MANAGERIAL EFFECTIVENESS SERIES

Managing Workplace Conflict

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The Costs of Conflict

"Discourage litigation. Persuade you neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser . . . in fees, expenses and waste of time."

Abraham Lincoln's words were never truer than they are today. The costs of conflict for business in America are astronomical. One source estimates that over the last decade business litigation expenses have increased 58.6%, to over $33 billion (Briggs and Morgan, p. 3). Fueled by rising stress in the workplace, anxiety about corporate reengineering/downsizing and extensive governmental regulation, workplace conflict is on the rise. Fueled by the sheer number of lawyers, easy access to the court, and incredible jury awards, more and more business disputes are being litigated. Over the last twenty year, the average yearly number of business-related cases filed in federal courts has more than quadrupled. Harassment related claims are now so epidemic and damage awards so high, many insurers refuse to cover them. In June 1995, a Wal Mart employee was awarded $50,000,000 because a supervisor refused to take immediate steps to stop comments that caused her discomfort. A temporary employee of the Baker and MacKenzie law firm was awarded $7,000,000 for conduct she said actually caused her "very little distress."

According to the Bureau of Justice Statistics (BJS), each year almost one million individuals become victims of violent crime while working. Over 500,000 workplace victims lose an estimated 1.8 million workdays and over $55 million in lost wages, not including days covered by sick and annual leave. In 1995, the total cost for employers of cases involving workplace violence, including litigation expenses and award losses, was over $4.2 billion. In March 1997, the EEOC had a backlog of 74,541 business-related bias and discrimination cases. The average case takes over 40 months to litigate.

The intangible costs of conflict are also high. Absenteeism, low productivity, staff turnover, low morale, the stifling of ideas and initiative and employees not developing their full potential are severe prices to pay for unmanaged workplace conflict. Such intangible costs combined with an apparent eagerness to litigate disputes only have a negative affect on business: higher prices for goods and services and decreased quality, productivity and competitiveness in the global market.

Alternative Dispute Resolution and Business

To address the costs of workplace conflict, many businesses have turned to alternative dispute resolution processes (ADR). Processes including mediation, arbitration, early neutral evaluation, neutral fact-finding, and mini-trial, originally developed to relieve over-crowded court dockets, are now increasingly used to resolve problems in arenas outside the court, including business.

Over 600 of the nation's leading corporations have pledged to resolve inter-corporate disputes through ADR procedures. Many corporations now have dispute resolution systems in place that address workplace conflicts through ADR processes before they worsen into litigation. Others employ outside ADR consultants to assist with workplace conflicts. Roger Fisher and William Ury of the Harvard Negotiation Project confirm that the early application of ADR procedures to business disputes can reduce resolution costs by over 80%. The savings in time are also substantial, 30-60 days for ADR processes in comparison to over 40 months for litigation. While in some cases litigation may remain the preferred alternative for resolving complex disputes, businesses today are efficiently addressing workplace conflicts through ADR procedures.

This Manual

This manual is written for ITC executives, managers and supervisors who are called upon to prevent and address workplace conflict. It is to be used with the materials from other classes in ITC's Management Effectiveness Training Program, including "Bringing Out the Best in People," in which we discussed how to deal with difficult people and discipline; "Managing Stress and Anger," and "Negotiation." Our goals for this class are to raise consciousness about the effects of workplace conflict and the conditions which generate it, to help managers develop practical skills for resolving and managing disputes, and to introduce several dispute resolution processes that are currently and successfully being employed by business professionals.

The manual is organized in two chapters:

Chapter One, Conflict Theory, helps managers understand the physiological, psychological and organizational sources of conflict in the workplace as well as providing practical strategies for decreasing the workplace stresses that generate disputes.

Chapter Two, Managerial Mediation, describes a process for managers to use when they are asked to serve as a third party neutral, a referee or a mediator between two parties in a dispute. It sets out the conditions in which mediation is most effective and provides practical guidelines to help managers help their employees resolve workplace disputes.

Chapter One

Conflict Theory

"Freedom is the ability to pause between the stimulus and the response and in the pause to choose."

Rollo May

Chapter One

Conflict Theory

Summary

Conflicts are patterns of interaction that have developed in the life of an individual, a relationship or an organization that create dysfunction. Conflict is a normal aspect of all relationships, whether business or personal, a necessary catalyst for growth and change. John Dewey wrote:

> "Conflict is the gadfly of thought. It stirs us to observation and memory. It instigates invention. It shocks us out of sheeplike passivity, and sets us at noting and contriving. Conflict is a *sine qua non* of reflection and ingenuity."

In this section we examine the basic elements of conflict theory.

- **What is the relationship between conflict and performance?**
- **What are the physiological origins of conflict?**
- **What happens in disputes as the level of conflict intensifies?**
- **How do the personalities of employees, workplace processes, the nature of the work itself and workplace polarities contribute to the formation of workplace disputes?**
- **What strategies and processes can managers employ to prevent, resolve and manage workplace conflict?**
- **How can managers choose appropriately among the variety of alternative dispute resolution processes for resolving conflicts?**

Henri Fayol's Eleven Management Principles

Henri Fayol was a French mining executive, who in 1916 was the first to conceive of management as a distinct vocation. His eleven management principles are still relevant today and provide the basis upon which managers make decisions, act and in general carry out the management process. Failure to follow any of these principles is often, at an organizational level, the root cause of workplace conflict.

1. **Division of Work and Specialization.** Divide work so that each person performs a specialized portion.

2. **Authority and Responsibility.** Managers have the right to give orders and instructions, and they also must accept the responsibility for whether or not the work is done correctly.

3. **Discipline, Morale and Integrity.** Managers have the right to discipline, the responsibility to build morale, but they also must be honest and consistent in their own actions. They have the right to expect loyalty and cooperation from their employees, while they are loyal and cooperative with them.

4. **Unity of Command.** An employee should have only one boss. Confusion and conflict are the product of ignoring this principle.

5. **Unity of Direction.** Every organization, division or department should have only one master plan and one set of goals and objectives. This results in cooperation between various job functions (e.g., maintenance and operations).

6. **Unity of Commitment**. All employees, especially supervisors, managers and executive must place their own interests second to those of the total organization.

7. **Pay and Rewards.** Remuneration should reflect each person's effort and contribution to achieving organizational goals. Pay according to worth, not whim.

8. **Chain of Command.** Orders should flow down from upper management to lower management. Communication and complaints should move upward. Managers should not bypass supervisors when giving instructions. Employees should not bypass supervisors when registering a complaint.

9. **The Virtue of Order.** Materials should be in their proper place. Equipment and the workplace should be maintained to ensure safety and efficient operation. Routine procedures minimize effort, waste and injury.

10. **Equity.** Employees should be treated equally and fairly. Managers can prevent, manage and resolve most conflicts among employees by enforcing this principle.

11. **Initiative.** Managers should encourage initiative among employees in order to "encourage their capacity to the full."

Ineffective Problem Solvers

- Didactic Problem Solvers
- Blaming Problem Solvers
- Irrational Problem Solvers
- Paranoid Problem Solvers: People Who Feel Victimized
- Perfectionist Problem Solvers
- Bureaucratic Problem Solvers
- People-Pleaser Problem Solvers:
- Status Quo Problem Solvers: People Who Hate Change

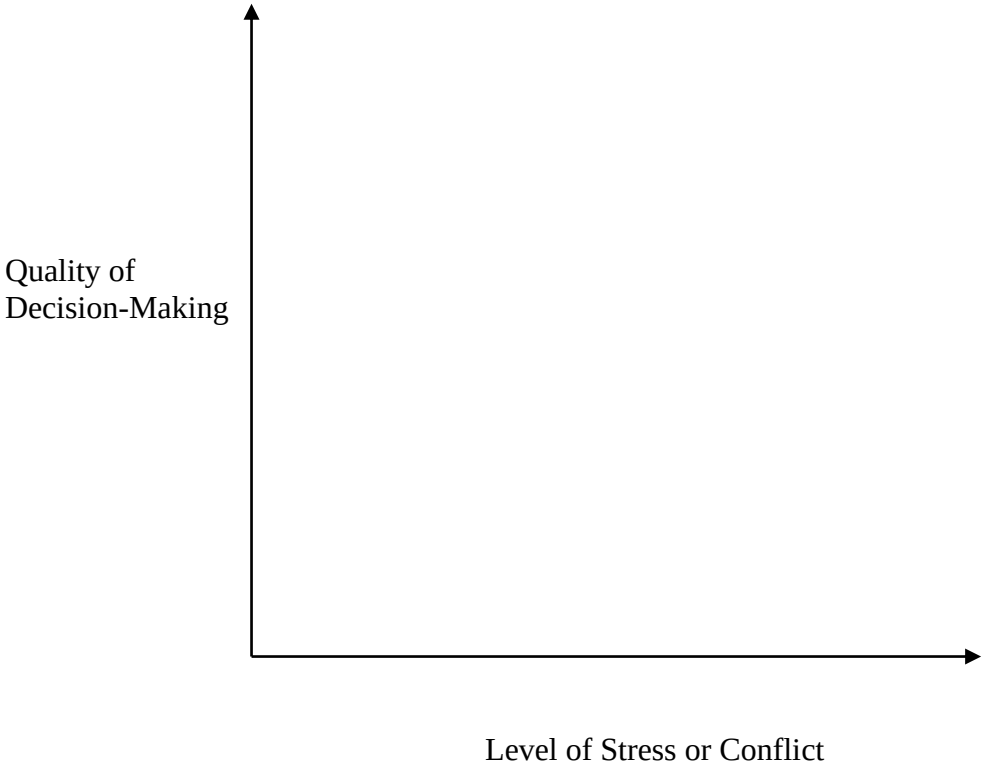
Conflict as a Teachable Moment: Stress and Growth

Whether or not conflict is productive depends on three elements:

- Ability of the parties to devise efficient, cooperative problem-solving methods.
- Ability of the parties to lay aside distrust and animosity to work together to solve the problem.
- The availability of solutions that will, at least partially, satisfy the interests of the parties.

The Stress Curve

Plot the quality of decision (degree of exploration) vs. the degree of conflict.



The Stress-Curve shows that:

- No stress through eu-stress: quality of decision making increases as the intensity of the conflict increases.

- Distress: effectiveness shuts down as people panic: cerebral cortex shuts down, medulla oblongata (birdbrain, reptilian brain) takes over (fight-flight).

The Stress-Curve changes according to:

- Differences in Organizations
- Time of day
- Issue
- Age of children
- Rules (Is it O.K. to fight?)
- Culture
- Genetics
- Other:

What does the stress-curve suggest about the role of the manager in the dispute resolution process?

The manager's role is to apply and facilitate a process that lengthens the curve and thereby keeps participants working on the problem.

Analogies to other professions:

Levels of Conflict

One important factor that managers consider in evaluating how to address a particular dispute is the intensity of the conflict. Determining the level or intensity of conflict in a given dispute is a matter of judgment. Building on the work of Malcolm Leary ("Handling Conflict: Dealing with Differences Creatively and Constructively," published by The Association of Teachers of Management), Alban Institute conflict resolution specialist Speed Leas has identified five ascending levels of conflict. A chart on the following page provides a summary of the issues, language, emotions, orientation, information, objectives and outcomes that are characteristic of conflict at each level. The levels of conflict intensity in ascending order are:

- **Level 1: Problems to Solve**
- **Level 2: Disagreement**
- **Level 3: Contest**
- **Level 4: Fight/Flight**
- **Level 5: Intractable Situations**

Level 1: Problems to Solve. Level 1 describes real differences, not just problems in communication or misunderstandings. At Level 1, people understand each other, but have conflicting goals, values, needs, action plans or information. They feel uncomfortable in each other's presence, but anger is short-lived. At Level 1, the objective is to fix the problem. Parties are problem-oriented and will use rational, collaborative, problem-solving methods to fix what is wrong. Language tends to be clear and specific, not loaded with innuendo or blaming.

Level 2: Disagreements. At Level 2, the intensity of the dispute increases, but not to the degree of win/lose. Parties are concerned less with problem-solving than with self-protection, with not getting hurt and coming out of the problem having "saved face." Shrewdness and calculation enter the dispute, parties enlist allies and develop strategies to deal with the conflict. Language shifts from specific to general: "Some people . . . ." "We have no trust around here." "We have a communication problem." Level 2 disputants are cautious, not yet hostile. People tend to withhold information that might enhance the other and hurt themselves. The mean-spirited humor or barbed gibe that puts down or derides the other is also present at this level.

Level 3: Contest. At Level 3, win-lose dynamics begin to appear. Parties want to win. They do not yet want to hurt or get rid of their opponent, they just want to defeat them. In fact, many disputants at Level 3 are stimulated by a worthy opponent and are disappointed when the other party folds without putting up a good fight. If the problem is widespread, factions may emerge and problems may cluster into issues or causes. Individuals will find allies who agree with them on most of the issues represented by a cause. People at this level of conflict are resistant to peace overtures (somehow the idea of winning is inconsistent with making peace). Personal attacks are endemic. At Level 3, the distortion of language becomes a problem:

- Magnification: the tendency to see oneself as more benevolent than one actually is and the other as more evil than he/she actually is.

