, that the hearing is confidential and that nothing said at the hearing will be discussed outside the hearing either by you or by the tribunal. Second, since it may be necessary for you to meet privately with each party, explain this to both of them. Emphasize that anything said to you in private by one of the parties will not be divulged to the other unless the party divulging the information agrees that you may share it with the other party. If you're serving as an arbitrator, however, you should inform the parties that you cannot base any part of a decision -- should it be required -- upon information that hasn't been shared with both parties.

e) Note taking -- Explain to both parties that you may be taking notes during the hearing. Indicate that these notes are only to help jog your memory during the hearing. You should explain that the parties, too, may take notes but that all notes will be collected at the end of the hearing and destroyed.

f) Other Ground Rules -- These will be more fully discussed under a separate heading; however, they include: Who will speak first, whether interruptions are possible, when questions may be asked, etc.

3) The Fact-Finding Phase. After explaining the ground rules, you're ready to proceed with the hearing. Explain to the parties that the only things you know about their dispute are the statements each one made on his or her submission agreement. Ask each party, in turn, to explain what happened to cause the dispute. During this initial information gathering, it's a good idea to allow each party to tell his or her story without interruptions from the other side.

4) The "Rebuttal" Phase. If you've banned interruptions during the fact-finding phase, you can almost see each party gritting his or her teeth to avoid leaping up and shouting, "That's not true" or "That's not the way it happened at all". The "rebuttal" phase allows each party to comment on what the other said. While this is taking place, you are gathering additional information to help you get a full understanding of the case.

5) The Mediation Phase. At some point (your training will help you develop a sense of when that point has been reached), you've gathered all the factual information you're going to get from the parties in a joint meeting. While you may have been asking questions of both parties throughout the opening phases, you're now ready to assume a slightly more active role. At this stage, you begin to determine what each of the parties would consider a fair resolution of the problem, and you begin to explore possible areas of compromise.

6) The Caucus. It may well be that the parties resolve their problem prior to this point. If that's the case, your only role is to help them reduce their settlement to writing. However, in many cases, the initial mediation phase reaches an impasse. The parties are far apart on what each considers a fair resolution, and neither one appears willing to bend.

During the caucus, you meet privately with each of the parties. It is during this phase that you'll often discover information that the parties were reluctant to discuss in front of each other. You may also discover that what you thought was the issue in dispute is really only a "smoke screen". The real issue has to do with the feelings and attitudes of the parties toward one another.

Since you're meeting privately with each party, they are freer to discuss their feelings, and you have greater latitude to explore compromise.

More than one caucus may be necessary with each party; your training and experience will help you develop a sense of when to bring the parties back together.

7) And Then. By this point, you should either be close to a settlement agreement -- or you're feeling very much as though the parties will be incapable of a resolution even if they spent a year in mediation.

If they're close to a settlement, you will, if course, proceed to help them draft it. If not, you enter a phase we'll call . . .

8) The Alternatives. Here you bring the parties back together. If you are functioning solely as a mediator, you explain that the parties do not appear to be able to settle their problem. If the matter was referred to the tribunal from a court, explain that you'll have to close the hearing and return the matter to the court for a trial. If the case did not come from a court, try and help the parties understand the consequences of their unresolved problem. After you've done this, ask the parties if they would like to try to continue working on a settlement. In some cases, your discussion of the alternatives may cause one or both of the parties to reconsider a previously fixed position. You may then attempt to break the deadlock by keeping the parties together or by returning to a separate caucus with one or both of them.

If you have the authority to make a decision in the case (an arbitrator), resist the temptation to jump immediately into the arbitrator's role. Use the "alternatives" phase to explain that the parties appear unable to reach a settlement and that you will, therefore, be required to decide the matter for them. Let both of them know that you're reluctant to do this, since your decision will probably not be as acceptable as an agreement they both have worked out. As with the mediator, you should give the parties one last opportunity to come to an agreement before you take the matTer out of their hands.

9) The Conclusion. Here is a brief rundown of the possible conclusions of mediation:

a) A Settlement Agreement. The parties have reached a settlement of their problem, and you have assisted them in reducing the agreement to writing. If you have an arbitrator's authority, this agreement is called a "consent award". You and the parties should all sign this agreement, and the parties should each have a copy with them when they leave the hearing.

b) An Adjournment. The parties have agreed to continue in mediation, since they feel a settlement can be reached eventually; however, there is no time to do so. You may adjourn the hearing to a date in the near future. You should ensure that the tribunal is aware of this adjournment and the date and time of the next hearing.

c) An Unsettled Case. You are acting solely as a mediator, and every effort to reach a settlement has failed. The parties are unwilling to reconsider their position. You conclude the hearing, making sure the parties understand that the case has been closed without settlement. Notify the tribunal immediately.

d) An Arbitrator's Award. You have the authority to decide the matter. You obtain whatever additional information or evidence from the parties which you feel you need to make a decision. You inform the parties that your decision must be based on the facts in the case, and that your decision must be based on information which you received during a caucus -- information which was not shared with the other party. You close the hearing, thank the parties for their willingness to use the system and assist in escorting them from the hearing. Within 10 days following the hearing, you deliver your decision and reasoning to the tribunal, which will transmit it to the parties.

CHAPTER VII

THE SETTLEMENT AGREEMENT

The settlement agreement is the culmination of the mediation process. This chapter will discuss the general issues surrounding this agreement. The next chapter will discuss matters relating to an arbitrator's consent agreement or decision.

A. In FULL Settlement

You've just spent two and one-half hours with the parties, as a group and in caucus. Tempers have gotten a little short at times, and you've had to stay on your toes to keep the bargaining moving. Now, however, the parties have agreed on a settlement. They want to resolve their problem, and they know how it should be done.

Don't pat yourself on the back yet. The parties must leave the hearing with a jointly-signed agreement before your work is through.

Many a mediated settlement has broken down at the point when the mediator and the parties begin to set down their individual understanding of the settlement on paper. Other agreements are never honored, even after they're signed, because the agreement was poorly drafted and the parties did not fully understand it.

If the agreement does not fully -- and clearly -- dispose of the issues in dispute, the time spent in mediation has largely been wasted. Make sure the agreement does both.

B. Too Specific -- Or Not Specific Enough

A basic consideration when helping the parties frame their settlement agreement is how specific it should be. By the time you've reached this point in in the mediation, you should have a reasonably good idea of the personalities with which you're dealing. So, ultimately, only you can decide how specific the agreement should be. However, here are some considerations:

1. Too Specific. At this extreme end of the spectrum, the parties and/or the mediator want to "cross every 't' and dot every 'i'". The parties can get so concerned with the letter of the agreement that they lose sight of its spirit. This can result in a breakdown of the mediation or a failure to honor the agreement.

If you've been mediating between parties who, throughout the process, have split hairs over every issue -- every statement -- be particularly wary of extreme specificity in agreements.

In one case, a mediation agreement calling for an exchange of money and property. Here's how the parties worded their agreement:

"Mr. Smith and Miss Jones will meet at 1:30 P.m. in the offices of the dispute settlement center on May 20, 1979. Miss Jones will bring with her a cashier's check in the amount of $405.69; Mr. Smith will bring with him the fur coat belonging to Miss Jones. The parties will exchange the check and the coat in the presence of a member of the center staff."

At 1:40 p.m. on May 20th, Mr. Smith stormed out of the center office, claiming that since Miss Jones had not appeared, the agreement had been broken. Five minutes after Smith left, Jones appeared.

Had the agreement not been quite so specific (and had Smith not been quite so picky), the center staff might have been in a position to offer Smith some alternatives.

2. Not Specific Enough.

At the opposite extreme, agreements have been so vague and general that no outsider, reading the agreement, would have any idea how the parties intended to resolve their dispute. As an example, we can rewrite the agreement above in the following manner:

"Mr. Smith will return Miss Jones property and Miss Jones will pay Mr. Smith the outstanding balance of her loan."

How much is the outstanding balance? When will Miss Jones pay? What is Miss Jones' "property"? How will Miss Jones pay? The agreement is so vague that, if a problem arises (Miss Jones thought she could pay in installments; Mr. Smith wanted immediate payment), the whole agreement may break down.

3. What To Do.

In general, it is probably better to help the parties be reasonably specific than it is to leave them with an agreement that's nearly meaningless. How specific it should be is something only you can judge -- it depends on the personalities of the parties and the nature of their dispute. Help them be specific, but don't get carried away.

C. The Format of the Agreement

All mediators are provided with Settlement Agreement forms as a part of the package you receive prior to the hearing. Naturally, you'll complete the information requested on the form. However, the specifics of each agreement are unique, and we suggest you break that portion of the agreement into two parts:

1) The Spirit of the Agreement. It helps both you and the parties if you don't jump immediately into a recitation of the specific things each party is agreeing to do. Instead, take the time to develop -- with the parties -- a broad statement regarding the nature of the dispute and the manner in which the parties intend to see it resolved.

In most cases, you'll find it is easier to get the parties to agree on the spirit of the settlement than on all the specific details. Later, if you find the parties disagreeing on some specific matter, you can bring them back to the spirit of the agreement. A brief discussion of the spirit can help break a deadlock over some specific.

One dispute a local center handled involved an estranged husband and wife. Attorneys for both individuals were attempting to negotiate a separation agreement. No separation agreement had yet been reached, and the parties continued to argue every time the husband came to the wife's house to pick up the children. Finally, in anger, the wife charged the husband with harassment and trespass. The case was referred to mediation. Here's how the mediator and the parties worded the "spirit" of the agreement:

> "Until the legal matters concerning marital rights and property are settled by lawyers for the parties, Mr. and Mrs. Jones agree that they desire to resolve their dispute over child visitation in a manner that is fair to both parties and considers the welfare of the children."

After reaching the "spriit" of the agreement, the parties proceeded to list the specific ways in which their dispute was to be resolved.

2) The Specifics of the Agreement.

Here, you assist the parties in spelling out exactly what each of them will do to settle their dispute.

In the case we just discussed, there were four specific areas of dispute. The parties wrote their specific agreements as follows:

"a) Mr. and Mrs. Jones agree that they will not communicate with one another except by telephone or mail.

b) Mr. and Mrs. Jones agree that they will cease any form of verbal abuse, direct or indirect, through friends or relatives.

c) Mr. Jones will continue to have the right to have both children each weekend and at such other times as both Mr. and Mrs. Jones mutually agree, in accordance with a), above.

d) During such visits, Mr. Jones agrees to transport the children to and from their residence and agrees that he will not enter the house when he is picking the children up and dropping them off."

In the opinion of the parties and the mediator, this agreement -- signed by both parties and the neutral -- resolved the major matters in dispute.