- Dichotomization: the tendency to divide everything and everybody into neat dual, but separate packages—us or them; right or wrong; stay or leave. At this level it is difficult to identify shades between extremes or more than two alternative positions.

- Over-generalization: the tendency to see specific behavior as an example of a category of events or attitudes. "You always . . ." "He never . . ." Everybody . . ."

- Assumption and arbitrary inference: Level 3 disputants delude themselves, believing that they are excellent mindreaders, students of their opposition's subtlest motives.

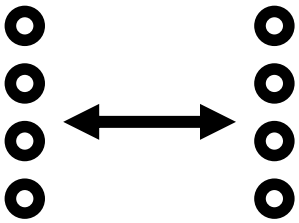
- Other examples of irrational thinking include: inconsistency; the non sequitur, exaggeration; building a case; shifting responsibility; viewing feelings as facts; viewing memories as present-day realities; perceiving remote possibilities as imminent probabilities; trying to reconstruct reality; expecting immediate or rapid change; following established habit patterns; assuming one is responsible for whatever happens; perfectionism; magical thinking; mindreading.

Level 4: Fight/Flight. At Level 4 the objectives change from winning to wanting to hurt or get rid of the other. Changing the other or the situation is no longer enough. Parties at this level do not believe the other can or will change. Their only option is the removal of the other from their environment. Being right and punishing become significant themes. Here factions solidify, clear lines mark who is in and who is out. People talk more about principles than about issues: truth, freedom, justice and rights. These principles are used to sanctify combatants and make it possible for them to be less concerned with the ethics of means. As Saul Alinsky said: "If the ends don't justify the means, what does?" Level 4 conflict brings out the primitive survival responses of both sides. No middle ground stands between running or attacking. The attacker cannot differentiate persons attacked from ideas or positions defended. Parties detach from one another, which prevents awareness of the pain they cause the other. They are unforgiving, cold and self-righteous. They come together only on unfriendly or hostile terms.

Level 5: Intractable Situations. Level 5 conflicts are not within the control of the participants. The objective of each side is to destroy the other. The opponent is seen as not only dysfunctional to the organization, but as harmful to society at large and therefore to be removed. Parties at this level often see themselves as fighting for an external cause or some universal principle. Since their ends are all-important, they are compelled to continue to fight.

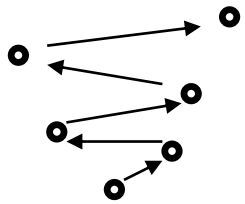
Social Transformation of Conflict (John Paul Lederach)

7. **Polarization: Change in Social Organization**

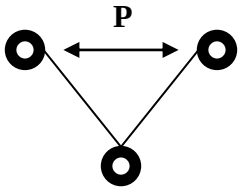


6. **Antagonism → Hostility**

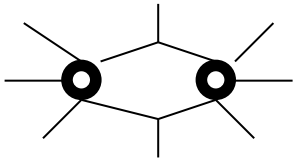
5. **Eye for an Eye Reaction and Escalation**



4. **Triangle: Talk about not with**

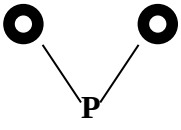


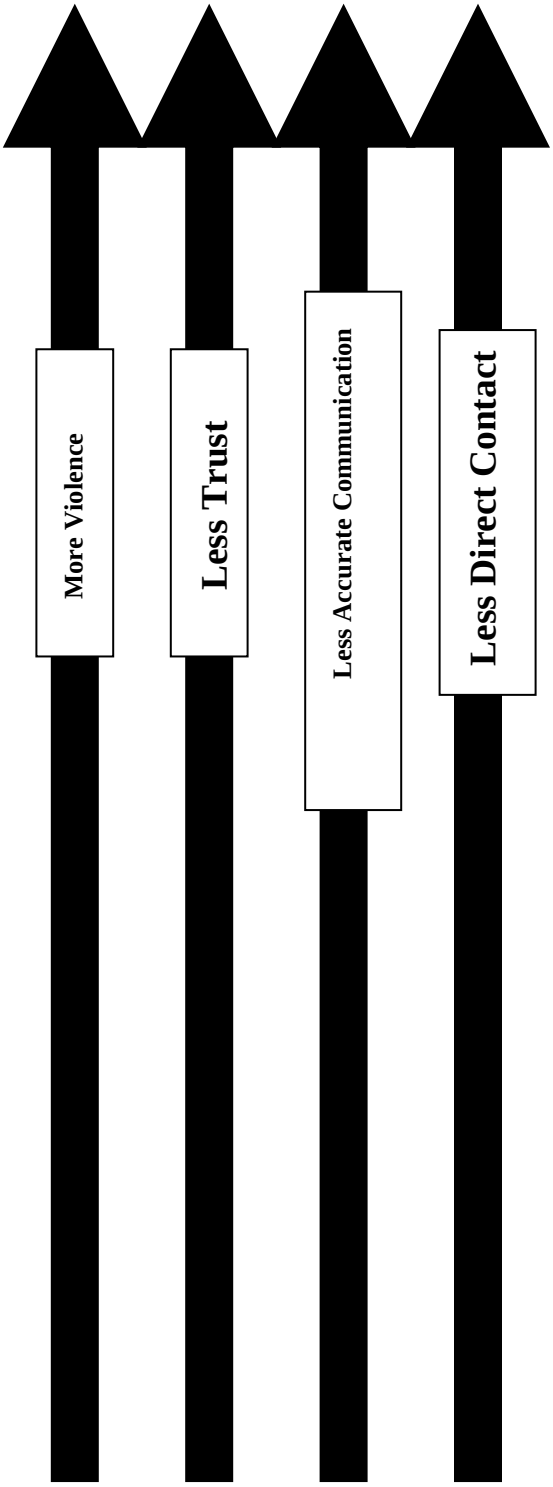
3. **Issue proliferation From specific to general**



2. **Shift from disagreement to personal antagonism. Person seen as problem**

1. **Problem-solving Disagree, but share problem**





The Sources of Conflict: People, Processes, Problems

The possibility of conflict exists where and whenever people come together. Whether visiting a close friend, working with a long-time colleague, or getting to know a new acquaintance, disputes surface that range from simple disagreements to all-out fights. Current trends in business such as downsizing, flatter hierarchies, teamwork and multiple responsibilities increase and intensify the interdependency of employees. In such a context, conflict is inevitable. This section describes the types of disputes that managers of the contemporary work environment may be called upon to mediate. Managers who know how to identify and address these disputes early, before they escalate into major fights, are better equipped to strengthen workplace relationships, to enhance the performance and improve the productivity of their employees and to cut the costs associated with serious workplace conflict.

Conflicts emerge in the interaction of three workplace systems:

1. **Disputes generated by the personalities of the employees and managers themselves (personality differences; stress-induced disputes; harassment issues; ethical and value differences; skill-level differences; disputes arising out of issues of deprivation).**

2. **Disputes generated by workplace processes (corporate culture and methodology).**

3. **Disputes generated by problems related to the work itself and by workplace polarities.**

The Sources of Conflict:

People

Simple personality differences, the effects of stress, value or ethical differences, harassment issues, differences in skill or ability, or the realities of personal deprivation may be people- or person-centered causes of conflict.

1. Personality-Related Conflicts.

Even at their best, people find themselves in conflict. Simple personality differences, cultural differences, a lack of communication, a misunderstanding, a difference in perspective can trigger a disagreement. What may seem to be a minor dispute—one that at first might appear not worth investing much time and effort—may actually offer the best opportunity to head off a future disaster.

People living together or working side-by-side may have very diverse, even conflicting personality types. The Myers-Briggs Type Indicator, a psychological test that describes the ways we perceive and relate to our world, defines personality in terms of four pairs of preference alternatives. We are either:

- **Extroverted (E) or Introverted (I).** This continuum tells us how we get our energy. The Extrovert is energized by the outer world, by multiple relationships, external events and sociability. These things exhaust the Introvert, who gets energy through reflection, introspection and solitude.

- **Sensing (S) or Intuitive (N).** This continuum plots how we gather information. Sensors are down-to-earth, present-focused, fact-oriented, practical realists. Intuitives are head-in-the-clouds, future-oriented, conceptual theoreticians.

- **Thinking (T) or Feeling (F).** This continuum describes our decision-making preferences. Thinkers are objective, firm-minded, detached and just. Feelers are subjective, fair-hearted, humane and involved.

- **Judging (J) or Perceiving (P).** This continuum describes how we create the environment around us. Judgers create an environment that is structured, scheduled, ordered, planned and controlled. Perceivers create an environment that is flexible, spontaneous, adaptive and responsive.

Sixteen personality types can be determined from these eight preferences. In their book, Type Talk: The Sixteen Personality Types that Determine How We Live, Love and Work, Kroeger and Thuesen list each type with a phrase that describes it. From just reading down the list, we can see how people at their best, living or working in close proximity, might easily find themselves in disagreement (e.g., compare ISTJ and ENFP):

- **ISTJ: Doing What Should Be Done**
- **ISFJ: A High Sense of Duty**
- **INFJ: An Inspiration to Others**
- **INTJ: Everything Has Room for Improvement**
- **ISTP: Ready to Try Anything Once**
- **ISFP: Sees Much But Shares Little**
- **INFP: Performing Noble Service to Aid Society**
- **INTP: A Love of Problem-Solving**
- **ESTP: The Ultimate Realist**
- **ESFP: You Only Go Around Once in Life**
- **ENFP: Giving Life a Little Squeeze**
- **ENTP: One Exciting Challenge After Another**
- **ESTJ: Life's Administrators**
- **ESFJ: Hosts and Hostesses of the World**
- **ENFJ: Smooth Talking Persuader**
- **ENTJ: Life's Natural Leaders**

In a helpful chapter, "Typewatching from 9 to 5," Kroeger and Thuesen show how paying attention to the personality type can help head off conflict in a wide range of organizational activities, including goal-setting, time management, hiring and firing and team-building. Here are three examples:

- **Goal Setting.** Extroverts do their thinking out loud; hence the goals they commit to are very much in the public domain. They verbalize their ideas. Extrovert-Judgers determine early on what the goals should be, make them clear to all, and impose them on everyone. Introverts may tire of the Extrovert's aggressiveness in goal setting and with the apparent redundancy of an Extrovert's verbalizing. They may feel imposed upon and would rather start meeting the goal than talk about it.

- **Time Management.** Sensors will be quite literal and precise in their descriptions of time. Intuitives will be more general and abstract. Judgers will be quite organized about time and will use it for some measurable accomplishment. Perceivers will be more open-ended about time and will want to spend their time in activities for which they will be less accountable.

- **Conflict Resolution.** For extroverts conflict is something to be examined out in the open. They talk more than they listen and not necessarily to the person with whom they have the dispute ("Let me tell you what that son of a gun just did to me!"). Introverts

internalize a disagreement so that they reflect on what took place. They rehearse and rework dialogue within their head in anticipation of what is to come.

The author's suggest several dispute resolution tips designed specifically for individual personality types:

- **Extroverts**: Stop, look and listen. Listen to the other person's point of view.
- **Introverts**: Express yourself. Make sure you get a hearing.
- **Sensors**: There's more to conflict than just the facts. Look at extenuating circumstances.
- **Intuitives**: Stick to the issues. Settle simple disputes before going on to the big one.
- **Thinkers**: Allow some genuine expression of emotion. Try it yourself and allow others the freedom to do so.
- **Feelers**: Be direct and confrontive and do not apologize for doing so.
- **Judgers**: It may be difficult to believe, but you are not always right.
- **Perceivers**: Take a clear position. Flexible and adaptive is not always helpful in resolving problems.

The Sources of Conflict: People-Generate Conflicts (Continued)

2. Stress-Related Conflicts.

Many disputes develop when people live or work under pressure. The fast pace of change, increased job complexity, increased economic pressures, reduced staff levels, less job security, heavier workloads and longer working hours, all increase stress at work. Many studies identify work as the single most important cause of stress in the developed world. A recent study of women in accounting indicated that working with someone of a different personality type was positively associated with increased stress. In another study of financial institutions, 64% of employers identified stress as the principal health threat facing the company.

In addition to the pressures of work, the difficult events in our personal or family life often increase our feeling of stress. People who are divorcing, experiencing bereavement and loss, are living with pain, are at midcareer, are experiencing financial difficulties, are committing to a partner, or are becoming parents often find themselves in the middle of a stress-induced conflict

In his book, Free Yourself from Harmful Stress, Trevor Powell identifies several symptoms of high levels of stress:

- Emotional outbursts
- Aggression
- Irritability and anger
- Chronic fatigue
- Health problems
- Increased smoking or drinking
- Lowered self-esteem
- Accident proneness/trembling
- Avoidance of particular situations
- Inactivity
- Difficulty in concentrating
- Difficulty in making decisions
- Frequent forgetfulness
- Increased sensitivity to criticism
- Negative self-critical thoughts
- Distorted, rigid ideas
- Anxiety
- Depression
- Moodiness
- Loneliness
- Jealousy
- Slow and/or inaccurate performance

Dr. Powell then describes a twelve-step plan to help people cope with work-related stress:

- Express your feelings. Don't bottle up feelings and emotions. Learn to identify and reduce the sources of stress.
- Make time for social activities. Don't squeeze out hobbies, leisure or outings with friends. Get regular exercise.
- Don't put things off. Do tasks now and don't avoid them.
- Delegate. Don't try to do everything yourself.
- Learn to say no. Don't agree to take on too much.
- Plan regular breaks. Stop for coffee, lunch and evenings, as well as weekends and vacations. Eat well.
- Don't work too long hours.
- Don't become addicted. Try not to become reliant on alcohol, cigarettes, drugs or food. Monitor personal health
- Separate work from home. Don't regularly take work home.
- Don't be a perfectionist. You can't get things perfect every time. Aim for 80%.
- Seek support. Openly discuss difficulties and ask for help.
- Keep a perspective. It's only a job—not your life.

A stress audit that raises questions about the manifestations, causes and consequences of workplace stress can be useful in such an analysis. Judith Gordon, Organizational Behavior, provides the following short example of a corporate stress audit:

1. Do any employees demonstrate physiological symptoms?
2. Is job satisfaction low, or are job tension, turnover, absenteeism, strikes, and accident-proneness high?
3. Does the organization's design contribute to the symptoms?
4. Do interpersonal relations contribute to the symptoms?
5. Do career-development variables contribute to the symptoms?
6. What effects do personality, sociocultural influences and the nonwork environment have on the relationship between the stressors and stress?

Workplace stress is an early warning sign of potential conflict. Manager's can help employees cope with dysfunctional stress by redesigning jobs or restructuring organizations, by encouraging employee attendance at stress management, health promotion and wellness programs, and by mediating stress-induced interpersonal disputes.

The Sources of Conflict: People-Generate Conflicts (Continued)

3. Harassment

Harassment is an extreme form of workplace conflict. Federal and state laws, as well as most corporate Human Resources grievance policies define and prohibit it. Corporate policies also normally set out specific guidelines for managers to follow once a harassment complaint has been filed. Nevertheless, all forms of harassment can be mediated effectively by managers, if corporate policy allows it, if the problem is addressed early and if both parties are willing to participate in the process. An excellent discussion of workplace issues and managerial responsibility concerning harassment is found in the Canadian Department of Justice policy paper, "Toward a Conflict and Harassment-Free Workplace" (1996) (Note: the concepts are applicable for businesses throughout North America). Generally, six kinds of conduct may be considered harassment.

1. ***Unwelcome and Offensive Conduct.*** Unwelcome conduct is conduct that is unwanted by the person who is the object of it. The actor knows, or reasonably should have known, that the conduct would be unwelcome. Offensive conduct is a form of unwelcome conduct that is degrading to the recipient. It includes remarks, jokes or taunting, insulting gestures, displays of offensive gestures or materials and unwelcome inquiries or comments about someone's personal life. Whether or not this kind of behavior meets the legal standard of harassment in a particular case, it demonstrates lack of respect and harms the work environment.

2. ***Sexual Harassment***. A specific kind of offensive conduct, sexual harassment includes any sexual conduct, comment, gesture or contact, whether it happened once or on a continuing basis that causes offense or humiliation to an employee or causes an employee to believe that a condition of a sexual nature has been placed on employment, training or promotion. In his book Understanding and Preventing Sexual Harassment, Peter Rutter includes a sample sexual harassment policy that includes the following definition:

> Sexual harassment includes unwelcome verbal or physical conduct of a sexual nature when: (1) submission to the conduct is implicitly or explicitly made a term or condition of employment; (2) submission to or rejection of the conduct is used as the basis for an employment decision affecting the individual; (3) the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, offensive, or hostile working environment.
>
> Examples of prohibited sexual harassment include, but are not limited to: (1) sexual innuendo, suggestive comments, insults, threats, jokes; (2) suggestive or insulting noises, staring, leering, whistling, or making obscene gestures; (3) propositions or pressure to engage in sexual activity; (4) sexual assault or coercing sexual intercourse; (5) touching, pinching, cornering, or brushing the body; (6) inappropriate comments concerning appearance; (7) sexual or sexually insulting written communication, or public postings, including in electronic media; (8) display of magazines, books or pictures with a sexual connotation; (9) a pattern of hiring or promoting sex partners over more qualified

persons; (10) any harassing behavior, whether or not sexual in nature, that is directed to a person because of the person's gender, including, but not limited to, hazing employees working in nontraditional work environments.

The best way for managers to deal with sexual harassment disputes is early prevention; that is, to create a work environment that encourages mutual respect and responds immediately to inappropriate behavior. Many companies have sexual harassment officers with whom managers can work to communicate company policies to employees and to raise consciousness among employees about appropriate sexual boundaries. By distributing a written outline of company policies to every employee, by having the policy posted on bulletin boards, by encouraging employees to attend workshops on workplace harassment, through caring interventions in which managers speak privately, respectfully and nonthreateningly with employees about inappropriate conduct, and through mediation with parties willing to discuss their disputes, managers can create a respectful work environment that engenders free and positive relationships between men and women, while minimizing the possibility of sexual harassment.

3. Threats. Threats are comments, specific or implied, that create a hostile or offensive work environment. For a statement to be a threat, its consequence must be totally out of proportion with its cause and consequences. For someone to describe the reasonable consequences of an action (e.g., telling an employee about the consequences of poor job performance), even if it makes the employee uncomfortable, is not a threat.

4. Discrimination. Discrimination is harassment of an employee because of her/his race, national or ethnic origin, color, age, religion, age, sex (including pregnancy or childbirth), marital or family status, physical or mental disability, conviction of an offense for which a pardon has been granted, or sexual orientation.

5. Abuses of authority. Abuse of authority is always harassment. It means improperly taking advantage of a position of authority:

- To endanger an employee's job
- To undermine an employee's job performance
- To threaten an employee's livelihood
- To interfere with or to influence his/her career

It may include behavior such as:

- Yelling
- Belittling an employee's work
- Reprimanding an employee in front of other staff members
- Arbitrarily withholding or delaying leave approval
- Favoritism
- Unjustifiably withholding information that an employee needs to perform her/his work
- Demanding overtime without reason, justification or prior notice
- Asking subordinates to take on personal errands.

6. Violence. On an average work day in America, three people are murdered while on the job. The Bureau of Justice Statistics reports that each year almost 1 million people become victims of violent crime while working. Workplace violence is the extreme form of harassment. Frustrated, dissatisfied employees, domestic problems that carry over into the workplace, dismissed employees, agitated employees seeking compensation and drug or alcohol induced violence are all causes of the problem. All businesses are vulnerable to violence.

Managers are responsible for insuring that the workplace is a safe environment. While there is no way to totally eliminate workplace violence, there are early warning signs, red flags, that can help managers identify potential threats and strategies managers can use to prevent it. In their publication, "A Strategic Plan to Prevent and Manage Workplace Violence," The Center for Workplace Health and Safety (Baltimore, Maryland) identifies the following profile of high-risk individuals:

- White male in his 30s and 40s
- Loner, socially isolated and does not have a support system
- Owns guns and displays a fascination for and proficiency in weapons
- Long history of frustration and failure
- Demonstrates emotional or mental instability
- Works in a high pressure setting
- Insubordinate, defiant, or blatantly violates procedures
- Has made threats against the company or an individual
- Suffering from a drug or alcohol abuse problem
- Hatred for women
- Has experienced some precipitating event

Some strategies for preventing workplace violence include:

- Managers should help employees feel their worth. Treat people with respect and understanding.
- Managers should get to know their employees, their likes and dislikes, their hobbies and habits, basic information about their families, what makes them happy and productive.
- A company policy on workplace violence should be established and endorsed by top management. Employees should sign and be instructed in the proper utilization of the policy.
- Managers should provide employees with awareness training to deal with workplace violence.
- Managers can network with other companies to share policies, problems and ideas.
- Place the topic of workplace violence on a staff meeting agenda, so that supervisors or others can freely exchange observations, problems surfacing, rumors or mood changes in employees.
- Make high-risk areas visible to most people.
- Install good external lighting.
- Use drop boxes to minimize cash on hand.

- Carry small amounts of cash.
- Post signs announcing that limited cash is on hand.
- Increase the number of staff on duty.
- Conduct background investigations on new employees.
- Provide training in conflict resolution and nonviolent response.
- Instruct workers to avoid resistance during a crisis.
- Provide bulletproof barriers or enclosures.
- Conduct monthly security surveys of the workplace.
- Review after-hour inspections of access control at location.
- Change locks and have a key control program.
- Utilize visitor control systems.
- Utilize communication system to notify employees of emergency.
- Develop emergency crisis management team and evacuation plan
- Have police check on workers routinely.
- Close establishment during high-risk hours (late at night and early in the morning).

7. General Managerial Strategies for Preventing Workplace Harassment. The Canadian Department of Justice policy paper, "Towards a Conflict and Harassment-Free Workplace suggests the following general strategies for preventing workplace harassment:

- Create an atmosphere of mutual trust, support and respect. The old adage of doing unto others remains true today. Politeness, respect and restraint are the basic tools.

- When in doubt, ask. In a diverse work environment that involves people of different cultures, religions, sexual orientations and beliefs, some comments and behaviors are clearly offensive while others are no so clearly offensive. What is considered offensive may vary from person to person. When in doubt, ask.

- Watch body language. Body language, tone of voice and sudden silences can show that someone is uncomfortable with what you are doing or saying. Be alert to how someone is responding to your behavior.

- Apologize. Even if you meant no harm, if your behavior made someone feel uncomfortable, embarrassed, degraded or exploited, your behavior caused a problem. Apologize and change your behavior.

- If you are a victim, whenever possible make your concern known. Simply letting the person know that you are offended can sometimes open lines of communication that lead to resolution.

- If you are a manager, discuss problems privately with the responsible person. Discuss also discuss harassment privately with the one who has been the target. Be discreet and supportive and encourage the person to take appropriate steps to stop the problem through either direct conversation or mediation.

- If the problem is serious, get help. Involve the Human Resources Department or Office of Sexual Harassment.

The Sources of Conflict: People-Generate Conflicts (Continued)

4. Ethical Issues

Every business decision involves a choice between alternatives. Sometimes the choice is clear, but in many cases ethical issues make it difficult. Conflicts surface when decisions require us to subordinate one important value for another. What do we do when a circumstance make us chose between telling the truth or maintaining loyalty to a friend or an organization? When we need to choose between our individual interests and those of the organization? Or when short-term and long-term objectives are in conflict?

- Your productivity is falling a little behind this month. Company procedures are clear, but you know a better (faster) way to do the job. If you violate the rules, you can bring your results up to an acceptable level.

- You are correcting a mistake that is delaying the completion of a project. Your boss doesn't know about it. If you tell her, you'll be blamed. If you don't you could get chewed out for taking too long to complete the project.

- A superior is harassing a fellow employee. Blow the whistle and he might retaliate against you. You might even lose your job.

Managers can help employees avoid disputes base on ethical dilemmas by nurturing a climate of ethical congruence in the workplace. **Strategies** might include:

- Provide employees with a code of ethics or guidelines for ethical decision-making.

- Train employees in ethical decision-making.

- Reward employees who exemplify the company's ethical goals and objectives.

- Build systems that help employees make ethical decisions.

- Build systems that measure the effectiveness of the company's ethical initiatives.

The Sources of Conflict: People-Generate Conflicts

4. Ethical Issues (Continued)

The following are examples of **Codes of Ethics**:

- **The Ten Commandments** (Exodus 20:1-17). Two parts: (1) Don't worship more than one God; Don't create a graven image; Don't take God's name in vain; Don't break the Sabbath; (2) Honor your parents; Don't kill; Don't commit adultery; Don't steal; Don't give false evidence or lie; Don't envy or covet. This code asserts prohibitions rather than asserting what must be done.

- **The Boy Scout Law**: "A scout is: Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, Reverent.

- **The Girl Scout Law**: A scout is: Trustworthy, Loyal, Useful, Friendly, Courteous, Kind to Animals, Obedient, Cheerful, Thrifty, Clean in Thought, Word, and Deed. *Boys must be kind, while girls need to be kind only to animals; boys should be "helpful," while girls are simply "useful."*

- **The West Point Honor Code**: "A cadet does not lie, cheat, steal or tolerate those who do." *Two screens: not only does the code regulate one's own behavior, it also requires one to pay attention to the action of others. What is the meaning of the word "tolerate?"*

- **The Four-Way Rotary Test**:

  1. Is it Truth?
  2. Is it Fair to all concerned?
  3. Will it build Goodwill and Better Friendships?
  4. Will it be beneficial to all concerned?

- **The McDonald-Douglas Code of Ethics**:

  1. Honest and trustworthy in all our relationships.
  2. Reliable in carrying out responsibilities and assignments.
  3. Truthful and accurate in what we say and write.
  4. Cooperative and constructive in all work undertaken.
  5. Fair and considerate in our treatment of employees, customers and all other persons.
  6. Law abiding in all our activities.
  7. Committed to accomplishing all tasks in a superior way.
  8. Economical in utilizing company resources.
  9. Dedicated in service to our company and to improvement of the quality of life in the world in which we live.

- **The Minnesota Principles (The Minnesota Center for Corporate Responsibility):**

Proposition #1: Business activities must be characterized by fairness. We understand fairness to include equitable treatment and equality of opportunity for all participants in the marketplace.

Proposition #2: Business activities must be characterized by honesty. We understand honesty to include candor, truthfulness and promise-keeping.