Remember, as a mediator, you have no obligation to write anything into the agreement stating why the parties decided to do what they've done. The less said about the reasons for the dispute, the better.

During your training, you will spend a portion of your time learning the procedures and techniques of drafting a settlement agreement. We've also included some sample settlement agreements at APPENDIX E.

CHAPTER VIII

THE DECISION

If you have the authority of an arbitrator, the parties have given you the right to decide their dispute if an agreement cannot be reached. The tribinual will provide you with the appropriate forms upon which you will complete your decision. Unlike a settlement agreement (or "consent award"), which is almost always given to the parties at the close of the hearing, an award may be given up to ten days following the hearing. Those ten days are, we believe, important for two reasons: It gives the parties a "cooling off" period following the hearing, and it gives you time to carefully consider all that you heard and observed at the hearing prior to making your decision.

Your decision should be broken down into two completely separate parts -- the "finding" (your reasoning) and the "award" (your decision). We'll discuss each of those, in turn.

A) The "Findings".

The "findings" are, in a sense, a roadmap which provides the parties with an overview of their case, the matters which you considered and the "why" of your decision. It is written on a form which is entirely separate from the "award" (your decision).

Here are some of the matters which should appear in your "findings":

1) An itemized list of the things in dispute.

2) A description of any "proofs" that either party gave you during the hearing.

3) A description of the arguments each party made during the hearing.

4) Your assessment of the case each party made and the reasons for your decision on each of the things in dispute.

We'll discuss each of these items briefly; however, your training will cover these matters in more detail.

An itemized list of the things in dispute. Professional arbitrators refer to this as a "stipulation of issues". Here you set down each matter upon which the parties disagree and you are being asked to decide. These items are usually written as questions which you are to answer. Referring back to our case involving Mr. and Mrs. Jones' dispute over visitation rights, the list of things in dispute might look like this:

1) Should the parties (Mr. and Mrs. Jones) have any direct communication with one another and, if so, what form should that communication take?
2) Until otherwise resolved by the parties' attorneys, how will the question of child visitation be settled?
3) Who will transport the children during visitation periods?
4) Under what circumstances, if any, shall Mr. Jones enter the former marital residence?

A description of any "proofs" you received. All you do here is list anything either party gave you at the hearing in an effort to prove that they were "right". These might include copies of contracts, letters between the parties, bills, etc.

A description of the arguments of each party. In this area, you briefly outline the key points each party made in support of his or her point of view.

Your assessment of each party's case. In this section, you give the parties some insight into your reasons for deciding the matter in the manner you did. Often this involves balancing the rights of one party against those of another. In many cases, you can combine a description of the arguments with your assessment. Again, using Mr. and Mrs. Jones case as an example, you might write:

> "Mr. Jones argues that the children are his and that he is entitled to visit them whenever he has free time.
>
> While the arbitrator finds some merit in this argument, the rights of the father to visit the children must be balanced against other factors.
>
> Mrs. Jones argues that she now is employed on a full-time basis and that the children are either away from the house at a day care center or at home in the custody of a baby sitter. Further, she states that she is often away from home on the weekend. She seeks to limit the father's visitation to a prearranged weekend once each month.

> The arbitrator sympathizes with many of Mrs. Jones' problems, but feels that in this particular case, the best interests of the children and Mr. Jones require more flexibility than Mrs. Jones has previously been willing to grant."

A sample of a complete finding is to be found at APPENDIX E, and should serve as a guide. You will, however, gain practice in writing "findings" during your training.

B) The Decision.

Your decision in the case (called an "award") is written on a separate document. A copy of this form will be provided to you by the tribunal, and you will, of course, complete the required information.

While you will receive practice on award writing during your training, here are some matters which you must consider.

1) Language you should use. Remember, mediation "recommends" -- arbitration "decides". Accordingly, you should stay away from language that is neither directive nor decisive.

Here are some examples of language not to use:

"The arbitrator suggests that Mr. Jones not enter the house. . ."

"The arbitrator recommends that Mr. Smith pay Mr. Jones. . ."

"Mrs. Smith ought to pay Mr. Jones $50.00 on or before. . ."

Instead, use terms which make it clear that your decision is final and binding. For example:

"The arbitrator directs that Mr. Jones not enter the house. . ."

"The arbitrator orders Mr. Smith to pay Mr. Jones. . ."

"Mrs. Smith will pay Mr. Jones $50.00 on or before. . ."

2) Specific Directions. We've discussed this matter earlier, but we want to reemphasize it. You must not be vague in your directions to the parties.

Don't tell Mr. Smith to pay Mr. Jones "within a reasonable time". The two parties may have quite different ideas about what constitutes a "reasonable" payment period.

Instead, tell the parties exactly what you believe is a reasonable time, tell them what form payment should take and let them know how the actual payment is to be delivered.

3) Don't Rule on Guilt or Innocence. Your award should direct the future actions of the parties. It should not determine one party "guilty" of some offense, nor should it decide a party is "innocent" of a charge.

4) Don't let your Award Stray from the Parties or the issues in dispute. Your authority to decide a case comes from the individuals who have signed an agreement to arbitrate. Your decision can only direct the actions of those who have signed that agreement. Here is an example:

> Mr. and Mrs. Jones have a dispute over a common driveway they share with Mr. and Mrs. Smith. During the course of the hearing, you discover that the real cause of the dispute is a tenant of Mr. and Mrs. Jones, who parks his car without any regard for Mr. and Mrs. Smith's rights. However, Mr. Adams, the tenant, has not signed an agreement to arbitrate -- although he appeared at the hearing as a witness.

Since Mr. Adams has not signed an agreement giving you any authority, your decision cannot direct his actions -- even though you realize that his careless parking is the real cause of the dispute. However, your award might direct Mr. and Mrs. Jones to establish a regular parking place for Mr. Adams in an effort to avoid future problems.

Likewise, your authority as an arbitrator only covers those issues the parties have agreed to submit to you for a decision. You can't pull some other issue in from left field and decide it without the parties specific permission. Here's an example:

> In our child visitation case involving Mr. and Mrs. Jones, there were four separate issues involved: 1) Direct communication between the parties; 2) Child visitation; 3) Transportation of the children; and 4) the husband's entry into the wife's house. The parties did not agree that you had any authority to rule on a matter involving child support payments, and your decision cannot involve that subject.

5) Don't Use Your Award to Punish a Party. The dispute settlement rules give you the authority to direct the parties future actions in matters which relate directly to their dispute. You also have the authority to compensate one party for an actual loss suffered at the

hands of another party. However, the rules specifically prohibit you from awarding "punitive damages" -- a settlement which has no bearing upon the actual loss incurred by a party, but merely "punishes" a party for some behavior. Here's an example:

> Smith and Jones have a dispute involving property damage. Smith had repeatedly warned Jones that a dead tree on Jones' property was dangerous and should be removed. During a high wind, the tree fell on Smith's tool shed, doing $500 in damages. If the facts warranted it, you might award the full $500 to Smith to compensate him for his actual loss. However, if your decision ordered Jones to pay Smith an additional $500 for failing to remove the tree after it had been called to his attention, that would be considered "punitive damage" -- something you ordered solely to punish Jones for his behavior. You have no authority to do this, and Jones would be under no obligation to make this additional payment.

In summary, your decision must be specific and it must direct, not suggest, the parties actions. The language you use should never imply guilt or innocence of either party, and you must stick to the issues the parties have given you the authority to decide. You cannot order someone to do something if that person hasn't signed an agreement to arbitrate, and you cannot use your award to "punish" a party.

CHAPTER IX

REOPENING THE CASE

If you served as a mediator, you and the parties signed a settlement agreement at the hearing. The parties agreed on the language, and they appeared to understand what each of them was to do to comply with their agreement.

However, two weeks later, problems have arisen. Either the parties aren't exactly clear on what they're supposed to do, or circumstances have changed, and the parties can no longer do what they agreed to do.

If you served as a mediator/arbitrator -- and you were required to issue a decision -- you made every effort to ensure that your decision was specific and clearly worded.

However, the parties don't understand one portion of your decision, and they want you to clarify it.

What happens now?

First, do not have any direct communication with the parties.

It is possible that one of the parties may contact you, explaining that he or she doesn't understand a portion of the agreement or decision. If this happens, tell that individual that you cannot discuss the matter. The rules of dispute settlement prohibit that. Tell the party to contact the tribunal for information on what to do.

When the parties have arrived at a settlement at the hearing, they normally understand exactly what they are supposed to do. However, they may no longer be able to do what they agreed to do. For example, a landlord may have agreed to return a tenant's personal property. The day after the hearing, however, the property was destroyed in a fire.

Whatever the circumstances, the tribunal is in the best position to serve as a "go-between". If some alternative arrangement can be worked out by the tribunal between the parties, another hearing may not be necessary. If that proves impossible, the tribunal will invite the parties back for a second hearing. You would, of course, be notified of the status of the matter.

If you've issued a decision (award) in the case, you have no authority to issue any statements clarifying your decision unless both parties consent -- in writing -- to such an action.

If one party requests a clarification, they must make that request, in writing, to the tribunal. The tribunal will then contact the other party, requesting that party's written agreement to have the arbitrator issue a statement of clarification.

If both parties agree, the tribunal will contact the arbitrator with the request.

If one party refuses to agree to a clarification, the tribunal will notify both parties that the arbitrator can issue no further clarification of his decision.

CHAPTER X

THE TOOLS OF YOUR TRADE

Every business, profession or trade has its tools -- certain basic equipment without which it is impossible to do a job. Mediation is no exception.

A mediator's basic equipment isn't tangible, like a hammer or a stethescope, but it just as essential to his or her work.

In this chapter, we're going to take a look at the following basic tools of your trade:

1) Neutrality

2) Trust

3) Time

4) The Undesirable Alternative

5) The Caucus

Almost every other technique you'll learn during your training will relate, in some way, to one of these five tools. In many cases, the five tools relate to one another. Without these tools, you and the parties stand little chance of coming to a resolution of a problem.

A. Neutrality.

Neutrality, like beauty, is half real and half in the eye of the beholder. You may or may not hold biases about a particular case. However, that does not necessarily have any bearing upon whether or not one of the parties views you as biased.

Let's first look at your own biases. Everyone has them, and they will affect your handling of an individual case. In some situations, neither you nor the parties will recognize your bias. In other cases, your bias should cause you to disqualify yourself from a particular case.

Some biases are such a basic part of our personality that we have difficulty recognizing them. These are usually biases which are a part of the particular culture into which we were born.

Here's a brief exercise to illustrate our point. Listed below are a series of "sayings". Take a separate sheet of paper and jot down your feelings about each of these sayings:

1. A woman's place is in the home.

2. Children should be seen and not heard.

3. The customer is always right.

4. Early to bed, early to rise, makes a man healthy, wealthy and wise.

5. An eye for an eye; a tooth for a tooth.

6. To the victor belongs the spoils.

7. Money is the root of all evil.

8. A man's home is his castle.

9. Let the buyer beware.

It really makes little difference what you wrote about each of these sayings. The point is that nearly everybody has some feelings -- pro, con, mixed -- about each of them.

When the mediator and the parties involved in a dispute hold essentially the same biases, these biases normally don't cause a problem. However, when the mediator's biases and those of the parties differ, one or both of the parties will perceive the mediator as "unfair".

During your training, you'll have the chance to participate in a role-playing exercise which will better illustrate this matter.

In addition to certain "cultural" biases we all have, each of us may have certain biases which we'll call "situational" biases.

These biases are unique to each individual, but they can very definitely affect a mediator's neutrality. This subject, too, will be further discussed during your training.

For the sake of this discussion, let's assume that you have no biases which would affect your handling of a particular case. That's still a little less than half the battle.

No matter how unbiased you are, if one (or both) of the parties believes that you're biased, you've lost your neutrality.

In mediation, appearances do count. Form is as important as substance. People will judge you more by what you do than what you say.

The appearance of neutrality is a very complex subject. Remember, we are dealing with a situation in which three (and sometimes more) individuals are attempting to develop a brief, but intense, personal relationship.

The parties, too, have their cultural and "situational" biases. One of the parties may have a bias against your age, sex, race, nationality, educational background -- and there's really not to much you can do about it. In many cases, a good mediator, projecting a real sense of fairness and neutrality, can overcome a reluctant party's built-in prejudice. Note we've said "overcome", not "eliminate".

However, in addition to the parties' own biases -- which you really can't do anything about -- there are a number of other factors which can affect your neutrality. If you recognize these factors, you can -- to some degree - control them. In addition, we've devoted a separate chapter to them in this manual.

Briefly, however, these are some of the things that we'll be talking about:

What you say -- your ability to verbally communicate with the parties.

What you don't say -- your ability to listen and to respect confidences.

How you appear -- your "body" language" and other forms of "non-verbal" communication.

Your neutrality is perhaps the most precious gift you can give to people with disputes. You'll discover that it is one of the most fragile. Maintaining it throughout the course of a hearing is one of the most difficult, yet essential, jobs you undertake when you agree to serve.

B. Trust

Normally, the parties to a mediation are angry and distrustful. The kinds of cases you will handle almost always involve people who had some kind of relationship before the dispute arose. Each comes into the hearing believing the other has betrayed him/her. Promises were broken; agreements were not kept.

The parties don't trust each other, they don't trust the mediation process, and they probably don't trust you.

As we said before, your neutrality is a tool. It allows you to build a second tool -- trust.

As a mediator, you have to allow the parties to vent their anger and begin to build their trust in you and in the mediation process. If they are unwilling to take some risks with you, they won't take any risks with one another. If they don't do that, you'll probably never reach a settlement.

Here are four important ways to help you build the parties trust:

1. Start your conversations by telling your purpose.

How would you react if a stranger approached you on the street and asked, "Where do you work?"

Before we'd answer that question, most of us would want to know who was asking the question and why he wanted to know.

If, however, the stranger said, "Excuse me, I'm looking for an insurance office -- do you work in this building?", most of us would answer the question without hesitation. In addition, we'd probably volunteer more information than the stranger asked for.

If I don't trust you, I don't want to share information and opinions with you. I'm afraid your knowing these things might somehow hurt me.

Two parties in mediation feel very vulnerable. They are very unlikely to tell you anything really important unless they feel safe in doing so.

Whenever you need to ask for information, particularly when you're opening a new area of discussion, tell the parties why you want to know. Now, in saying this, we don't mean that you have to launch into a ten minute speech about your reasons for asking the question.

If you want one of the parties to draw a sketch of her apartment, however, give her enough information so she understands why you're asking -- "Mrs. Jones, I'm having a hard time picturing the layout of your apartment, and I think its important for me to understand where all the rooms are. Would you make a quick sketch of the rooms for me?"

When you do this, you're telling the parties two things. First, you trust them enough to let them know why you're asking; second, you can be trusted, since you have no hidden reason for asking the question.

2. Respect the other person and his or her feelings.

There are, of course, very obvious ways of showing that you respect both parties. These are the elements of common courtesy and good manners all of us learned at some point.

There are other, less obvious ways, however, One of these is your attitude toward the other person. Through the way in which you listen to his ideas and explain your own, you let him know what you think of him.

If you simplify your ideas so that a three-year-old can understand them, you may communicate a low opinion of the other person's ideas.

If you keep interrupting the other party, you're telling him that his ideas aren't important enough to listen to.

If you share your feelings with the other party, you're implying that you trust him.

If you ask for his opinion, you're telling him that his judgment is worthy of respect.

No matter how brilliant your mediation technique or how logical your suggestions are, they are worthless if one of the parties is resistant. One of the surest ways to make one party resistant is to show that you don't respect him.

3. Accept irrelevancy and explore its purpose.

In any hearing, there is a strong temptation for the mediator to keep the discussion moving so that little time is wasted. It is irritating to follow one party's apparently aimless wanderings into side issues which seem to have no bearing at all on the issue at hand.

However, its often worth doing. What appears to you as irrelevant may be the real, central issue to the party who's telling the story.

It is not only important for you to understand the facts in the case, it is vital that you also understand the feelings that the parties have about their dispute. You can't do that if you force the parties to "stick to the facts".

It is difficult to build trust when you fail to explore what you think is irrelevant. You're telling the party that his feelings aren't important to you or to the case.

4. Respect Confidences.

During the course of a hearing, it may be necessary for you to meet with one or both of the parties privately. You do this in an effort to learn if one party is holding back information he or she is afraid to share with the other party. You also use these meetings to find out if the parties are willing to compromise.

During the caucus, you may receive information of a confidential nature.

It almost goes without saying -- but we'll say it anyway.

You will almost always destroy both parties trust if you reveal confidential information you received from one party to the other.

C. Time

A third tool at yor disposal is time.

A good mediator is aware of this tool and uses it to his or her full advantage.

In many cases, the parties enter mediation after having been involved in a dispute for a sometimes lengthy period. It is improbable to imagine that you'll be able to help the parties resolve their problem according to some specific time schedule.

During your training, you'll play the role of a mediator in a mock dispute. Because of the time constraints during training, most mock hearings take about one hour and usually involve one caucus.

Unfortunately, some novice mediators develop a kind of internal clock -- based on the training. The "clock" says, "It's been an hour and a half since we started; I've met with both parties; I've caucused with each one privately; we haven't reached a settlement. Time's up".

The parties often come into the hearing with very rigid positions. They may cling to those positions for some time. Within certain limits, the longer the hearing runs, the more likely these positions will be to soften. Some people can cling stubbornly to an outrageous demand for an hour or two; after three hours, all but the most stubborn will begin to ask themselves "how much longer is this hearing going to go on". They may begin to reexamine an inflexible position.

There are times when a mediator can help achieve a settlement simply by appearing to be completely unaware of time.

In certain other situations, a mediator can help push toward a settlement by making the parties very aware of time. If the parties appear to be very close to a settlement, but they are deadlocked over one or two minor points, the mediator can interject a deadline into the process.

For example, the mediator might point out that he has an appointment and must leave in a short period of time, or that the hearing room must be vacated. If the parties are close to an agreement on most points, they may be more willing to compromise on those that remain rather than see the whole agreement walk out the door with the mediator.

Knowing when to appear unconcerned about time and when to set deadlines is a subtle skill, and experience is the best teacher. Time is, however, a tool, and every mediator should practice its use.

D) The Undesirable Alternative.

In international relations, the undesirable alternative to negotiation is war. When unions and management sit down at the bargaining table, the undesirable alternative to successful negotiation is the strike.

We'd all like to believe that individuals negotiate and compromise because it is the "proper" thing to do. Realistically, most people negotiate because it is preferable to something far worse.

A mediator relies on the undesirable alternative as another tool to promote settlement. Since most parties are aware of the alternatives, the mediator simply reminds the parties -- at crucial moments during negotiation -- what those alternatives are. He or she does this in a "matter of fact" way, and encourages the parties to weigh their desire to press a demand against the alternatives if the negotiations fail.

Here are some of the undesirable alternatives which might exist in a community dispute:

The Court -- if the dispute was referred from a criminal or civil court, it will be returned to the court if a settlement isn't reached. Here, the parties are faced with the possibility of another delay, the possibility of an unpleasant decision, having to present their case all over again and having their dispute become a matter of public record.

The arbitrator's decision -- if you have the authority to make a decision in the case, you remind the parties of that fact. You tell them that a decision you hand down will probably not be as acceptable as a settlement the parties reach themselves. You point out that if they reach an agreement, they can walk out of the hearing with the signed settlement, but it will be at least ten days before they receive your decision.

The unresolved dispute -- if the case didn't come from the court and you have no authority to make a decision, you point out that they must have wanted to settle their problem, or they wouldn't have come to the dispute settlement service. You try and explain to them that the unresolved problem will continue to fester. You emphasize that the time they've already spent will have been wasted without a settlement. You may point out specific issues within the parties' dispute that will continue to cause them problems.

Pointing out these alternatives to the parties may help them reexamine their positions and arrive at an acceptable settlement agreement.

E. The Caucus.

One of the more important tools available to the mediator is the caucus -- a private meeting between the mediator and one of the parties.

The purpose of the caucus is to obtain information which the parties might be unwilling to share in front of each other, to explore areas of compromise in a "face-saving" setting and to avoid open hostility between the parties.

There are, however, two major disadvantages of the caucus, and you should be aware of them. While you're meeting with one party, the other party may suspect that you're taking sides. Further, separate meetings with the parties don't help open new channels of communication between the two.

If the parties are working well with you during the hearing, if they appear willing to compromise and discuss their problem, there may be absolutely no need for a caucus. Don't automatically assume that a caucus must take place in every hearing.

However, if you've heard both sides of the dispute and the parties seem unwilling or unable to make even a tentative offer toward settlement, you should consider using the caucus.

First, explain to both parties exactly what you plan to do, and emphasize the confidential nature of the meeting. Ask one of the parties to remain in the hearing room, and escort the other party to a waiting area. If you are holding your hearing at the tribunal's offices, a tribunal staff member may be available to get coffee for the waiting party and, perhaps, keep that party company. If you are not meeting in a location where other staff members are available, REMEMBER . . .