Proposition #3: Business activities must be characterized by respect for human dignity. We understand this to mean that business activities should show a special concern for the less powerful and disadvantaged.

Proposition #4. Business activities must be characterized by respect for the environment. We understand this to mean that business activities should promote sustainable development and prevent environmental degradation and waste of resources.

- **Johnson and Johnson Credo**: "We believe our first responsibility is to the doctors, nurses, and patients, to mothers and fathers, and to all others who use our products and services."

In a helpful book for managers, How Good People Make Tough Choices, Rushworth Kidder identifies three methods and nine checkpoints for ethical decision-making:

Three Methods for Ethical Decision-Making:

- Ends-based: "Do whatever produces the greatest good for the greatest number." Involves an assessment of consequences and the forecasting of outcomes.

- Rule-based: "Follow only the principle that you want everyone else to follow." Act in a way that your actions could become a universal standard that others ought to obey.

- Care-based: "Do unto others as you would have them do unto you." Reversibility: the process of putting yourself in someone else's shoes. Imagine how it would feel if you were the recipient, not the perpetrator, of the action.

Nine Checkpoints for Ethical Decision-Making:

1. ***Recognize that there is an ethical dilemma***. Identify the issue needing attention. Sift genuine moral issues from those merely involving manners or social convention.

2. ***Determine the actor***. Whose moral issue is this? The question is not whether or not I am involved, it's whether or not I'm responsible. Am I morally obligated and empowered to do anything about the issue raised?

3. ***Gather relevant facts***. Good decision-making requires good reporting. Discover the ways events unfolded, what finally happened, who said what to whom, who may have suppressed information, etc.

4. ***Test for right vs. wrong issues***. (a) The legal test: were any laws broken? (b) The stench test: moral intuition, how does it feel on a gut level, does it have the indefinable odor of corruption? (c) The front-page test: how would you feel if what you are about to do showed up on the front page of the newspaper tomorrow morning? (d) The mom test: "If I were my mother, would I do this?" The focus here is on any moral exemplar who cares about you and means a lot to you.

5. ***Test for right vs. right paradigms***: What sort of dilemma is this? Truth vs. Loyalty; Self vs. Community; Short Term vs. Long Term; Justice vs. Mercy.

6. ***Apply resolution principles***: (a) ends-based or utilitarian principle; (b) rule-based or Kantian principle; (c) care-based or Golden Rule.

7. ***Investigate trilemma options***: Is there a third or a fourth way through the dilemma?

8. ***Make the decision***.

9. ***Revisit and reflect on the decision.***

The Sources of Conflict: People-Generate Conflicts (Continued)

5. Skill differences:

a. Ability to maintain control of self while dealing with others.
b. Ability to choose among alternative behaviors.
c. Limited repertoire: undermining, arguing, belittling.

6. Personal and interpersonal deprivation (inclusion, affection, recognition).

The Sources of Conflict:

Process: Patterns of Dysfunctional Interaction.

1. All organizations have persistent formal and tacit patterns of interaction (rules, roles, rituals, goals).

a. Formal:

- rules: Policies, Constitution
- roles: CEO, Vice President, Manager
- rituals: Board Meetings; Procedures
- goals: Articulated Long and Short-term Objectives

b. Tacit:

- rules: norms, dress codes, no talking about politics.
- roles: "smoother" of conflict; gatekeeper, matriarch
- rituals: shaking hands, "How are you?"
- goals: Just make it until Friday.

2. Formal structures may exacerbate conflict:

a. Disproportionate power: powerlessness tends to foster hostility.
b. Boards, committees, teams, departments put in competition with each other.
c. Secret deliberations.
d. Environmental factors that hinder cooperation.
e. Formal patterns of dispute resolution that foster conflict.

3. Informal structures that may exacerbate conflict:

a. Norms that deny that dissent and differences are legitimate.
b. Communication patterns (triangling) which raise anxiety within the organization.
c. Patterns of interaction that limit appropriate uses of authority within the organization.
d. Secrets, secret meetings, collusion.
e. Patterns of interaction that confound decision-making (over-study; not calling for decisions, questioning the motives of people who raise legitimate issues).
f. Patterns of dispute resolution that foster competition and conflict.

Sources of Conflict:

Problems to Solve and Polarities to Manage

1. Problems to Solve:

Managers can effectively and informally address conflicts that are related to the work itself. Work-related disputes often concern the fair allocation of resources, about who will have what, how much and when. Sometimes they involve resolving the hurt feelings associated with the perception that allocations are made based on favoritism. Often workplace disputes arise over differing perceptions on what is important and what is not. One person thinks the work needs to get out, while the other thinks the quality is not good enough. Supervisory mediation with a view to the department's established goals and standards can be effective in such disputes. Changes in job description that imply a change in status can lead to conflict between employees. Sometimes new employees are perceived to be infringing on the more established employee's "territory." Often when things are going poorly in a department a general distrust arises among employees. People begin to blame one another. Managerial assistance may be necessary to reconcile relationships and build trust. Resolving conflicts between employees and supervisors over performance reviews and termination are frequent disputes that managers must address. In this era of reengineering and downsizing, managers are often called upon to help address the anxiety, quarreling and complaints that regularly accompany change.

Problems are issues or conflicts related to the relationships or work itself that ***can be solved.***

- Differing values.
- Opposing views about how to make a decision.
- Incompatible needs or interests.
- Concrete differences about how to use, distribute or access limited resources (land, time, money).

Sources of Conflict: Problems to Solve and Polarities to Manage

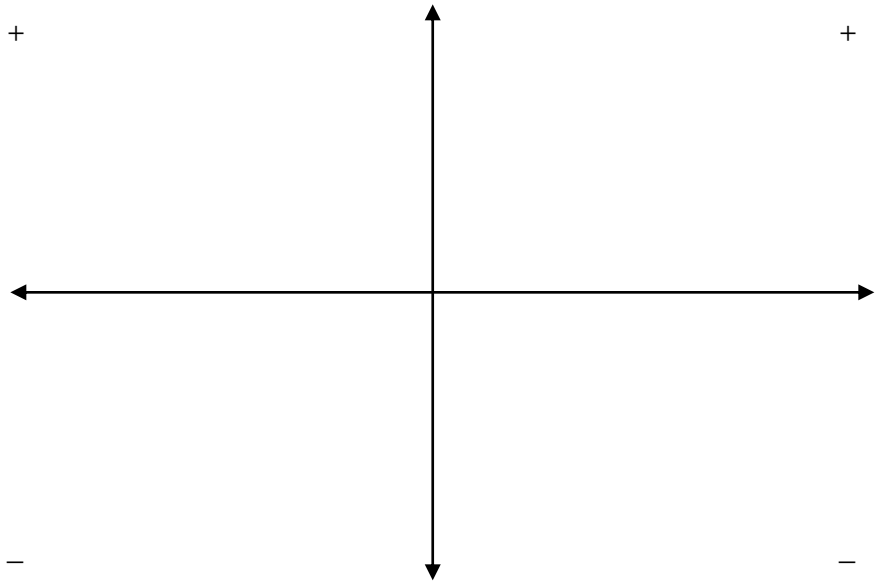
2. Polarities to Manage

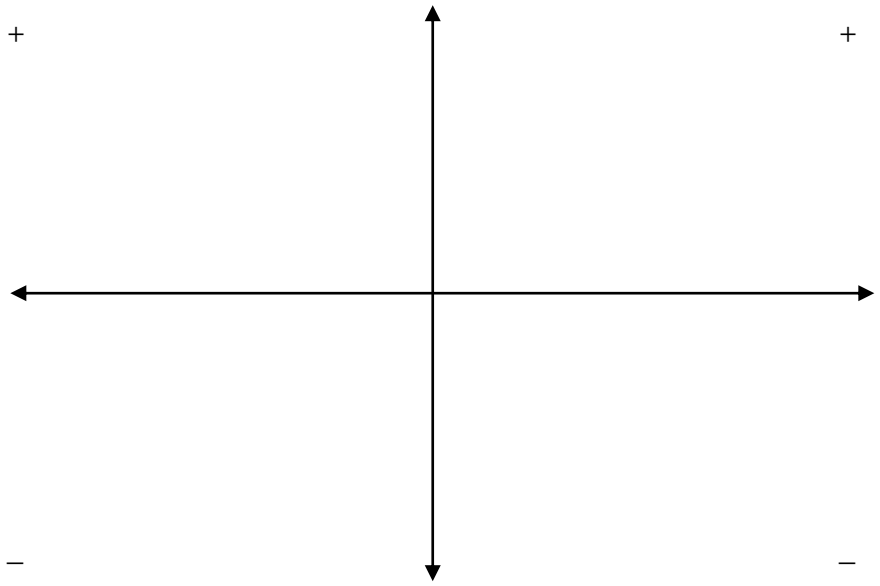
Some workplace conflicts can never be resolved but must continually be managed. Such disputes, called "polarities," involve elements that both are essential to the on-going health of an organization and are simultaneously opposite. Organizational polarities might include disputes between departments that are at cross-purposes, such as production and maintenance, production control and sales, sales and credit, or accounting and retailing. Other corporate polarities might include disputes over visionary vs. managerial leadership, team vs. individual emphasis, inside vs. outside focus. Since both sides of a polarity are opposite and both are necessary, these conflicts never go away. Managers in whose departments they surface must continually negotiate agreements on how they will be managed. In his book, Polarity Management: Identifying and Managing Unsolvable Problems, Barry Johnson maintains that polarity management skills can help a manager become "more effective as third party mediator. This is especially true in conflicts where two groups are stuck in a polarity and are treating the polarity as if it is a problem to solve."

- **What is a Polarity?**
    - Sometimes a conflict is unresolvable because it involves two issues or realities that are both necessary and opposite. It is not possible to do both at the same time.
    - While problems have one solution which can be mutually satisfactory, polarities can never be solved and must therefore be managed.

Polarities (Continued)

Diagramming Polarities





Polarities (Continued)

Examples of Common Workplace Polarities

- Individual and Team
- Critical Analysis and Encouragement
- Managerial and Transformational Leadership
- Clear and Flexible
- Planning and Action
- My Job and My Place
- Individual Responsibility and Organizational Responsibility
- Word and Deed
- Stability and Change
- Conditional Respect and Unconditional Respect
- Autocratic and Participatory
- Centralized and Decentralized
- Stress and Tranquility
- Part and Whole
- Team and Department
- Department and Company
- Differentiate and Integrate
- The Organization and the Customer
- The Product and the Market
- Uniqueness and Connectedness
- Competition and Collaboration
- Product Engineering and Process Engineering
- Training for Work and Doing the Work
- Means and Ends
- Team Balance and Team Task
- Right Brain and Left Brain

Polarities (Continued)

Managing Polarities

1. **Bad systems, organizations move from the downside of one polarity to the downside of another.**

2. **Healthy systems work both sides of the polarity.**

3. **Learn to move in the upper quadrants (how to manage polarities):**

    - Work to get a complete picture of the polarity.

        - What's good about where you are?
        - What's good about the opposite pole?
        - What are the values of the other side (e.g. the managerial-transformational leadership polarity)?

    - Keep the polarity moving by:

        - Structuring tension into the system:

            - set up organization with checks and balances;
            - different committees, teams, each having unique voice;
            - each responsible for important areas, neither fully in charge;
            - build into organization competing groups struggling for the same resources;
            - include new people, or people whose perspectives have not been well represented.

        - Scheduling shifts:

            - focus on this now, on that later;
            - undertake two tasks at the same meeting;
            - establish groups in the organization that work both ends of the pole.

        - Initiating responsive shifts:

            - respond to the reality that we're not handling these things very well;
            - organizations have individuals who are appointed by God to scream. Listen to them, they may be aware of areas in which people's needs are not met;
            - person designated at meeting as process observer/a person who speaks the truth;
            - impeachment;
            - systems inventory, evaluative strategies.

Managerial Strategies for People, Process, and Problem-Generated Disputes

1. Manager's Role in People-Generated Disputes:

- Elicit the expression of emotions and perspectives about the conflict.
- Recognize the human need to explain, justify and vent feelings.
- Respect the dignity of people as human beings.
- Support self-esteem.
- Probe perceptions and conceptualizations of the situation and of others.
- Identify how the other's behavior has affected them and their lives.
- Identify how personality differences impact on relationships.
- Identify differences in communication skill levels.

2. Manager's Role in Process-Generated Disputes:

- Uncover the dysfunctional patterns of communication as they relate to decision making.
- Interrupt dysfunctional interaction patterns by making the unconscious conscious.

  (1) Triangulation: be direct.
  (2) Gossip and rumors: problem is listening to gossip, "Have you spoken with . . ."
  (3) No talk: let's talk.
  (4) Blame: look inside.
  (5) Be nice: be proactive; ask for permission not to follow the norm.
  (6) No anger: it's O.K. to be angry, not O.K. to attack; acknowledge it.

- Discover how people feel about how decisions have been made.
- Understand and address power imbalances and their role in the conflict.
- Decrease anxiety.
- Focus more on process than on content.
- Implement process that is fair and is experienced as fair by participants.

3. Manager's Role in Problem-Generated Disputes:

- Clarify areas of concern and the specific issues dividing people.
- Uncover basic needs and interests underlying issues.
- Establish mutually acceptable criteria/process for decision-making.
- Identify principles and values held in common.
- Identify and manage polarities.