> The party who's waiting may suspect you're taking sides during the private meeting.

To minimize this problem, let the waiting party know how long you expect to meet (let's say 15 minutes). If your private meeting goes beyond 15 minutes, excuse yourself from the private meeting. Explain the delay to the other party and reassure him or her that everything is alright. Do this every 10 or 15 minutes until you've concluded the caucus.

When you are first alone with one of the parties, again explain that anything said in the caucus is private and that you won't divulge any private information to the other party without permission.

Ask the party if there is anything about the dispute that he or she would like you to know. If there is, listen carefully, and don't interrupt.

Explore possible areas of compromise, and try and determine what each party's "bottom line" is.

When you feel you've received all the information you're going to get, again remind the party that you'll keep the information confidential, but take the time to ask if there is anything that the party said that he or she wants kept confidential. You may discover that -- while one party waited until the caucus to tell you something -- once its been told, he or she no longer cares whether the other party finds out.

Always ask if anything you've been told is confidential; never divulge anything you've been told is private.

After meeting with one of the parties, you may feel you've got a settlement. It may be absolutely apparent that there isn't any need for a caucus with the other party, because one party is willing to give everything the other originally asked.

Remember, though, that you haven't got a settlement until both parties have signed a written agreement. Remember, too, that your continued neutrality and the other party's trust are important to that settlement.

It is a good idea to caucus with the other party, even if it isn't absolutely necessary. Thus, you're giving "equal time" to both.

Continue the back-and-forth caucus process as long as it seems to be productive. You'll get a better sense of this during your training.

Once again, remember that the caucus can be very productive; however, it holds many pitfalls if you fail to recognize the ways your neutrality can be jeopardized.

Neutrality, trust, time, alternatives and the caucus -- these are your tools. In the next chapter, we'll discuss some of the major techniques you should use throughout the hearing.

CHAPTER XI

EFFECTIVE MEDIATION

In the last chapter, we mentioned three elements which had a direct bearing on the parties' view of your neutrality. These elements were:

What you say

What you don't say

What you do

From the moment you first meet the parties, through the hearing and caucus to the final settlement agreement or decision, your success will depend on how well -- or poorly -- you handle these three elements.

A. What you say

In many ways, this is the easiest of the three elements to explain, and during the course of the training, most individuals develop considerable skill in verbal techniques.

What you say includes all the verbal portions of the hearing, from the moment you first introduce yourself until the parties leave the room at the end of the hearing.

1. In general, one of the early mistakes mediators make -- and the easiest to correct -- is the use of "loaded words". These are words which conjur up vivid images in the mind of the person hearing them. To a greater or lesser degree, all words are "loaded". As a mediator, you want to avoid those that are heavily loaded and which carry negative or undesirable meanings.

Here are some examples of what we mean;

Loaded Words	More Positive Expression
Stole	Took without permission
Not true, lied	Misleading
Always	Usually
Never	Seldom
Wrong	Not quite correct

These are only a few of the thousands of heavily loaded words, phrases and slang expressions we hear every day. We certainly don't intend to list them all here.

You have little control over the words the parties use to describe their case. Because they are often hurt and angry, the parties may use the most loaded words they can think of to describe the other party's behavior.

You do have considerable control over the words you use, however, and you should weigh them carefully before you adopt one of the parties' expressions as your own.

Mr. Jones: ". . .and then, to top it all off, he stole my tool box."

Mediator: "Mr. Smith, were you aware of the consequences when you stole Mr. Jones' tool box?"

Stealing is a crime. In adopting Mr. Jones' term, the mediator -- in this example -- implies that he has accepted Jones' version of the story and is "accusing" Smith of a crime. Its very likely that the mediator's neutrality will slip a few notches in Smith's eyes.

2. Asking questions. Since we've already mentioned the subject, we'll simply remind you that -- in most cases -- its a good idea to explain why you want information before you ask for it.

3. Verbal responding. When you ask a question, make an observation or venture an opinion, you are trying to communicate to the parties that you hear them and understand their viewpoint.

There are ten major verbal responses you'll likely use, and they are:

a) Minimum Verbal Response: These are the verbal counterpart of occasional head-nodding. These are verbal clues such as "mm-mmm", "yes", "I see", "un-huh" to indicate that you are listening and following what the client is saying.

b) Paraphrasing: This is a verbal statement that is interchangeable with the party's statement, although the words are synonyms of words the party has used. For example:

Party: "I had a lousy day today."
Mediator: "Things didn't go well for you today."

c) Probing: This is an open-ended attempt to obtain more information about something and is most effective when used in the form of a statement such as "Tell me more", "Let's talk about that", "I'm wondering about. . .", rather than one word questions like "How.", "When", "Who?".

d) Reflecting: This refers to communicating our understanding of the disputant to that person. We can reflect stated or implied feelings, as well as things we have observed in the parties' behavior. Examples of reflecting are: "You're feeling uncomfortable about seeing him?", or "Sounds as if you're really angry with your brother."

e) Clarifying: Clarifying is an attempt to focus upon or understand the basic nature of a party's statement. Examples are: "I'm having trouble understanding what you are saying. Is it that. . .", or "I'm confused about. . . Could you go over that again, please?".

f) Checking Out: This occurs when the mediator is genuinely confused about his or her perceptions of verbal or non-verbal behavior or when the mediator has a hunch that bears trying out. Examples are: "Does it seem as if. . .", or "I have a hunch that this feeling is familiar to you?" The mediator is asking the party to confirm or correct the mediator's understanding.

g) Interpreting: This occurs when the mediator adds something to the party's statement, when the mediator tries to help the client gain an understanding of his or her feelings. For example:

Party: "I just can't seem to bring myself to write that report. I always put it off, and it's hanging me up right now."
Mediator: "You seem to resent having to do something you don't want to do."

h) Confronting: This involves honest feedback about what the mediator thinks is going on with one of the parties' Confronting should be used with great caution. When it is recklessly done, it can jeopardize the mediator's neutrality. It is a technique which is seldom used outside the caucus. Confrontation may focus on "genuineness", such as "I feel you really don't want to talk about this. . .". It can also focus on a discrepancy the mediator has observed, such as "On the one hand, you seem to be hurt by not getting that job, but on the other hand, you seem sort of relieved, too."

i) Informing: This occurs when you share objective and factual information with them.

j) Summarizing: Summarizing is a clarifying type of statement by which the mediator synthesizes what has been communicated and highlights the major themes. This is very important at the end of a session or during the first part of a subsequent session. Summarizing is beneficial when both the mediator and the parties participate and agree with the message. It is also an opportunity to encourage the parties to share their feelings about the mediator and the session.

4. General Guidelines

Here are some general guidelines which should govern what you say during a hearing:

a) Try and use the same type of vocabulary as the parties are using.

b) Speak slowly and clearly enough so that the parties understand each word.

c) Use concise -- rather than rambling -- statements.

d) Take your cues from the parties -- follow up on matters they've introduced into the hearing.

e) Always talk directly to the parties -- not about them.

f) Encourage the parties to talk about their feelings.

g) Time your questions and comments to encourage communication, not block it.

B. What you don't say

One of the more difficult areas for a novice mediator is silence. Most individuals who volunteer as mediators have good communication skills. Learning when to be silent -- and how to deal with the parties' silence -- is an equally important skill a mediator must acquire.

Generally, the more you say about a case, the less you'll learn. Many of us are uncomfortable with an awkward lull in conversation. When it occurs, we want to fill the void. You must learn to control that impulse. If the silence is that painful, one of the parties will fill it, and you'll learn something. If you fill it, you won't learn anything you don't already know.

There are a number of different "types" of silence during a hearing. Since you have to listen to the parties in order to understand their viewpoint, you will have to learn to recognize the reasons why silences occur. Then you're in a position to encourage the parties to communicate.

Here are some of the various "types" of silence, together with some suggestions on how to handle them:

1) Toe-the-Mark Silence. One party takes a respectful, "wait-until-you're-asked" approach. He only talks when he knows what the mediator wants him to talk about, and he only gives enough information to answer the specific question.

How to handle this: Naturally, all parties have the right to be silent. With this party, you have to reassure him that he also has the right to speak. Here are some appropriate comments:

--"I'm interested in what you are thinking. It would help us decide on some directions to take."
--"There must be lots going on. I wonder if you are ready to share it with me."

2) Awkward Silence. As you well know, this is an uncomfortable silence that comes when one topic ends and the parties are searching for something to discuss next. At other times, the party may founder because he doesn't know how to begin or where to go next. This turning point makes the conversation difficult, because the party doesn't know how to make a transition from a general conversation to a more serious concern.

How to handle this:

--"I feel as if both of us have nothing more to say about this point."
--"Perhaps we've said all we are going to say about this matter."

3) Hot-Seat Silence. The unpleasant feeling of sitting on a "hot-seat" of anxiety is part of the awkward silence. One of the parties is fearful and feels very alone, so he clams up.

How to handle this: Each party needs acceptance and support from the mediator; the anxious person needs it most. If one party feels withdrawn and isolated, the mediator begins the conversation with some item which seems likely to ease the party into conversation:

--"It's okay if you want to wait until the words come."
--"Hard to say what you want. . . isn't it? If you give me a hint, maybe I can help you find the words."
--"It's okay to say whatever you like. Begin where you want."

4) Jumbled Silence: One of the parties may say something that confuses the mediator, or the mediator may have said something that has confused the client. The pause which follows indicates that the party or the mediator (or both) is confused.

How to handle this:

--"What I said just now about. . . seems to have confused you."
--"What I meant was . . ." (Mediator rephrases his previous statement.)

5) Foot-dragging Silence: The party is reluctant to speak and appear hostile. He may resent the mediator's probing and uses the "silent treatment" as a form of defiance. In other cases, the party simply isn't interested in what the mediator has to say. The party shows his annoyance through an antagonistic silence. "Foot-dragging" silence is more likely to occur in cases where one party reluctantly entered mediation (for example, in cases referred by the court).

How to handle this: Unless you view this "silent treatment" as a challenge, rather than a threat, you'll have difficulty handling it. It is important that you avoid a response that shows you feel personally attacked. Instead, your response should accept the party's form of protest.

--"It seems to me that you're reluctant to talk about. . ."
--"I can wait, but if there's something you're feeling, let's get it out. . .let's look at it together."

6) Retreat Silence: This usually occurs when both the mediator and one of the parties speak at the same time -- then both are silent, each waiting for the other to speak. This is an easy situation to remedy.