General Strategies for Managing or Decreasing Conflict

1. Foster a Dialogical Climate.

- Prize the emotional side of life (venting, catharsis, expression).
- Be intentional about the process of inclusion (structure inclusion).
- Develop practical ways for employees/members to work on goals/objectives.

2. Structure Meetings Purposefully.

3. Decrease Fear/Anxiety/Stress.

- Deepen spirituality
- Encouragement, support
- Environment of safety
- Slow the process
- Establish ground rules
- Improve organizational structure

4. Decrease Seriousness, Increase Playfulness

5. Discourage Secrets.

6. Focus More on Process, Less on Content.

7. Interrupt Dysfunctional Interaction Patterns by Making the Non-Conscious Conscious.

- Triangulation: be direct.
- Gossip and rumors: problem is listening to gossip, "Have you spoken with . . ."
- No talk: let's talk.
- Blame: look inside.
- Be nice: be proactive; ask for permission not to follow the norm.
- No anger: it's O.K. to be angry, not O.K. to attack; acknowledge it.

8. Develop a Clear Dispute Resolution System.

- Clear policies and procedures.
- Avenues to express grievances.
- Conflict resolution teams.

9. Continuously Manage Polarities

How Can Managers Help Employees Avoid Disputes?

Managers can employ the following strategies to create an atmosphere of respect in the workplace, a climate that diffuses anxiety and de-escalates conflicts before they develop into fights. Based on tips from the Canadian Department of Justice policy paper, "Towards a Conflict and Harassment-Free Workplace," this section summarizes a managerial approach to conflict that is preventative, respectful and conciliatory.

- **Be Aware.** Managers are responsible for the way relationships are conducted in their work area. Walking around the workplace, being present to employees will influence how employees behave. Be explicit with employees: insults, derogatory comments and jokes will not be tolerated and could lead to disciplinary action. Insist that employees give respect to others on all levels and at all times.

- **Communicate Openly and Respectfully.** Take the time to talk to and listen to your employees. Make clear that you are willing to hear honest complaints and constructive criticism. Solicit suggestions for the improvement of workplace effectiveness and morale. Tell subordinate managers that you are willing to help them with conflicts between them and any employee or member of their staff. Treat personal information with sensitivity and provide as much confidentiality to parties as possible. Be willing to seek assistance in resolving workplace disputes from your own superior or from the company's Human Resources department.

- **Model Conciliation.** Show respect for the employees within your area of responsibility. Never participate in or approve of behavior that could be construed as offensive, disrespectful or harassing. When you witness such conduct, remember that standing by and doing nothing suggests that you approve. Your tacit approval of offensive behavior will most likely cause it to escalate.

- **Watch for Problems.** Rumors, increased absenteeism, decreased productivity, motivation and quality, lower job performance and high staff turnover are all signs of conflict.

- **Deal Promptly with Disputes.** It's easy for managers to want to avoid conflict. Conflict avoidance is a normal human response, particularly for a busy professional. Delays in addressing a conflict, however, will usually only make things worse. Address conflicts promptly and effectively.

- **Take Issues Seriously.** Post your company's dispute resolution policy. Mention the policy or system at staff meetings. Hold regular awareness sessions. Explain to your employees how the policy works, what to do in given circumstances, how to prevent and deal with conflict when it arises and how to restore positive working relationships once a dispute is resolved.

Typical Unproductive Responses to Perceived Aggression

Counterattack **A** ←

Defend **A** → | **B**

Roll over **B**

Blame someone else **B** → **C**

Run away **B** →

Refuse to budge **B**

Undermine A **A** ↓

Why B Loses with Each of These Responses

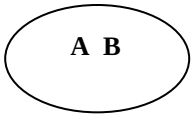
Notice that in each of B's responses, A is more dominant and powerful, while B appears weaker and merely responding to A's cues. A gets something from every one of B's responses:

- If B counterattacks, A will have succeeded in getting Bs attention, and may earn support or sympathy from others by no longer appearing to be the one who initiated the problem.
- If B withdraws, A wins.
- If B becomes defensive, A can say B is not listening.
- If B blames C or refuses to budge, A can say B is refusing to accept responsibility for the problem.
- A may even look like the innocent victim of B's unprovoked attack to an outside observer who did not actually see A attack B first!

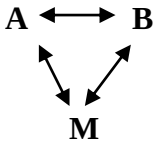
In each of these responses B does A a favor by entering the conflict and increases A's power

Productive Responses to Perceived Aggression

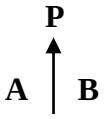
Discover common interests



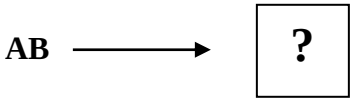
Bring in a mediator



Focus on the problem

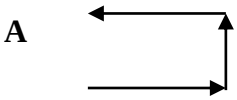


Focus on the future

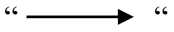


Invite it in

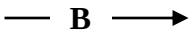
Create introspection



Reframe the issue



Let it pass through



None of these responses is easy but each one leads away from warfare and toward opportunity. These practical ways of responding shift your response from one that is based on perceived aggression to one that is based on potential collaboration.

In each of these responses the cycle of aggression is halted. The focus turns from the person to the problem. Dialogue centers around mutual concerns. Time focus moves from the past to the future and both parties begin to operate out of a collaborative context.

B halts the escalation of the conflict simply by refusing to accept the role a creates for you. B does not have to be the victim, or accept A's definition of the problem, or accept A's version of B's role in the conflict. B gains power and deprives A of the reactions that reward aggressive behavior. This approach also makes A appear uncooperative if A continues to act in an aggressive manner.

Creating Separations

In conflict, we tend to lump issues that upset us into a mass of indistinguishable complaints. As long as they are intertwined, it is difficult to negotiate, fix, or resolve them. As strange as it may seem, simply creating distinctions--separations between the elements in our conflicts--can produce a significant shift in our ability to approach them constructively.

These separations can transform our attitude from passive, reactive, and powerless to self-possessed, proactive, and strategic. They signal our transition from focusing on listening and emotional processing to focusing on problem solving and negotiation. With them, we break down seemingly monolithic issues into easy-to-handle parts, using a set of uncomplicated tools. In doing so, we discover solutions and prepare to implement them.

The following "separations" should allow you to see your conflicts more clearly, identify strategies for tackling each piece separately and make it easier to transform the whole.

- Separate positions from interests
- Separate people from problems
- Separate problems from solutions
- Separate commonalities from differences
- Separate the future from the past
- Separate emotion from negotiation
- Separate process from content
- Separate options from choices
- Separate criteria from selection
- Separate yourself from others

Formal Conflict Resolution Processes: The Dispute Resolution Continuum

If a manager hears rumors about a dispute or observes one directly, it is imperative that he/she act immediately. Managers are responsible for acting promptly, appropriately and with discretion to put an end to inappropriate behavior and to address disputes. Managers have been held *personally* liable if they knew or reasonably ought to have known about an incident of harassment and did not take steps to deal with it. Often, particularly after a formal grievance has been filed, the manager's response to a dispute is dictated by company policy. Managers in larger companies may have specific procedures, Human Resources personnel or conflict resolution specialists available to help them address disputes through the company's dispute resolution system. However, before a formal procedure is initiated or when a manager observes a lower level conflict at an early stage or in smaller companies without dispute resolution systems or in place, a manager has several options for dealing with workplace conflict. Dispute resolution alternatives are set out below along a continuum ranging from the more informal to the more formal processes

The Dispute Resolution Continuum

1. Conflict Avoidance ("lumping it")

- Issue not that important
- No power to force change
- No viable options for change

2. Direct Discussion

At low levels of conflict, a manager may simply ask employees to see if they can together work out their differences without outside help. Either through direct conversation or conversation joined with a letter, a manager can talk to an employee accused of acting inappropriately. Often employees are not aware of the effect of their behavior. Speaking to them about it in private may be enough to stop it. Be descriptive, not accusatory. Describe what you've heard and your feelings about it and state what you want to have happen next. If you want the behavior to stop, state that explicitly. A manager might consider having the conversation first and following up with a letter if the behavior continues.

- Avoidance not possible
- Issue briefly discussed
- Issue dropped or resolved

3. An Awareness Session.

A manager might conduct or ask an outside consultant to conduct an awareness session for employees to help them think and talk openly about workplace behavior. Case studies that mirror actual office dynamics could be presented to encourage employees to discuss workplace issues and conflicts. Sessions like these can help remedy potentially problems without further action.

4. Negotiation

A more directive approach would have the manager provide employees with guidelines for a negotiation and require them to report back with the results of their efforts.

- Two or more parties who confer with each other to reach a mutually acceptable settlement.
- Formal or informal
- Identifying common interests

5. Ombudsperson

In a more formal procedure, an ombudsperson, a grievance handling official, investigates complaints (often against a public entity or governmental agency) and depending on the investigation recommends a solution (either that the agency grant relief or persuading the complainant that the agency was correct). He/she generally lacks authority to impose a solution on either party. Their principle powers are to investigate and recommend. Their influence generally rests in their ability to persuade the disputing parties to accept their recommendations.

- Problem solver who works in organization and has high authority (works in president's office)
- Has a neutral role
- Has the ability to gather information

6. Conciliation

Conciliation is a less formal form of mediation in which a third party, such as a manager, might observe or assist disputing parties as they attempt to resolve their conflict. For example, a manager might invite two disputants into her/his office for a three-way conversation about the dispute.

- A step before mediation
- Brings parties together to diffuse emotion

7. Mediation

- Facilitated negotiation: necessary to understand negotiation theory and process, dynamics to be an effective mediator.
- Third party added to a negotiation: the intervention of an acceptable, impartial and neutral third party who has no authoritative decision making power to assist the contending parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.
- A more formal process, follows stages
- Privacy question answered by the ADR act: confidentiality. Privacy can be promised to parties.
- Multiple parties may be present: parties, lawyers, possibly experts, co-mediators, others present on the side only if they're needed.
- Mediator has no power to decide; not arbitration
- Type of decision that may result: binding nature of mediation--if you negotiate effectively and reach an agreement and you commit it to writing, the agreement is binding under Texas contract law. Under Texas ADR Act written agreements are enforceable.
- Coercion: Does a mediator have the power of coercion? Sometimes it is a power to coerce people to stay at negotiation table. We are to be removed and neutral. How can I convince them that they are making progress?
- Time: varies
- Money: varies; this is an entrepreneurial profession
- Self-determination is the heart of the mediation process: "You have an opportunity here to resolve this yourself. Tomorrow, on the other side of the due process line you lose self-determination."
- Levels of emotion: venting--allowing parties to go a while with high emotion.
- Continuing relationship--yes.

8. Evaluative Processes

- **Early neutral evaluation**: someone with subject matter expertise puts a monetary value on case.
- **Moderated settlement conferences**: pending litigation, moderators, experienced lawyers in the area of dispute, hear an abbreviated case and provide a range at which the settlement might occur. With this information, disputants go back to negotiation
- **Mini Trial**. Two CEO's sit down at table and have an opportunity to hear the other's case before going to litigation. Gives participants and opportunity to understand the others perspective. Then negotiation.
- **Summary jury trial.** Jury summoned. Panel of six. Case put on in abbreviated form. Jury decides. Used as advice to participants who return to negotiation.
- **Non-binding arbitration.** Arbitrator hears case, gives opinion, not binding. Opinion is used to go back to the negotiation table.

"DUE PROCESS" LINE

9. Arbitration

An even more formal process is arbitration. While arbitration may be non-binding, most often it crosses the due process line on the dispute resolution continuum into the area of binding processes. In this process the parties in dispute agree to be bound by a decision of an impartial person outside the normal judicial process. Lawyers for the parties are involved, the process is normally private and arbitrators have ultimate authority. There is often strong coercion by the arbitrator on the parties and the decision of the arbitrator is binding on the parties in dispute.

- Third party
- Binding decision
- More private process (outside the judicial process)
- Lawyers involved
- Arbitrators have ultimate authority.
- Decision is binding
- Coercion is strong

10. Administrative Hearings (EPA, Social Security Administration)

- Governmental agency
- An official with subject matter expertise makes a binding decision that affects the parties.
- Lawyers may attend or be necessary to protect rights

11. Litigation

- Adjudicatory process with formalized rules and appealable decisions made by a judge or jury.
- Formal process
- Judge and jury
- No way to just tell your story
- Not private, not confidentiality
- Time: long time between time case is filed and heard
- Lose self-determination (sabotage more likely)

12. Legislation

- Formal process by which laws are made or changed
- Lawyers and legislators involved
- Process is an open forum; but there is an underlying informal part of the process (lobbying)

13. Non-violent Direct Action

- Sit-ins
- Gandhi
- Peace marches

14. Violence/War/Abuse/Sabotage ("Going Postal")

Criteria for Selection of Dispute Resolution Process

- People Involved
- Finality of Process
- Type of Resolution Desired
- Privacy of Resolution Method Desired
- Amount of Time Willing to Devote
- Self-determination important?
- Flexibility of Outcomes Important?
- Level of Emotion Present
- Continuing Relationship Expectations
- Formality of Process Desired
- Amount of Coercion Needed to Be Exerted on the Disputing Parties
- Agency Policy
- Financial Constraints
- Authority of Third Party
- Communication Possible
- Legal Precedent Necessary
- Available Neutrals or Courts
- Impasse in Negotiation
- Potential Trade-Offs

Choosing Dispute Resolution Strategies: An Exercise

Which dispute resolution process or processes would you choose to address the following disputes?