How to handle this:

--"Sorry I got in the way. Go ahead."
--"What were you saying."
--(just smile and nod encouragingly to the party)

7) Reinforced Silence: Here is a situation where you have encouraged one or both parties to remain silent. In some cases, you aren't really aware that this is happening. Perhaps one party has noticed that every time there is an "awkward silence", you rush in to fill it. By increasing the number of awkward silences, the party has manipulated the situation so that, ultimately, you're doing most of the talking.

How to handle this: You must be aware of your power to steer the parties. If you find yourself doing too much (or too little) talking, take time to examine what's really happening.

8) Mediator's Silence: There are times when you need to be quiet -- to collect your thoughts or to consider some key point one of the party's has made. If one of the parties is somewhat insecure or hostile, your silence may be threatening.

How to handle this:

--"I just don't have anything to say right now. . .I'm with you. . .I'm listening. . .Please go on."

"Truthfully, I don't know why I have so little to say today. . . just played out, I guess. I'm with you, though; please go on."

And speaking of the mediator's silence, when you're not speaking, you should be listening. Listening is more than not speaking; it is an art, which you should learn to apply. Here are three listening tips:

Be comfortable with silence. As we've said before, silence can be an uncomfortable experience in conversations. However, you can use silence to gather more information and to organize what you've already heard. In most cases, you can count on the parties to fill the communication's gap, possibly by expanding on what has just been said or even by giving you information you would never have obtained otherwise. Only if the speaker appears uncomfortable with the silence should you fill it -- and before you do, we suggest you try and determine why the speaker is silent.

Concentrate on physically giving your attention. There is nothing more frustrating than talking to someone whose mind seems a million miles away. Give the speaker your attention by maintaining eye contact and minimizing your own activity. Lean forward into the conversation. Facial expressions, nodding the head and other physical signs of interest help the speaker operate without interruption.

Listen with understanding. Try to place yourself in the speaker's position and to appreciate what the words really mean to the person who's saying them. Try to understand not just the words, but the person speaking, as well.

C. What You Do.

Why is it that some mediators can turn in an absolutely flawless technical performance during the hearing, yet the parties are unable to reach a settlement? Why are some highly proficient arbitrators suspected of "bias" after a decision is handed down? Why is it that some neutrals seem to stumble through the technical points of mediation or arbitration, yet the parties praise the neutral's "skill" and "lack of bias"?

In many cases, the answer lies not in what the arbitrator or mediator said during the hearing, nor in how closely he or she followed the procedural requirements. Instead, the answer lies in what the mediator did.

We've said it before -- but it deserves reemphasis. Actions DO speak louder than words, and the parties will judge your skills and your neutrality at least as much by what you do as by what you say.

During your training, you will spend a good portion of your time learning to recognize many of the things that you -- and other mediators -- do to influence the parties' belief in your neutrality and skill. We can't possibly cover all these things in the manual; we can give you some basic guidelines, however.

1. Your neutrality. Your neutrality is a fragile commodity. A few, highly-skilled mediators are able to build on their neutrality throughout the hearing. Most of us are fortunate if we are able to simply maintain the parties' initial perception of our neutrality throughout the hearing.

Most disputants seem to be willing to accept that the individual assigned to hear their case is neutral; however, from the moment the mediator enters the hearing room at the start of the case, the parties are constantly listening, looking for clues, sizing you up and revising their impression of your neutrality.

The longer the hearing goes, the more you interact with the parties, then the greater the chance that your neutrality will drop a notch or two in the eyes of one (or both) of the parties.

We say this only to emphasize that your continuing acceptability to the parties is tenuous. You can't simply assume that, because you know you're neutral, the parties will continue to see you that way throughout the process.

Like trust, neutrality must be earned throughout the hearing.

2. First impressions. Remember the old saying "don't judge a book by its cover"? It's a good goal that we should strive toward; unfortunately, many people do judge books by their covers -- and they often refuse to change their mind even after they've read the story.

For this reason, the first five minutes or so of the hearing are very important. It is for the period when you are being judged by your "cover".

You can't possibly avoid all negative first impressions. In most cases, you won't be exactly what the parties expected you'd be ("he's younger than I expected". . ."she's just another pretty face", etc.).

You can, however, avoid some "first impression" problems through preparation and common sense.

--Mediator Jones arrives for the hearing over one-half hour late.

(Non-verbal message: Your problem really isn't that important to me)

--Mediator Smith spends the first 5 minutes of the hearing mispronouncing one of the parties' name.

(Non-verbal message: I'm not really very concerned about you or your problem)

--Mediator Johnson opens the hearing by referring to one party as Dr. Jones and the other party as Bob.

(Non-verbal message: I am impressed by titles)

A little preparation prior to the hearing can help you avoid some of these pitfalls. Try and learn something about the parties from the tribunal. Spend a few minutes going over the material you received about the dispute. Arrive at the hearing site in advance of the parties. Finally, use a little good, common sense when you arrive in the hearing room. The parties are sizing you up; you should do the same.

--Mediator Jones comes to the hearing directly from work, wearing a three-piece business suit. When he enters the hearing (a landlord/tenant dispute), he notices the landlord is also wearing a three-piece suit; the tenant is wearing blue jeans and a work shirt. Common sense tells Jones that his neutrality may be jeopardized. He readily solves the problem by telling the parties he "needs a few moments to get comfortable", then removing his suit coat, vest and tie. Rolling up his shirt sleeves, Jones sits down at the table and begins the hearing.

3. Body Language. We all "speak" and understand body language. Some of us, however, are much more aware of this non-verbal communication.

One of the goals of your training program is to make you more aware of your own body language and to help you interpret the body language of the parties.

There are two major points about body language which we'll cover briefly below.

a) Eye contact:

"He couldn't look me in the eye."

"She just kept staring at me."

Each of these bits of conversation creates an impression in our mind about the person being discussed. The man who can't "look you in the eye" is viewed as being bored, or nervous, or painfully shy -- perhaps even untrustworthy. Someone who "stares" may be aggressive, insolent, even challenging.

It is important for you to understand that your eye contact (or lack) of eye contact) can definitely have an impact on the parties view of your skill and neutrality.

If you spend a considerable amount of time during the hearing making eye contact with one of the parties, while avoiding the other, the party you're ignoring will soon feel you don't care about his/her case. You may also give the impression that you've made up your mind about who's "right" and who's "wrong" in the case.

If one of the parties is telling his story, while you're looking at the ceiling, your shirt, and an empty chair, it won't take long before the party who's speaking will stop. After all, if you're not interested in what's being said, why say anthing.

You should try to make eye contact with both parties on a roughly equal basis throughout the course of the hearing and during the caucus.

However, you can have too much of a good thing. During training, most neutrals become aware of their need to make eye contact during a hearing. In an effort to do so, some overcompensate. Eye contact becomes "staring" when we look someone squarely in the eye and hold that gaze beyond the point which is considered a "normal looking time".

While this "normal looking time" may vary from culture to culture, most Americans are comfortable if the person they're talking with makes eye contact roughly 50 percent of the time.

You'll get a much better sense of "eye contact" during your training. It is one of the major ways that we communicate with other people without saying a word.

b) Posture -- "Open/receptive" and "closed/rejecting"

As a neutral, it is important that we convey to the parties that we're open to their respective stories, willing to listen and trying to understand their viewpoints.

Yet no matter how often we try and remind the parties of this during the hearing, we have to be aware that our body language may be sending a quite different message. Your posture during a hearing can have a significant bearing on how well, or poorly, you communicate your neutrality.

Try this experiment. Sit in front of a mirror, as though you were facing two parties at a hearing table. Lean back in your chair, cross your arms in front of your chest and make eye contact with one of the imaginary parties. Then say: "I understand what you're saying, Mr. Jones, please go on."

Now, sit back up at the table. Fold your hands in front of you on the table, lean forward slightly, make eye contact, and again say, "I understand what you're saying, Mr. Jones, please go on."

Even though you're saying the same words in both cases, most of us would agree that the "lean-back-arms-crossed" posture appears more intimidating. Our body language seems to be saying "I've already decided who's right; go ahead and try to convince me I'm wrong."

During the hearing, take time every so often to check out your posture. It says a great deal to the parties about your neutrality and your interest in their case.

D) IN SUMMARY

Without a doubt, the procedures you'll learn to follow in mediation and arbitration are important. Once you've mastered the procedures, however, you'll discover that the real key to a successful dispute settlement process are all the intangible elements of technique.

What you say, what you don't say and what you do are elements you'll develop a "feel" for during your training. A sophisticated computer could probably handle the procedural aspects of mediation and arbitration. It is the human element, well applied, that makes the process challenging for the neutral and rewarding for the parties in dispute.

CONCLUSION

When it is presented in a manual such as this, the dispute settlement process appears somewhat intimidating. On one hand, we've barely scratched the surface of all the information that's available on the subject; on the other hand, the volume of information contained here is considerable.

Don't be discouraged. Boiled down to essentials, mediation and arbitration are effective dispute settlement procedures which place considerable emphasis on the full participation of the parties. The information presented in this manual is largely common sense, and most of us have been settling disputes -- in one way or another -- most of our lifetimes.

In many cases, the parties are anxious to resolve their dispute, sincerely appreciate your efforts to assist them and cooperate fully with you throughout the proceeding.

At a time when disputes of all types appear to be increasing, when court calendars are growing longer, the availability of mediation and arbitration -- and the willingness of volunteers to serve as neutrals -- is a significant public service.

APPENDIX A

DISPUTE SETTLEMENT RULES

ARBITRATION RULES FOR COMMUNITY DISPUTES

Prepared by:

DISPUTE SETTLEMENT CENTER

of the

Better Business Bureau of Western New York, Inc.

Section 1 -- Definitions

A. "MEDIATION/ARBITRATION" is a process in which two or more persons agree to allow an impartial person assist them in trying to reach
B. a settlement of their dispute. If a settlement cannot be reached, the parties agree to let the impartial person decide their dispute. If you agree to use this system, you agree to accept the decision and you give up your right to appeal.

C. "YOU" as used in these rules, means one of the parties involved in a dispute.

D. "TRIBUNAL" means the organization or agency administering the mediation/arbitration process.

E. "NEUTRAL" means the mediator/arbitrator selected or appointed to conduct the hearing and make or sign a final settlement in the dispute.

F. "CAUCUS", as used in these rules, means a process where the neutral meets privately with each party to the dispute as a way of gaining a better understanding of the problem and in an effort to promote a settlement.

G. "DISPUTES" which may be arbitrated under these rules include any dispute which both parties and the tribunal agree will be submitted to a neutral arbitrator. These disputes do not include matters which may not be arbitrated under law. Unless you agree otherwise, these disputes also will not include claims for loss of wages, mental anguish, punitive damages. A decision as to whether your dispute, or any part of your dispute, can be submitted under these rules rests solely with the tribunal.

H. SETTLEMENT AGREEMENT" or "CONSENT DECISION" are terms used to describe a settlement you reach with the other party at the hearing. If you and the other party both agree on a way to settle your dispute, the neutral will help you write that agreement on paper. This "Settlement Agreement" is signed by you and the other party, and it is included, word-for-word, in the neutral's decision -- called a "consent decision", because you and the other party "consented" to it.

Section 2 -- Application of these Rules

These rules apply to any dispute which you agree to settle (arbitrate) through the tribunal. You accept these rules when you sign an agreement to arbitrate; however, the tribunal cannot arrange a hearing unless both parties have agreed.

Section 3 -- The State Law

The law of the state of New York shall apply to any proceedings conducted under these rules.

Section 4 -- Beginning Arbitration

If your own efforts to resolve your dispute have not been successful, the tribunal may suggest mediation/arbitration to you, or you may request the tribunal to start a mediation/arbitration, or an agency of the court may refer you to the tribunal. The tribunal will prepare an arbitration agreement -- listing the matters in dispute -- for you and the other party to sign.

If you agree with the matters to be arbitrated under this agreement, you should sign the agreement and return it to the tribunal within FIVE DAYS of receiving it, unless the tribunal gives you additional time.

If you don't agree with one of the matters to be arbitrated, contact the tribunal and it will try to resolve the problem with the other party.

Your failure to return the agreement within FIVE DAYS will be considered to mean that you do not wish to have your dispute arbitrated.

EXCEPTION: If you have signed a prior agreement to arbitrate disputes through the tribunal, your failure to return the agreement to the tribunal in FIVE DAYS will be considered AN ACCEPTANCE OF THE STATED ISSUES.

When the tribunal has received the agreement from all parties to a dispute, it will begin the arbitration process.

Section 5 -- Appointing Your Neutral

The tribunal will maintain a pool of volunteers, who reflect to the extent possible the total community. The neutral will be appointed from this pool by the tribunal.

Section 6 -- Facilities and Costs of Arbitration

The tribunal will provide or arrange for facilities to hold your hearing and it will maintain all of your arbitration records. If you want an attorney to represent you, you are responsible for this cost.

Section 7 -- Communicating with the Arbitrator

You may NOT have any direct communication with the neutral about your dispute UNLESS ALL OTHER PARTIES ARE PRESENT, with the exception of

a caucus which takes place during the hearing. All communciation with the neutral should be sent through the tribunal. The tribunal will relay them to the neutral, with copies to the other party to the dispute. Except for your NOTICE OF HEARING form, all tribunal communications to you will be by regular mail or by other reasonable means, subject to state law requirements.

Section 8 -- The Arbitrator's Oath and Appointment

The tribunal will send the neutral a notice of his or her appointment to hear your case, together with a copy of these rules, your agreement, and any other appropriate material relating to your dispute. The neutral must sign a special oath and give this to the tribunal together with a disclosure of any relationships with any party to the dispute.

Section 9 -- Disqualifying neutrals; Filling Vacancies

Before signing the oath pledging to make a fair decision in your dispute, the neutral must disclose any financial, competitive, professional, family or social relationship, however minor, with you or any other party to your dispute. If the relationship is such that a fair decision cannot be made, the neutral must refuse to serve. All other disclosures should be given by the neutral to the tribunal, which will let you know about them and give you an opportunity to accept or reject the neutral. The tribunal, too, may reject a neutral on the basis of such disclosures.

If the neutral is rejected, either by the tribunal or by one of the parties, a new neutral will be appointed by the tribunal.

Section 10 -- Representation by a Lawyer

In an arbitration hearing, you may present your own case or have someone else represent you. If your representative is an attorney, you must give the lawyer's name and address to the tribunal at least SEVEN DAYS before the hearing, so the tribunal can inform the other parties in the dispute and give them an opportunity to get a lawyer if they wish.

Section 11 -- Inspection

In some kinds of cases, it may be helpful if the neutral makes an inspection of some product, service or property which may be involved in your dispute. Either you or the neutral may request such an inspection; however, the neutral has the final decision on whether or not to conduct an inspection.

If the neutral decides an inspection is desirable, the tribunal will be notified and a NOTICE OF INSPECTION form will be sent to you AT LEAST EIGHT DAYS in advance by certified mail, or by other methods permitted under State law. If you or a representative cannot attend, you will be given an opportunity to comment on any of the observations the neutral makes during the inspection.

Section 12 -- Experts

At the request of the neutral, the tribunal will make every effort to obtain a volunteer expert to examine a product, service or property at issue in your dispute. At the tribunal's option, the expert's findings will be presented in writing or in person at your hearing. At the hearing, you will have an opportunity to evaluate and comment on the qualifications of the expert and any findings made by the expert.

Section 13 -- Hearing Dates; Notice of Hearing

When a neutral has agreed to serve, the tribunal will set a time and place for your arbitration hearing, with due regard for your convenience and that of the neutral. Notice of your hearing will be sent to you at least EIGHT DAYS in advance by the tribunal by certified mail or by other methods approved by state law. If you object to the time or place stated in your notice, contact the tribunal IMMEDIATELY and let them know. If you do not object or if you come to the hearing, your acceptance of the notice will be assumed.

Section 14 -- Attendance at Hearings

Unless you otherwise agree in writing, only those with a direct interest in your dispute, which may include your lawyer, may attend the hearing. The neutral has the option of either permitting your witnesses to be present for the entire hearing or to appear only for their testimony.

Section 15 -- Absence of a Party

If you fail to come to a hearing after accepting notice of the hearing, the neutral MAY decide to hold the hearing in your absence. Your absence does not mean that the neutral will automatically decide against you. The neutral may, however, give you the right to present your statement and any evidence in writing within a set time.

Section 16 -- Interpreters

If you need an interpreter for your hearing and cannot provide your own, contact the tribunal and it will make every effort to find a volunteer interpreter or a neutral fluent in your native language. If there is a cost for interpreter's services, you will be responsible for that cost.

Section 17 -- Oaths

The neutral is required to sign a special notarized oath before your hearing. You and any witnesses may be placed under oath at the hearing, except in instances where the procedure is not required by the tribunal or by state law.

Section 18 -- Hearing Procedure

The neutral will decide on the order and procedures for you to tell your side of the dispute. You will be given an opportunity to make a full presentation of your case.

When the neutral has heard both sides of the dispute, he may wish to ask questions of you and the other party. The neutral will assist you and the other party in seeking an agreeable settlement of your dispute.

The neutral may wish to meet with you outside the presence of the other party. This is known as a "caucus". Normally, the neutral will also meet privately with the other party. The neutral will use these private meetings in an effort to help you and the other party settle your dispute. However, the neutral cannot base a decision on any information received only in the private caucus unless the other party has heard that information and has had a chance to comment upon it.

If you and the other party cannot arrive at a settlement, the neutral will bring all parties back together. You will have the opportunity to make a closing statement. When the neutral is satisfied that all sides of the dispute have been heard, your hearing will be closed.

Section 19 -- Admission of Evidence

You may give your presentation and evidence without being restricted by the usual rules of evidence, and the neutral will decide how relevant or meaningful it is in coming to a final decision.

Section 20 -- Incomplete Hearings

If the neutral considers it necessary for a fair decision, new or additional hearings may be scheduled in your dispute. After your hearing has been closed by the neutral, you may request that it be reopened to consider matters not raised at the original hearing, if the neutral has not yet made a final decision. Your request must be sent to the tribunal and copies will be sent to any other parties. The neutral will make the final decision on whether to reopen the hearing or not.

Section 21 -- Affidavits

The neutral may permit written statements, made under oath and notarized, instead of oral statements.

Section 22 -- Waiver of Rules

If you believe that any part of these rules has not been followed, you must object in writing to the tribunal BEFORE the neutral makes a final decision or your objection will not be considered.

Section 23 -- Change of time

You and any other parties to your dispute may agree to change any period of time stated in these rules.

Section 24 -- The Decision

A. TIME. The neutral must write a final decision no later than TEN DAYS after your hearing is closed and the tribunal may request that this time be reduced in some cases. If you have been asked to furnish additional materials relating to your dispute, the neutral will set a time for these materials to be sent to the tribunal, and a final decision will be made TEN DAYS after they are received. The tribunal will send you a copy of this decision by certified mail or by other means permitted by state law.

B. SCOPE. The neutral may make any decision which the neutral deems to be fair and equitable within the scope of your agreement to arbitrate, provided state law does not prohibit all or part of that decision.

C. MODIFYING THE DECISION. If you believe the final decision is impossible to perform, or that it contains a mistake of fact or miscalculation, or that it is otherwise imperfect in form, you should notify the tribunal in writing. The tribunal will share your observation with the other parties and forward it, together with their views, to the neutral, who may accept it in whole or in part or reject it altogether.

D. SETTLEMENT AGREEMENT. If you and the other parties voluntarily decide to settle your dispute during a hearing, the neutral will assist you in writing your agreement on paper.

The neutral will have the agreement put in final form, and you and the other party will be asked to sign it.

The neutral will then make that signed agreement his decision in the case. Normally, you will be given a copy of a settlement agreement BEFORE you leave the hearing.

If you and the other party agree on a settlement AFTER the hearing BUT BEFORE you've received the neutral's decision, IMMEDIATELY notify the tribunal.

E. FORM AND FILING. The neutral will make the final decision in writing, and it will be notarized BEFORE the tribunal makes copies and sends a copy to you and any other party.

If it is required by state law or court procedure, the tribunal will file a copy of the decision with the appropriate court. Neither the neutral nor the tribunal will make any public disclosure of the decision UNLESS you and all other parties agree in writing.

Section 25 -- Interpretation of Rules

The neutral will interpret these rules and your agreement to arbitrate on all matters relating to the powers and duties of the arbitrator. On all other questions about these Rules, the tribunal will make the final decision.

APPENDIX B

NEW YORK STATE ARBITRATION LAW

CIVIL PRACTICE LAW AND RULES

SECTION 7501 - 7514

NEW YORK STATE CIVIL PRACTICE LAW AND RULES
SECTION 7501 - 7514

7501. Effect of arbitration agreement

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justicable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

7502. Applications to the court; venue; statutes of limitation

(a) Applications to the court; venue. A special proceeding shall be used to bring before the court the first application arising out of an arbitrable controversy which is not made by motion in a pending action. The proceeding shall be brought in the court and county specified in the agreement; or, if none be specified, in a court in the county in which one of the parties resides or is doing business, or, if there is no such county, in a court in any county; or in a court in the county in which the arbitration was held. All subsequent applications shall be made by motion in the pending action or the special proceeding.