1. Two of your best friends whisper and tell jokes while you are giving a speech at the local Rotary Club. You see that some people are distracted by their behavior and it is annoying to you. You see them at the coffee time immediately following the meeting.

2. For over 25 years, the Mosers and the Gefferts have been owners of neighboring tracts of land. Originally, the boundary between their tracts of land was a winding road. 15 years ago the road was straightened—each party had about 6 acres of his neighbor's land on his side of the road. Always friendly neighbors, the two families simply granted deeds conveying the surface estates of the pieces of land to the other one. Each party however retained their rights to the mineral estates on the conveyed land. Five years ago uranium was discovered on the tract of land conveyed to the Mosers. The Gefferts insisted that the uranium was a part of the mineral estate, and therefore belonged to them. However since the uranium was near the surface, the Mosers insisted that it was a part of the surface estate conveyed to them.

3. A recently fired employee has reported to the EPA that his former employer, the Sundance Chemical Corporation, has been dumping hazardous chemicals into the Blue Willow River. After investigation, high levels of a chemical synthesized at the plant are found in fish in an area of the river near the plant. A suit has been brought by the EPA against the company to stop the dumping. The company suggests mediation. Do you as the agent for the EPA agree to have the case mediated? Why or why not?

4. John's new 1998 Lincoln Continental regularly stalls at stoplights. Several times the car has even shut off completely as he was driving on the freeway. Five times in the last 3 months he's brought it back to the dealership for service. The dealer can't find anything wrong with the car and tells John that the car is stalling because John doesn't let it warm up properly. John thinks his car is a lemon and wants it replaced. He is threatening to sue the dealership. You are the regional manager for Lincoln responsible for handling customer complaints and have just received a letter from John's attorney demanding a remedy.

5. Rick's mom Emily has Alzheimer's disease. She is bed-ridden, unable to communicate, to control her bodily functions, or to feed herself. Without Rick's knowledge or permission, the doctor has inserted a feeding tube into Emily's stomach so that she can receive nutrition and hydration. With the tube Emily could live for several more years. Rick feels that his once dignified, proper and independent mother would prefer to die with dignity than remain in her present state. The doctor believes that he cannot now remove the tube without "killing" Emily. Rick is seeking legal counsel to force the doctor to remove the tube. You are the hospital administrator.

6. There is a great deal of unhappiness among faculty members about the pedagogical methods of Dr. Green, an eccentric biologist. A few of his students appear to do very well, excelling above most of the biology majors. Most of his students, however, end up failing the courses. Complaints are now coming into the dean's office from some of the parents of these students, among whom are significant donors to the university's endowment. The reputation of the department is being damaged. Other science faculty members are getting tired of having to counsel students soured on science from their experiences with Dr. Green. You are the dean.

Chapter Two

Managerial Mediation

"Mediation is the intervention of an acceptable, impartial and neutral third party who has no authoritative decision making power to assist the contending parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute."

Christopher Moore

Chapter Two

Managerial Mediation

Summary

Mediation is a process in which an impartial and neutral third party assists contending parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute. This chapter discusses the applicability of this important dispute resolution process for the workplace. When should managers mediate employee disputes? What legal and ethical guidelines govern the practice of mediation? What method can managers employ to mediate workplace disputes?

Assessing the Appropriateness of Disputes for Mediation
When Should Managers Mediate Workplace Disputes?

The Ethical Issue

When should a manager mediate a workplace dispute? A prior ethical issue needs to be addressed: "Should managers mediate workplace disputes at all, or should they refer them on to others for resolution?" As with most ethical issues, the approach is contextual, it depends on the situation. The relevant questions are: (1) What do we mean by the word mediate? (2) What is the nature of the dispute? and (3) What is the relationship between the manager and the parties in dispute?

1. What do we mean by the word "mediate?" The word "mediate" simply and informally means "to stand between two sides, to help two parties in dispute come to agreement on issues that divide them." With the advent of the Alternative Dispute Resolution movement, the word also carries a formal meaning. It refers specifically to the actions of a person who conducts a formal process, a mediation. Mediation in this formal sense is a procedure that follows a clear agenda, demands specific skills of the mediator and is governed by ethical standards. When we use the word "mediate" in this way, serious questions are raised about whether a manager can function as a mediator for two employees under her/his supervision.

The problem centers in the conflict of interest inherent in the two roles. Managers and mediators conduct their work based on different, potentially conflicting codes of ethics.

A. mediator is primarily responsible for facilitating a process that allows two parties in conflict to express freely their perspectives along the way toward a self-determined agreement. The freedom of expression necessary for such a process requires trust. The tools used in the mediation process to build trust are ***neutrality, impartiality and confidentiality***. A mediator is expected to be a neutral third party, one not invested in the outcome, one who allows and empowers the parties to discover their own mutually satisfactory settlement. He/she promises at

the outset not to reveal any information learned from the parties during the course of the mediation. Such mediator ethics can often be in conflict with those inherent in the role of manager.

An executive, middle manager or supervisor is primarily responsible obtaining, deploying and utilizing a variety of human and material resources in order to achieve an organization's objectives. A manager's priorities are planning, initiating, implementing and evaluating programs that serve the goals of the company or the manager's department. Managers at all levels of an organization answer to superiors for the performance of their areas of responsibility. Executives report to the Board or to shareholders. Middle managers carry out the broader objectives set by executives. Supervisors report to managers. Poor performance in any area reflects poorly on the one in charge. The code of professional ethics or corporate responsibility implied by this chain of command could potentially challenge the ability of a manager to maintain neutrality and confidentiality when functioning as a formal mediator. When, for example, a manager functioning in the role of mediator hears something that could negatively impact the performance of the manager's own area of responsibility--something therefore that could potentially jeopardize the manager's own reputation--immediate questions surface about the manager's ability to remain neutral and to maintain confidentiality.

For this reason, dispute resolution specialists often speak of a less formal or hybrid form of mediation that managers can use in the workplace. While full-blown formal mediation might cause problems of conscience for a manager, a "little" mediation, that is, a supervisory (Kovach, Folberg) or informal (Slaikeu, Bittel) application of mediation techniques can go a long way to addressing employee conflicts.

Kovach (216) and Folberg (134) speak of "supervisory mediation" in which the mediator holds some inherent authority, either assumed by the mediator or provided by the parties. All understand from the beginning of the mediation that if the parties do not reach an acceptable settlement (one also acceptable to the mediator), the mediator may use this authority to decide for them. The supervisory approach is defined by its informality, the private nature of the conflicts addressed, the authority or respect afforded the mediator, the mediator's personal interest in the outcome, and the speed of the process.

Slaikeu (213) describes for managers a variation on the standard process he calls "informal mediation." In informal mediation, aspects of the mediation process are employed to help employees resolve problems, without the term "mediation" and its associated ethical guidelines being used. The manager simply performs the functions of a mediator without the formal title. Not all steps in the formal mediation process come into play, only what is necessary to help parties reach an agreement. The setting may also be informal. A manager may employ elements of the mediation model during board or planning meetings or simply while standing with colleagues by the water cooler. The goal is the same as in the formal process: an integrative solution that honors the interests of both parties and is worked out by the parties themselves.

Bittel (350) calls the informal mediating process "refereeing." The referee manager first calls together the people who can best decide the issue. He/she lets the disputants settle the conflict

by negotiation or bargaining. The manager holds up total organizational results as an important criterion in the negotiation and keeps the focus on mutually beneficial outcomes.

While not functioning in the formal role, a manager with the knowledge and skills of a mediator can therefore significantly address workplace conflicts. Even more, since such mediation skills are applicable to many aspects of management—consultation, strategic planning, and team building—a manager's training in this area can significantly enhance the productivity of the work environment.

2. What is the nature of the dispute? Often a company's grievance policy requires that a manager immediately refer specific types of conflicts to the industrial relations, human resources or personnel department. Employee discrimination, sexual harassment or cases that involve potential litigation can fall into this category. As we have emphasized above, however, a manager who observes such conflicts at an early stage could, by applying mediation techniques, prevent such issues from erupting into the major disruptions that damage corporate life. A manager's ability to judge the level of conflict involved in a dispute is key to determining whether a dispute needs to be referred to personnel or can be handled through informal mediation. We discuss a method for assessing the level of conflict later in this section.

3. What is the manager's relation to the employees? Whether or not a manager mediates a dispute between two employees often depends on the relation the manager has with the disputants. The nature of the relationship is determined by a number of factors. The size of the organization plays a significant role. Larger corporations might have dispute resolution systems in place or personnel departments set up to handle workplace conflicts for managers. In a small organization, where the manager is the sole supervisor of a few employees, he/she might be the only one available to mediate a dispute. Corporate policies or procedures may limit or encourage a manager's role as mediator of employee disputes. A manager's job description may preclude mediating disputes. Too occupied with the business of business—planning, implementing and evaluating—a manager may have no time to deal with employee disputes and therefore refer them to other departments or to an outside consultant for resolution.

4. The Prior Question of Trust. Trust is perhaps the major consideration in determining whether a manager should mediate a dispute between two employees. Do the employees trust the manager to be fair and to facilitate a process that will honor and respect the rights and interests of both parties? It is far more important that the disputants trust the manager/mediator than that they trust one another.

Managers build a reputation of trustworthiness by consistently exhibiting behaviors that engender rapport with their employees:

- Trusted managers are consistently good listeners; they put aside their own view to listen to the thoughts, feelings and interests of others.

- Trusted managers are consistently able to maintain objectivity; they are able to recognize the validity of the interests on all sides of an issue.

- Trusted managers are aware of their own biases and prejudices; they admit their conflicts of interest that might make them poor mediators of a given dispute.

- Trusted managers prize the emotional side of life; they are not threatened by the strong expression of feeling and therefore provide both private and public contexts in which the emotions of their employees can be expressed.

- Trusted managers understand their own limitations; they recognize when a problem is too complex for them to solve without help; they are in touch with outside resources whom they call to help employees work through difficult issues.

- Trusted managers are good communicators; they know how clearly to express their own thoughts and concerns, and they are able to help others do the same.

- When two employees in conflict both trust their manager, he/she could be an excellent resource for mediation.

***5. Conclusion*.** Should a manager mediate a dispute between two employees? If the manager has the skills and knows the process, if conflicts of interest involving neutrality and confidentiality can be overcome, if the parties agree to a supervisory methodology or if informal mediation is applied, if the company's policies and size permit it, if the manager's job description and time constraints permit it, and if the employees trust their manager, a manager could effectively mediate a dispute between two employees.

Mediation

Guidelines for Determining the Appropriateness of Workplace Mediation

When should a manager choose mediation as the method for addressing a workplace dispute?

- If the ethical issues of confidentiality and neutrality can be satisfactorily addressed with all parties in the dispute.
- If the company policy permits it.
- If the manager's job description and time constraints permit it.
- If the employees trust the manager and voluntarily request mediation.
- If the manager's skills as a mediator are adequate for the nature and intensity of the dispute.
- If there is an issue of safety, if one party in the dispute feels that it is unsafe to be honest with the other, that full expression of feelings would lead to retribution or to a deterioration of the relationship, mediation can provide a safe place that allows for greater honesty.
- If there is an impasse, when attempts to have employees negotiate an agreement are deadlocked, a mediator might know methods to help move the conversation forward.
- If there are strong emotions involved in the dispute, mediation can help decrease the emotionality that often surrounds conflict.
- If the disputants have different cultural background, a mediator can help parties bridge cultural and communication differences.
- If there is a power imbalance, a mediator can help address power imbalances that make the lesser party feel threatened or unsafe.
- If there is confusion, mediation can help people explore and understand the reasons that underlie the conflict.
- If a conflict is having a negative impact on productivity in the workplace, a mediator may be able to help the parties come to resolution quicker than they would on their own or through other resolution procedures.

Mediation

The Method for Mediating Workplace Disputes
How Should Managers Conduct a Mediation?

Introduction

In the previous section we noted that a conflict of interest might prevent a manager from conducting a formal mediation between two employees. Because managers have a primary responsibility to advance company objectives, they may not be able to honor commitments about neutrality and confidentiality central to the role of mediator. For this reason we described a less formal or hybrid form of mediation, supervisory or managerial mediation, in which the mediator holds some inherent authority, either assumed by the mediator or provided by the parties. All understand from the beginning of the mediation that if the parties do not reach an acceptable settlement (one also acceptable to the mediator), the manager/mediator may use her/his authority to decide for them. An alternative to this would establish explicit agreements between the mediator and the parties about what kinds of information could or could not be kept confidential. One of the benefits of mediation is flexibility. If ground rules are established on which all parties agree the mediation can go forward. For example, the parties may agree to mediate a dispute without a promise of confidentiality from the manager/mediator.