(b) Limitation of time. If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court as provided in section 7503 or subdivision (b) of section 7511. The failure to assert such bar by such application shall not preclude its assertion before the arbitrators, who may, in their sole discretion, apply or not apply the bar. Except as provided in subdivision (b) of section 7511, such exercise of discretion by the arbitrators shall not be subject to review by a court on an application to confirm, vacate or modify the award.

7503. Application to compel or stay arbitration; stay of action; notice of intention to arbitrate

(a) Application to compel arbitration; stay of action. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall

operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

(b) Application to stay arbitration. Subject to the provisions of sub-division (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of Section 7502.

(c) Notice of intention to arbitrate. A party may serve upon another party a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within ten days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with, and from asserting in court the bar of a limitation of time. Such notice shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitration must be made by the party served within ten days after service upon him of the notice or he shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested.

7504. Court appointment of arbitrator.

If the arbitration agreement does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator.

7505. Powers of Arbitrator.

An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas. An arbitrator has the power to administer oaths.

7506. Hearing.

(a) Oath of arbitrator. Before hearing any testimony, an arbitrator shall be sworn to hear and decide the controversy faithfully and fairly by an officer authorized to administer an oath.

(b) Time and place. The arbitrator shall appoint a time and place for the hearing and notify the parties in writing personally or by registered mail not less than eight days before the hearing. The arbitrator may adjourn or postpone the hearing. The court, upon application of any party, may direct the arbitrator to proceed promptly with the hearing and determination of the controversy.

(c) Evidence. The parties are entitled to be heard, to present evidence and to cross-examine witnesses. Notwithstanding the failure of a party duly notified to appear, the arbitrator may hear and determine the

controversy upon the evidence presented.

(d) Representation by attorney. A party has the right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearing which has not taken place. This right may not be waived. If a party is represented by an attorney, papers to be served on the party shall be served upon his attorney.

(e) Determination by majority. The hearing shall be conducted by all the arbitrators, but a majority may determine any question and render an award.

(f) Waiver. Except as provided in subdivision (d), a requirement of this section may be waived by written consent of the parties and it is waived if the parties continue with the arbitration without objection.

7507. Award; form; time; delivery.

Except as provided in section 7508, the award shall be in writing, signed and acknowledged by the arbitrator making it within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders. The parties may in writing extend the time either before or after its expiration. A party waives the objection that an award was not made within the time required unless he notifies the arbitrator in writing of his objection prior to the delivery of the award to him. The arbitrator shall deliver a copy of the award to each party in the manner provided in the agreement, or, if no provision is so made, personally or by registered or certified mail, return receipt requested.

7508. Award by confession.

(a) When available. An award by confession may be made for money due or to become due at any time before an award is otherwise made. The award shall be based upon a statement, verified by each party, containing an authorization to make the award, the sum of the award or the method of ascertaining it, and the facts constituting the liability.

(b) Time of award. The award may be made at any time within three months after the statement is verified.

(c) Person or agency making award. The award may be made by an arbitrator or by the agency or person named by the parties to designate the arbitrator.

7509. Modification of award by arbitrator.

On written application of a party to the arbitrators within twenty days after delivery of the award to the applicant, the arbitrators may modify the award upon the grounds stated in subdivision (c) of section 7511. Written notice of the application shall be given to other parties to the arbitration. Written objection to modification must be served on the arbitrators and other parties to the arbitration within ten days of receipt of the notice. The arbitrators shall dispose of any application made under this section in writing, signed and acknowledged by them

within thirty days after either written objection to modification has been served on them or the time for serving said objection has expired, whichever is earlier. The parties may in writing extend the time for such disposition whether before or after its expiration.

7510. Confirmation of award.

The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.

7511. Vacating or modifying award.

(a) When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:

(i) The rights of that party were prejudiced by one of the grounds specified in paragraph one; or

(ii) a valid agreement to arbitrate was not made; or

(iii) the agreement to arbirate had not been complied with; or

(iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.

(c) Grounds for modifying. The court shall modify the award if:

(1) there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) the award is imperfect in a matter of form, not affecting the merits of the controversy.

(d) Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court.

(e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.

7512. Death or incompetency of a party.

Where a party dies after making a written agreement to submit a controversy to arbitration, the proceedings may be begun or continued upon the application of, or upon notice to, his executor or administrator or, where it relates to real property, his distributee or devisee who has succeeded to his interest in the real property. Where a committee of the property or of the person of a party to such an agreement is appointed, the proceedings may be continued upon the application of, or notice to, the committee. Upon the death or incompetency of a party, the court may extend the time within which an application to confirm, vacate or modify the award or to stay arbitration must be made. Where a party has died since an award was delivered, the proceedings thereupon are the same as where a party dies after a verdict.

7513. Fees and expenses.

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including attorney's fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. The court, on application, may reduce or disallow any fee or expenses it finds excessive or allocate it as justice requires.

7514. Judgment on an award.

(a) Entry. A judgment shall be entered upon the confirmation of an award.

(b) Judgment-roll. The judgment-roll consists of the original or a copy of the agreement and each written extention of time within which to

make an award; the statement required by section 7508 where the award was by confession; the award; each paper submitted to the court and each order of the court upon an application under sections 7510 and 7511; and a copy of the judgment.

APPENDIX C

1. Sample Settlement Agreement
2. Sample Consent Decision
3. Sample Arbitrator's Decision
4. Sample "Reasoning of Arbitrator"

1. SAMPLE SETTLEMENT AGREEMENT

NOTE: This agreement is always written on the Settlement Agreement Form provided by the tribunal.

SETTLEMENT AGREEMENT

IN THE MATTER OF:
(names of parties)

John A. Smith
11 North Street
Anytown, New York

and

Mary M. Jones
16 West Street
Anytown, New York

DATE: January 15, 1976

CASE # MCC 488-76

SPIRIT OF AGREEMENT:

John Smith and Mary Jones wish to resolve their dispute over commonly-owned property in a manner which is just and fair to each of them. To that end, they make the following agreements:

SPECIFICS OF AGREEMENT:

1. John A. Smith and Mary M. Jones hereby agree that all summons and complaints filed or pending before January 15, 1976, will be specifically dropped.

2. John A. Smith and Mary M. Jones agree that the furniture and personal property each had separately acquired prior to March 10, 1975 (the date the parties jointly occupied an apartment at 16 West Street) remain the property of each individual.

3. John A. Smith and Mary M. Jones further agree that three major items of personal property, acquired jointly by them after March 10, 1975, will be disposed of as follows:

a) John A. Smith agrees that Mary M. Jones will have sole ownership of the Sony Stereo System, including all components and accessories as well as all tapes and records.

b) Mary M. Jones agrees that John A. Smith will have sole ownership of the Sony Color Television set.

(more)

IN THE MATTER OF: John A. Smith and Mary M. Jones #MCC 488-76

c) John A. Smith agrees that, since the 1975 Ford Fairlane was purchased by Mary M. Jones and since Mary M. Jones is responsible for repayment of the automobile loan, Mary M. Jones may retain possession of the vehicle; however,

d) Since John A. Smith contributed $500 of his personal funds toward the down payment on the vehicle and since John A. Smith made one-half of all car loan payments from July 1975 through November 1975, Mary M. Jones agrees that she will pay John A. Smith $800.00. Mary M. Jones further agrees that she will make this payment to John A. Smith no later than January 28, 1976, by Postal Money Order.

4. Mary M. Jones further agrees that John A. Smith may pick up his personal belongings -- including the television set mentioned above -- at any time on the weekend of January 30th during the hours of 8:30 a.m. to 5:00 p.m. Saturday or Sunday. Both parties agree that Mary M. Jones' brother, Michael Jones, will open the apartment to Mr. Smith and will supervise the removal of personal property in accordance with this agreement.

SETTLEMENT AGREEMENT SIGNED THIS: 15th day of January, 1976

BY: _____
(John A. Smith

BY: _____
(Mary M. Jones)

IN THE PRESENCE OF:

MEDIATOR: _____
(William J. Johnson)

2. SAMPLE CONSENT DECISION

NOTE: This decision is always written on the Consent Decision Form provided by the tribunal.

CONSENT DECISION

IN THE MATTER OF:
(names of parties)

John A. Smith
11 North Street
Anytown, New York

and

Mary M. Jones
16 West Street
Anytown, New York

DATE: January 15, 1976

CASE # MCC 488-76

I, the undersigned arbitrator, having been appointed under the Arbitration Rules for Community Disputes, do make this decision upon the specific consent of the parties. The parties intend that their agreement be my decision, and they agree to be bound by it under the Arbitration Rules for Community Disputes and the laws of the State of New York:

1. John A. Smith and Mary M. Jones will specifically drop all summons and complaints filed or pending before January 15, 1976.

2. Personal property and furniture acquired by the parties prior to March 10, 1975, remain the property of each individual.

3. Mary M. Jones will have sole ownership of the SONY stereo system, including all components, accessories, tapes and records.

4. John A. Smith will have sole ownership on the SONY color television set.

5. Mary M. Jones will have sole ownership of the 1975 Ford Fairlane.

6. Mary M. Jones will pay to John A. Smith the sum of $800 by Postal Money Order not later than January 28, 1976.

(more)

IN THE MATTER OF: John A. Smith and Mary M. Jones Case # MCC 488-76

7. Mary M. Jones will permit John A. Smith to pick up his personal belongings -- including the television set mentioned above -- on the weekend of January 30th during the hours of 8:30 a.m. to 5:00 p.m. on Saturday or Sunday. Mary M. Jones will arrange for her brother, Michael Jones, to open the apartment to Mr. Smith and to supervise the removal of personal property in accordance with this consent decision.

AGREED TO THIS: 15th Day of January 1976

_____
(John A. Smith)

_____
(Mary M. Jones)

This consent decision is in full settlement of all claims and counterclaims submitted to arbitration by either party against the other.

DATE: January 15, 1976

ARBITRATOR'S SIGNATURE: _____

STATE OF: New York
COUNTY OF: Erie

On this 15th day of January, 1976, before me personally came and appeared William J. Johnson, to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he/she executed the same.

My Commission expires: Jan. 1978.

_____
(Notary Public)

3. SAMPLE ARBITRATOR'S DECISION

NOTE: This decision is always written on the Decision of Arbitrator Form provided by the tribunal.

DECISION

IN THE MATTER OF:

John A. Smith
11 North Street
Anytown, New York

and

Mary M. Jones
16 West Street
Anytown, New York

DATE: January 21, 1976

CASE # MCC 488-76

I, the undersigned arbitrator, having been appointed under the Arbitration Rules for Community Disputes and having heard the claims and considered the evidence of the above-named Parties to this dispute, do give my decision as follows:

1. All personal property and furniture acquired by the parties prior to March 10, 1975, remains the property of each individual.

2. Mary M. Jones will have sole ownership of the SONY stereo system, including all components, accessories, tapes and records.

3. John A. Smith will have sole ownership of the SONY Color Television set.

4. Mary M. Jones will have sole ownership of the 1975 Ford Fairlane.

5. Mary M. Jones will pay to John A. Smith the sum of $1,250 by Postal Money Order not later than February 5, 1976. Mary Jones will bring this payment to the tribunal offices, and the tribunal will notify Mr. Smith when the payment has been received.

6. Mary M. Jones will permit John A. Smith to pick up his personal belongings -- including the television set -- on January 30th, 1976, between the hours of 10:00 a.m. and 3:00 p.m.

This award is in full settlement of all claims and counterclaims submitted to arbitration by either party against the other.

DATE: January 21, 1976

ARBITRATOR'S SIGNATURE: _____

Notary seal

4. SAMPLE "REASONING OF ARBITRATOR"

NOTE: This docuemnt must be written on a separate sheet of paper (not part of the decision) and must be delivered to the tribunal in each case.

REASONING OF ARBITRATOR

This document is provided by the arbitrator as a courtesy to the parties. The arbitrator considers the document marked "decision" as the only decision in the dispute.

In the matter of the arbitration between

John A. Jones Case # MCC 488-76

and

Mary M. Smith

Procedure:

A hearing on the matter was held in the offices of the Dispute Settlement Center, One Main Street, Anytown, New York, at 3:00 p.m. on January 15, 1976. The parties to the dispute were present; neither party brought any witnesses.

Issues:

After some discussion, the parties agreed that the issues in dispute were:

1. Ownership of personal property each had acquired prior to their decision to jointly occupy Mary Smith's apartment.
2. Ownership of three major items of personal property acquired after the parties began to share living quarters; specifically a stereo system, a color television set and an automobile.
3. Mr. Smith's inability to gain access to the former joint residence in order to pick up his personal belongings.

Position of the Parties:

Mr. Smith stated that he and Miss Jones had dated for nearly a year before they jointly decided to occupy Miss Jones' apartment. Mr. Smith indicated that he had given up his own apartment in order to live with Miss Jones. After several months, Mr. Smith stated, he began to realize that "the relationship wasn't working out". During an argument in December, Mr. Smith left the apartment and went to his brother's house. Mr. Smith claims he has been living there since the night of the argument. Mr. Smith wants possession of the stereo system and color television set which, he argues, are "more his than hers", since he uses

them more often. He also seeks to have the Ford Fairlane automobile sold and the proceeds of the sale divided jointly between himself and Miss Jones. Mr. Smith states that he "arranged with" Miss Jones to pick up his personal belongings; however, when he arrived to do so, she refused to let him in the apartment. When he began kicking at the door, one of the neighbors called the police. Mr. Smith claims he has been "terribly inconvenienced" by being without his personal possessions and clothing.

Miss Jones stated that she, too, "had a feeling that the relationship wasn't working out". She was, however, surprised that Mr. Smith "simply walked out one night and never came back". Miss Jones stated that she had made arrangements with Mr. Smith to allow him to pick up his clothing; however, one of her friends had advised her not to let this happen until she and Mr. Smith had agreed on how the property was to be divided. Miss Jones wants to keep the stereo, which she claims she "uses all the time", but she is willing to let Mr. Smith have the television. Further, she does not want to have the car sold. She states that the car is in her name, the bank loan is in her name and she needs the transportation for work. She is, however, willing to pay Mr. Jones $500, an amount which represents his contribution toward the down payment on the vehicle.

Reasoning

During the course of the hearing, the parties were able to agree on a number of matters which had been submitted to the arbitrator. The parties came to an agreement on personal property held prior to the joint occupancy of the apartment, on possession of the television set and the stereo system, and on a date when Mr. Smith might pick up his personal property. The arbitrator has incorporated those agreements into his decision.

However, the parties could not agree on the disposition of the automobile. Neither party was willing to sign a settlement agreement unless this issue was resolved. Since no agreement could be reached, this decision was necessary.

The arbitrator considered the desire of Mr. Smith to sell the vehicle and split the proceeds. In the arbitrator's opinion, this would have resulted in an inequity to both parties. The vehicle's present market value would just about pay off the note due on the car loan. The arbitrator also considered Miss Jones willingness to refund the $500 which Mr. Smith had used as a downpayment. However, the arbitrator believed that, since Mr. Smith made all car payments during the period of joint ownership, paid for and installed a stereo tape deck in the vehicle and paid one full year's insurance premiums on the car, the mere return of Mr. Smith's $500 would be inequitable.

My decision directs Miss Jones to pay Mr. Smith $1,250, which includes Mr. Smith's $500 down payment, the $300 in car payments made during the period, the remaining balance of the insurance premiums ($200) and the depreciated value of the stereo system ($250).

Submitted by
Arbitrator William J. Johnson

APPENDIX D

INSTRUCTIONS AND GUIDELINES
FOR
NEUTRALS

APPENDIX D

INSTRUCTIONS TO NEUTRALS

PRIOR TO THE HEARING

1. Carefully review the dispute settlement rules and informational materials prior to the hearing.

2. Review the party's agreements, carefully noting their names and names of attorneys (if any). Notify the tribunal immediately if you believe you cannot act impartially in the case.

3. Check the time and place designated for the hearing. If you cannot attend, immediately notify the tribunal.

4. If at any time prior to (or even during) the hearing, you decide that an on-site inspection is necessary, notify the tribunal of your decision.

AT THE INSPECTION

1. If an inspection is agreed upon, it should be conducted prior to the hearing, if possible, and with both parties present.

2. Conduct the inspection informally, but allow only enough discussion to identify the matters relevant to the dispute. The purpose of an inspection is to permit the neutral to examine the quality of workmanship, the degree of performance or other aspects of the dispute which only an inspection outside the hearing room can provide.

3. Although there is no time limit under the Rules, an inspection should be conducted as thoroughly, but quickly, as possible.

4. Make brief written notes listing observations and evaluations made at the hearing site.

AT THE HEARING

1. Arrive at The hearing room well in advance. This will provide time to discuss any last-minute details with the tribunal staff.

2. Once the parties have arrived, ask if they are ready to begin. Introduce yourself to both parties, and explain the basic procedures, including:

a) Some words of welcome
b) The reasons for the dispute settlement program
c) Your role
d) The confidentiality of the hearing
e) The separate caucus
f) Note-taking
g) Ground rules for the hearing.

3. Stress the importance of maintaining courtesy and decorum during the proceeding.

4. Remember, the proceeding should be informal, but not uncontrolled. Admonish the parties or their witnesses if they speak out of turn or fail to show mutual respect.

5. If you can't find a rule to govern a particular procedural question, use common sense and decide the question on the basis of fairness to both parties.

6. Normally, the complaining party (the one who initiated the hearing) will speak first, presenting his or her case, documents, witnesses, etc. The other party then presents his or her case. Both should be allowed to proceed without interruptions from the other party. In some cases, however, each party has filed a complaint against the other. Use common sense and fairness to decide who will speak first. You should, of course, always feel free to ask questions throughout the proceeding.

7. Before you decide to caucus with the parties, try and work with them to develop a list of matters in dispute. This is a list of specific things about which the parties disagree. This list will help you while working through the caucus. If you must decide the case, you'll know exactly what matters are to be decided.

8. Allow both parties the full opportunity to tell their story their way; however, don't let one party completely dominate the hearing with a continuing repetition of matters already covered. Stress the importance of disposing of the matter in one hearing, if possible.

9. If a settlement cannot be reached, bring the parties back together. Stress the alternatives if the agreement can't be reached. If you have the authority to make a decision, allow each party a brief period (five minutes or so) to sum up his or her case.

10. If another hearing is necessary, a time and place should be agreed upon at the close of the first hearing, if possible. Immediately notify the tribunal of the new hearing date, time and location.

AFTER THE HEARING

1. Insure that the tribunal is aware of the proposed time and place for a second hearing, if any.

2. Be sure and deliver your decision, if one is necessary, within the time frame contained in the Rules (10 days). If a settlement was reached at the hearing, the parties should both have a copy of the signed agreement before they leave the hearing site.

3. All material and documents relating to the hearing should be returned to the tribunal.

4. It is the responsibility of the tribunal to see that a decision is mailed to the parties or filed with an appropriate court, if necessary.

5. If you are contacted by either party after the hearing, instruct them to contact the tribunal. Do not have any conversations with either party after the decision has been made.

A NEUTRAL'S GUIDE TO PROCEDURAL ERRORS

This guide is prepared to assist the neutral in avoiding procedural errors which will diminish your neutrality as a mediator and will almost certainly result in an arbitrator's decision being overturned by the courts.

No two neutrals handle cases in exactly the same way. These differences are referred to as the neutral's "style". Some neutrals conduct a very relaxed hearing; others insist on more formality. One neutral may want witnesses present throughout the hearing, another may insist that witnesses only enter the hearing to speak their piece. Some neutrals never use a caucus; others use one in every case. A neutral's style", like his or her clothing, is a matter of personal preference and comfort.

Regardless of the arbitrator's individual "style", however, certain errors will either destroy your neutrality and/or cause a court to set aside your decision. The following are some examples of major procedural errors.

PRIOR TO THE HEARING

Failing to disclose any personal, financial, professional or social relationship with either party (however remote you believe that relationship might be).

AT THE HEARING

1. Failing to disclose any relationship (if unknown prior to the hearing, but discovered at any point during the hearing).

2. Discussing any aspect of the case with either party outside the presence of the other party (other than during a formal caucus during the course of the hearing).

3. Refusing to listen to evidence, the nature of which is material to one of the parties' case.

4. Using obvious coersion to force one party into accepting a settlement agreement.

5. Refusing to allow one party the opportunity to question the other party or that party's witnesses.

FOLLOWING THE HEARING

1. Contacting either party without the knowledge and consent of the other party.

2. Taking additional evidence outside the presence of the parties.

IN THE DECISION

1. Basing a decision specifically upon information you obtained from one of the parties during the caucus, when that information was not shared with the other party.

2. Making a decision on a matter not submitted by both parties for a decision.

3. Basing a decision solely on the absence of one of the parties, rather than upon the facts and evidence presented.

4. Making a decision that is so unclear or imperfect that a settlement of the dispute is not accomplished by the decision.