This section instructs managers in how to conduct a mediation. The method set out here is formal. As we have indicated above, sometimes a "little" mediation, a less formal application of the method is preferable for a particular dispute. Based on the steps and skills described below, managers can design their own method consistent with their own personal style, with the nature of the dispute and with the personalities of the disputants. Once learned, managers will find these processes and skills applicable to a number of workplace contexts. The process includes seven steps:

- **Preliminary Matters**
- **The Mediators Introduction**
- **The Parties' Initial Statements**
- **Issue Identification and Identification of Shared Interests.**
- **Defining Issues/Agenda Setting.**
- **Option Generation/Negotiation and Bargaining.**
- **Agreement/Close.**

Mediation

The Seven-Step Mediation Process: A Summary

1. Preliminary Matters. A manager/mediator first determines whether or not a case is appropriate for mediation. What are the pros? Parties get control over the outcome; all save time and money; job preservation; privacy; little to lose; informal process; shared interests of parties; preserve the relationship; avoid legal precedent and bad press. What are the cons? One side has a really strong case; one or both sides want revenge; one or both sides want a binding settlement; a legal precedent is needed; parties are unequal; there are too many parties; high emotions; or a complexity of issues.

A manager/mediator also considers the methods of entry into the mediation. Who made the request for mediation? Which party? Are both parties voluntarily requesting mediation? Has the entry point set up a perceived bias? Does the one who referred have a stake in the outcome? Has the mediator her/himself gone after the case?

During the preliminary phase of the mediation the manager/mediator builds credibility and rapport with the parties and educates the participants in the process. Ethical issues are discussed and agreements on ground rules are made. The manager/mediator gains a commitment from the parties that insures participation, gets information about the parties, provides information to the parties about the process and sets up the logistics, the time and place, for the mediation.

2. The Mediator's Introduction. The manager/mediator begins the mediation with an introductory statement that normally includes the following elements:

- Agreement on the names that will be used in the process.
- Introductions and niceties.
- Process orientation: What is mediation? What is the role of a mediator?
- Logistics: breaks, lunch, restrooms.
- Process overview: an outline of what they can expect.
- Issues related to mediator neutrality and acceptability explained and accepted.
- Role of the private meeting or caucus (use only if necessary).
- Confidentiality and note-taking.
- Outcome expectations (settlement; conciliation; narrowing of issues).
- Setting of behavioral guidelines and ground rules (swearing, smoking, name-calling).
- Role of counsel in process.
- Role of others (e.g., experts; witnesses) in process.

The opening statement establishes the manager/mediator's control over the process, identifies the mediator's role and the role of the parties, establishes rapport, builds confidence in the process, clarifies expectations, establishes a structure that enhances the possibility of accurate communication and establishes a positive tone for the mediation.

Mediation

The Mediation Process (Continued)

3. The Parties' Initial Statements and Information Gathering. Once the manager/mediator completes her/his opening statement, both parties have (or each party at the table has) an opportunity to make a statement. From their own perspective and in their own words, each party describes the nature of the dispute that brings them to the mediation table. This is the first part of the information-gathering process, on the basis of which later agreements are built. The mediator encourages both parties to listen to the other without interruption. Often, but not always (it's the mediator's call), the person bringing the action or the complaint is instructed to go first. The parties' statements provide an opportunity for them to listen to an uninterrupted statement from the other side, to give a complete uninterrupted statement of their own perspectives on the matter in dispute and to vent emotions about their concerns. The mediator listens carefully, takes notes, and gathers information, not only about the case but also about the participants and their problem-solving/communication skills. At this point in the process, disagreement between the parties is expected.

4. Issue Identification and Identification of Shared Interests. Not all information relevant to the case or necessary for settlement is revealed in the parties' opening statements. During the issue identification phase, the mediator works to help the parties define all the relevant information needed for them to generate their own ideas and options for settlement. The mediator does this through effective questioning that attempts to reveal the underlying interests of both parties. Tools used by the mediator during this phase include open-ended questions; requests for clarification; leading questions; open-focused questions; either/or questions/closed end questions. During this phase, the mediator tries to get the parties to separate the people from the problem and to focus on interests, not positions. At this point caucus may also be an effective tool to gather information that at this early stage of the mediation one side may not be ready to reveal to the other (see below). Caucus is used at the discretion of the mediator and is not necessarily a required part of the process. While maintaining control over the process, the mediator may also encourage the disputing parties to ask questions of each other.

5. Defining Issues/Agenda Setting. Once the issues have been identified, setting the agenda becomes a strategic move for the mediator. The mediator defines the issues and lists them in the order in which they will be addressed. He/she attempts to do this in a way that minimizes the dispute. The method of approach sets the tone for the rest of the mediation. Sometimes, for example, a positive tone is set by achieving success on smaller issues at the beginning. Determining factors for setting the agenda are: the number and complexity of the issues; clarity of the presentation of the parties; the degree of persuasion necessary to resolve the issues; barriers to collaboration inherent in a given issue; and the degree of resistance to cooperation on a given issue. The mediator may set the agenda in a number of ways: alternating choices between the parties; most difficult or easiest first; principled; order of importance; or ad hoc (analyzing issues thoroughly in the order in which they were placed on the table). The mediator needs to be flexible in relation to the agenda, ready to depart from it and move to another issue if problems arise.

Mediation

The Mediation Process (Continued)

6. Option Generation/Negotiation and Bargaining. The negotiation/bargaining stage of the mediation begins with both parties generating options that could potentially settle the matter in dispute. The manager/mediator explains that an essential part of the mediation is for both parties to identify and consider all options before solutions can be determined or decisions can be made. The mediator encourages creative option generation through brainstorming and lateral thinking techniques. The mediator her/himself may also think about options during this time, but shares them only if the parties have been unsuccessful at generating their own. Mediators normally share their own options only as suggestions or with option phrases such as "Some people in this situation do . . ." or "What about . . ." When options have been generated, the parties then examine them and make selections. During this time the parties may bargain or negotiate on the specific nature of a given option until agreement on that alternative is reached.

7. Agreement/Close. In this last stage of the mediation the manager/mediator guides the participants to a final settlement. As the parties negotiate directly toward a specific agreement, the mediator is careful to note particular details of the agreement and to congratulate participants on progress. The mediator also insures that all issues previously identified are covered by the settlement. When the mediation is drawing to a close, because the settlement belongs to the parties, not the mediator, the mediator should determine, in as much as possible, whether they are satisfied with the procedure and whether they are psychologically and substantively satisfied with the settlement. As the agreement is finalized the mediator should ascertain whether it can be determined from the agreement alone, who will do what, when, where, how and how much? The shape of the agreement can take several forms, from oral to written and is often determined by the purpose of and the context within which the mediation takes place. Enforceable agreements are normally written and signed by the parties. The mediator brings the mediation to a close by asking for final comments from participants and by giving everyone a copy of the agreement. If an agreement has not been reached, a mediator may recommend that the parties reschedule another mediation. After the mediator's closing remarks, the parties shake hands and the mediation is over.

The Mediation Process

An Overview

Mediation

Mediation Defined

1. A Facilitated Negotiation.

"Trying to get two people to do what they least want to do—talk to each other."

2. Christopher Moore:

"The *intervention* of an *acceptable, impartial* and *neutral* third party who *has no authoritative decision making power* to *assist* the contending parties in *voluntarily* reaching their own *mutually acceptable settlement* of issues in dispute."

- ***Intervention:*** mediator intervenes in this on-going system of relationship for the purpose of helping them. To reach an agreement by influencing the beliefs of the parties through empathy, by providing knowledge or information, by providing a more effective negotiating process.

- ***Acceptability.*** Parties have to have some trust in you, to let you intervene.

- ***Impartiality.*** An attitude of the mediator, unbiased. Hard for managers. We must be perceived by parties in mediation as unbiased. We all have biases that we bring to the table. Keep them in our consciousness. Empathetic, not sympathetic.

- ***Neutrality.*** Refers to the on-going relationship between the mediator and the parties. Parties must perceive mediator as neutral.

- ***No Authoritative Decision-Making Power.*** Distinguishes mediators from judges and arbitrators; role is to help parties to identify the future and their interest and needs and to get the parties negotiating through some exchange of ideas that will meet some standards of fairness.

- ***Assists.*** Opener of communication channels; legitimizer (may be the first time one of the parties had a right to be; process facilitators who chairs the process; we are a trainer educating in the bargaining process; we are resource expanders, helping them identify technical expertise; agents of reality; leader in moving the process along;

- ***Voluntary.***

- ***Mutually Acceptable Settlement of the Issues in Dispute.*** 100% predictable.

Mediation

Mediation: History and Related Law

History

1. Ancient China: mediation used to resolve disputes. Confucian view is that adversarial process is the antithesis of relationships. Still present today.

2. Japan: law and custom to use mediation and conciliation. Preference reflects procedural barriers.

3. Africa: a moot, an informal community context to resolve disputes.

4. Early Matriarchal and Patriarchal Societies: "go between," authoritative person who mediates.

5. Church and Temple: Jews, Early Quakers, Mennonites wanted to keep dispute process within their community.

6. Mediation formally began in the labor and management area.

7. History in America:

- Early Quakers
- Construction disputes (Army Corps of Engineers)
- Labor and Management
- 1964 Civil Rights Act: Emphasized the Use of Federal Mediation
- The Federal Mediation and Conciliation Service (1947)
- The Pound Conference. Frank Sanders, "The Multidoor Courthouse"
- Parallel movement in communities.

8. Legislative History in Texas:

- Texas Constitution (1845) favors arbitration
- 1846 settlement of disputes by conciliation
- Neighborhood Justice Centers, now Dispute Resolution Centers. Texas movement started in Houston. 16 centers throughout the state of Texas, funded through filing fees. Use volunteer mediators, who provide services in cases lower than a fixed amount. One in Conroe, Harris County, Fort Bend County
- Texas Alternative Dispute Resolution Procedures Acts (Texas ADR Act). 1987, passed; 1988, amended.

Mediation: History and Related Law (Continued)

The Texas ADR Act.

The Texas ADR Act is the law governing ADR in Texas. Applies to pre-litigation and litigation mediation. A summary of important points follows:

1. Outline:

- Responsibility of courts
- Referral process
- Objection
- ADR processes
- Qualifications
- Standards and Duties
- Compensation
- Qualified immunity
- Effect of written settlement
- Confidentiality

2. Sec 154002. It is the policy of the state to encourage the peaceable relationship of disputes, particularly family disputes and the early settlement of litigation, through early voluntary settlement procedures. Issue: If the court orders you to mediation is this voluntary?

3. Sec. 154021. When a lawsuit is pending in any court, the court may refer the case to an ADR procedure or any other informal procedure for resolution. The court is supposed to confer with the parties as to what procedure should be used.

4. Parties may raise objections to court-ordered mediation: "I've already been to mediation." "We have not done enough discovery."

5. Walk through the ADR Procedures:

- Mediation: a forum in which an impartial person facilitates communication to promote reconciliation, settlement or understanding among them. Outcomes can be more than settlement. Sometimes narrowing the issues can be an appropriate outcome. The mediator may not impose her/his own judgment on the parties.

- Mini-trial

- Moderated settlement conference

- Sec. 154027. Non-binding arbitration.

The Texas ADR Act (Continued)

6. The appointment of the mediator. The court appointment process. Most judges do not engage in appointment process. Court may appoint more than one third party.

7. Qualifications: Must have completed a minimum of 40 hour training approved by the court making the appointment. The court consider more that you have the 40 hours of training, than where you got your training? To qualify for mediation of parent child-family cases you need an addition 24 hours advanced mediation training including family law, family dynamics and child development. Sub C: extraordinary life experience.

8. Standards and duties:

- Encourage and assist the parties in reaching a settlement, but not coerce them in reaching a settlement.

- Unless expressly authorized, we may not disclose to either party information disclosed by the other party.

- Unless the parties otherwise agree, all matters are confidential and may never be disclosed to anyone including the judge.

9. Compensation: courts can set a reasonable fee and can attach it as the costs of court. Some charge hourly rates, some charge daily rates. Often divided evenly among participants.

10. Qualified immunity of impartial third party. Volunteer mediators have qualified immunity. If you are engaging as a volunteer mediator you cannot be sued.

11. Sec. 154071. Agreement is enforceable as is any other contract.

12. Mediator may not be required to testify. However, if you bring in to mediation something that may be discoverable by other means that may be subpoenaed. If you can find it out another way it can be admissible. If there is a conflict it can be disclosed to the court in private.

13. Mediators need to make clear that confidentiality is not absolute. You can list exceptions in agreement to mediate. In Ohio there is no confidentiality.

The Benefits of the Mediation Process

- Cost
- Speed
- Mutually Satisfactory Outcomes
- Higher Rate of Compliance (with the exception of criminal cases)
- More Comprehensive or Customized Agreements than in Legal Setting
- Greater Degree of Control and Predictability of Outcome
- Personal Empowerment
- Preservation of an On-going Working Relationship
- Workable or Implementable Settlements
- Mediation Can Help Establish Relationship
- No Adverse Legal Precedent
- Preserves Confidentiality and Privacy (with some warnings)
- Provides Assistance to Communication Breakdowns
- Helpful When People Have an Unrealistic Understanding of Their Case
- Mediation Is Not Appropriate:
    - legal precedent needed
    - new product liability at issue
    - legal process gives protection (bankruptcy)
    - when there is potential for criminal action
    - can be used as discovery tool
    - can be a delay tactic
    - strong business competition between the parties who do not want to share information

The Mediation Process: Summary

I. Preliminary Matters

- Process for getting the parties to the table
- The agreement to mediate
- Ground Rules
- Logistics

II. Mediator Introduction

- Welcome and introduction
- Define role as mediator
- Set out your expectations as to their participation in the process
- Describe the process
- Define ground rules
- Define caucus (private meeting)
- Talk about outcomes. "We hope that our final outcome to this process will generate an agreement."
- Inform about logistics
- Remind them about confidentiality

III. The Parties' Opening Statements and Information Gathering

- Story telling phase
- Each party has uninterrupted time to tell their side of the story

IV. Caucus or Private Meeting (optional)

V. Issue Identification and Agenda Setting

- Information gathering phase
- Clarifying questions
- Mediator frames the agenda

VI. Generating Options

- Help them do this
- Brainstorming--everything is O.K.
- Go to expert
- Send them home with homework

VII. Negotiation and Bargaining

VIII. Agreement and Close

The Mediation Process:

I. Getting to the Table: Preliminary Matters

Summary of Preliminary Phase

- **A mediator must first determine whether or not a case is appropriate for mediation.**
- **A mediator must also consider the methods of entry into the mediation.**
- **During the intake phase of the mediation the mediator also builds credibility and rapport; educates the participants as to the process; gains a commitment from the parties that insures participation; gets information about the parties; provides information to them about the process (what they must do before the mediation); and sets up the logistics of the mediation.**
- **The mediator makes sure that the place of the mediation is ready and secures the materials needed for the session.**

The Mediation Process: Preliminary Matters

Cases Appropriate for Mediation. When is a case appropriate for mediation?

Summary of Pros:

- control over the outcome
- save money and time
- job preservation
- privacy and confidentiality
- little to lose
- preserve ability to go on to litigation
- informal process
- shared interests of the parties
- high levels of emotion but maybe too volatile
- preserve the relationship
- avoid legal precedent and bad press

Summary of Cons:

- really strong case
- parties want revenge
- confidentiality
- non-binding
- legal precedent avoided when needed
- unequal bargaining position, parties are too unequal
- new law needed
- too many parties
- high emotions
- public protection
- complexity of the issues, goes both ways

The Mediation Process: Preliminary Matters

The Intake Phase of Getting to the Table

- **Build Credibility**
    - Personally
    - Institutionally
    - Procedurally
- **Establish Rapport**
    - Continue process of building trust
    - Talk about items outside the conflict at hand
- **Educate Participants**
    - Describe the mediation process
    - Define the role of mediator
- **Gain commitment of the parties**
    - Insure that they want to be a part of the process
    - Ascertain mediator acceptability
    - Resolve conflicts of interest
    - Work out details with attorneys, expert witnesses
    - Sign agreement to mediate

The Mediation Process: Preliminary Matters

Checklists

1. Information I will provide:

- Name of mediator
- date, time, location of meeting
- background of mediator--credentials; one page synopsis
- overview of the process
- ground rules (costs of session)
- highlight neutral party role
- highlight confidentiality issues
- time length of meeting
- rights and responsibilities of the parties
- food/breaks

2. Information they will provide:

- names of all the parties in dispute
- nature of complaint
- history of what has happened prior to mediation process
- special needs?
- commitment to process
- let mediator if they have time limitations
- how they got to the mediation process
- desired goals of those in process
- future relationship

3. Tasks I must complete before session:

- room reservation. How many rooms do you need?
- food reservations
- locate expert who may need to be called in technical matters
- prepare opening statement
- review notes from initial conversations
- check, notify security in building
- decide whether a co-mediator is needed; confer with co-mediator
- assemble supplies
- note/sign to avoid interruptions
- confirm meeting time with participants

Checklists (Continued)

4. Tasks they must perform before session:

- contact attorney
- prepare documentation they may need
- identify expert witnesses
- prepare opening statements
- fill out questionnaire on possible outcomes they might want to see
- agree on us as mediators
- formulate expectations on outcome

5. Miscellaneous matters for mediator preparation

- smoking policy
- accessible rooms
- special dietary needs
- building functions, parking
- directions to the building
- set up the room

6. Materials needed for the session

- pencils
- box of Kleenex
- evaluation and agreement forms
- water, cokes and coffee
- tablets
- first aid kit
- table and chairs; round tables are symbolic of the collaborative process; if attorneys are present, seat the disputants next to mediator and attorneys on the other side
- telephone and fax machine
- markers and flip charts
- process outlines
- stress toys
- VCR
- clock
- recorder: someone who takes notes in a large mediation
- telephone and fax
- put self in safe place in the room, near the door.
- make statement about no concealed handguns or tape recorders
- candy

The Mediation Process:

II. The Mediator's Opening Statement

Summary:

The mediator begins the mediation with an introductory statement that includes the following elements: agreement on the names that will be used in the process; introductions; process orientation (What is mediation? What is the role of a mediator? Personal qualifications?); logistics (When we'll have breaks? Lunch, Restrooms); process overview (an outline of what they can expect, on flip chart); issues related to the mediator (neutrality; acceptability); role of private meeting or caucus (use only if necessary); confidentiality and note-taking; outcome expectations (settlement; conciliation; narrowing of issues); setting of behavioral guidelines and ground rules (swearing, smoking, name-calling, etc.); role of counsel in process; role of others (e.g., experts; witnesses) in process. The opening statement establishes the mediator's control over the process, identifies the mediator's role and the role of the parties, establishes rapport, builds confidence in the process, clarifies expectations, establishes a structure that enhances the possibility of accurate communication, and establishes a positive tone for the mediation.

II. The Mediator's Opening Statement

The Purpose of the Mediator's Opening Statement

- Establishes mediator's control over the process
- Identifies the mediator's role and the role of the parties
- Establishes rapport with the parties
- Conveys that the mediator is confident and skilled
- Clarifies expectations
- Establishes a positive tone of trust and common concern; you can feel safe here
- Gives parties some understanding of the mediation process
- Helps the parties understand the process involved in educating one another about the nature of the problem
- Provides a structure that enhances the possibility of accurate communication.
- Allows the parties to feel comfortable with you the mediator.
- Gives uncomfortable parties an option to get out
- Establishes an atmosphere of agreements by getting them to agree on ground rules.

II. The Mediator's Opening Statement

Opening Statement: Content

- Names (first or last): get agreement on how parties will address one another.
- Define role of mediator. Not judge or arbitrator, rather the master of the process: this is the process that we're going to follow. Get agreement with the parties that they will let you run the show. Agreement on process, not outcome.
- Logistics: when we're going to have breaks, lunch, restrooms.
- Process overview: outline of what they can expect, on flip chart.
- Establish mediator neutrality: identify information that might be a conflict, past relationship with the mediator, explain what the relationship was.
- Role of private meeting: may be used to gather more information. This is confidential time.
- Confidentiality: where it does and does not apply.
- Outcome expectations: take a blank agreement form and let it sit out on the table as an expectation of outcome. Outcome could also be conciliation or narrowing of issues.
- Role of counsel: we encourage the parties to speak for themselves, but most lawyers will not allow this.
- Role of others.
- Set behavioral guidelines (mediator's call)
    - swearing
    - smoking
    - name-calling
    - yelling (venting, cultural expectations, norms of home life)
    - break schedule
    - note-taking
    - agreement to mediate
    - seated or not seated, if parties get a little out of control mediator stands up ("We do urge you to stay in your seat. Does anyone have a problem with that?")
- Is there any problem with me being your mediator?

II. The Mediator's Opening Statement

Exercise:

Use the space below to write your own mediator's opening statement.

II. The Mediator's Opening Statement

Review

- Welcome and introductions
- Purpose and role of mediator
- Participation of the parties
- Process overview:
    - Initial statement from parties and information gathering
    - Clarification of issues and agenda setting
    - Generating options
    - Negotiating and bargaining
    - Agreement and Close
- Caucus (as a tool not a rule)
- Privacy and note-taking (confidentiality)
- Logistics
- Mediator acceptability
- Questions

The Mediation Process:

III. The Parties' Opening Statements and Information Gathering

"This is the time for the parties to explain, in their own words, just how they feel and how they think they have been wronged; not only in a factual sense, but also in an emotional sense." Kim Kovach, Mediation

Summary

Once the mediator completes her/his opening statement, both parties have (or each party at the table has) an opportunity to make a statement that focuses from their own perspective and in their own words on the nature of the dispute that brings them to the mediation table. This is the first part of the information-gathering process, on the basis of which later agreements will be built. The mediator encourages both parties to listen to the other without interruption. Often, but not always (it's the mediator's call), the person bringing the action or the complaint is instructed to go first. The parties' statements provide them an opportunity to listen to an uninterrupted statement from the other side; to give a complete uninterrupted statement of their own perspectives on the matter in dispute; and to vent, or "get off their chest" their concerns. The mediator listens carefully, takes notes, and gathers information, not only about the case but also about the participants and their problem-solving/communication skills. At this point in the process, disagreement between the parties is expected.

III. The Parties' Opening Statements and Information Gathering

1. The Purpose

- Clarify the reasons for the conflict
- Understand the dynamics and history of the conflict
- Observe behavior of the parties
- Determine the appropriate manner to proceed

2. The Method

- Opening statement of the parties:
    - Ask first party to begin story telling or to give perspective on the issues involved in conflict. Who first brought this case to our attention? Ask the initiating party to start.
    - Assure that the parties tell their story with sufficient detail for others to gain understanding.
- Determine indirectly the desired settlement. Finesse from the parties what it is that they want without being direct, without locking parties into positions.
- Use active listening--reframing.
- Clarify major issues, separate issues, needs and solutions. What do you see as the major issues? Look for interests that underlie positions.

3. Tasks to be achieved in the opening statement portion of the process:

- Identify broad topic areas of concern.
- Agreement on subtopics or issues. "What I hear you talking about is: (1), (2), (3)." Smaller bites, sub-topics.
- Begin determining the sequence for discussion of topics. Mediator may or may not decide on order. Mediator may want to decide her/himself.

III. The Parties' Opening Statements and Information Gathering

4. Process options:

- Each party explains while the other party listens. Be a heavy on the ground rules.
- Mediator summarizes at the end of each statement or at the end of both statements (makes it a joint problem).
- Mediator seeks clarification or party response.

5. Pointers for the mediator:

- Build rapport with parties, don't lose sight of facts and figures.
- Take cues from speaker by observing non-verbal communication.
- Remember-not all parties will agree with your paraphrase. "Thank you for clarifying that." Then re-paraphrase.
- While venting and expression of emotion is an important part of the process at this point, the mediator should be careful not to allow venting to become a direct attack on the other side.
- Be firm about "no interruptions."
- Use notes as a tool. If you want the parties to talk to one another put your face in your notes.
- After each side gives opening statement, go back and fill in any information that is missing or confusing.

6. Follow-up questioning. After the parties' opening statements, the mediator should continue to gather more information from the participants. This phase should include summarizing and reframing by the mediator as well as the use of a variety of types of questions.

The Mediation Process:

IV. Caucus

Summary

Caucus is a closed meeting between the mediator and only one party to the dispute. It generally occurs with the knowledge of the uninvolved party. To maintain balance, mediators often caucus in tandem, first one party, then the other. In most cases the caucus is confidential, the mediator shares only that information he/she has been given permission to divulge. Some mediators feel that, particularly when there is an on-going relationship between the parties, caucus may not be advised, so that the participants may develop their joint problem-solving skills.

Caucus is used as a tool, not as a rule.

IV. Caucus

Reasons to Use Caucus

- when there is a need for constructive venting without the risk of alienation
- when there is a need to control information as a way of managing the risks of mediation
- when there is a need for an in-depth analysis without the fear of revealed information being used as a weapon by the other party
- when high stress or destructive behavior between the parties needs to be managed
- when parties are at an impasse or the mediator needs information from one party in order to move the mediation forward
- when a mediator wishes to assist a party in the evaluation of her/his case or to urge the participants to take a realistic look at their options ("reality test")
- when either party needs education about the negotiation process; when one party appears to fear "losing face" before their opponent
- when the mediator feels that he/she needs to be more direct with one party
- when the mediator senses that one or both parties are hiding relevant information
- when the initial statement has been rocky and the mediator detects no willingness to make concessions
- when the mediator detects false expectations about the mediation process

IV. Caucus

The Caucus Session

- Establish rapport before jumping into issues
- Establish the confidentiality of the session.
- Get feedback from the party concerning impressions, feelings about process thus far: "How do you think things are going?"
- Emphasize positive accomplishment, helpful behaviors or contributions.
- Allow venting of strong feelings.
- Allow disclosure of sensitive information through active listening.
- Explore false expectations, hidden agendas and possible solutions:
    - Get party to list disputed issues
    - Get party to clarify positions on issues
    - Get party to suggest what they would be willing to do to resolve issues
    - Determine party's flexibility
    - Use "reality test" to help party think through consequences of not reaching an agreement
    - Use "if-then" technique
    - Encourage direct dialogue with the other party. May model dialogue.
- Risk-benefit analysis
    - Identify strengths of case
    - Identify weaknesses of case
    - Identify likelihood of winning/losing case
    - Identify possible likely outcomes
    - Discuss time and expense of litigation vs. other ADR procedures
    - Discuss effectiveness of the other side (case in general or attorney)
    - Discuss ability to find or reach key witnesses
    - Discuss impact of case on long-term relationship with the other side
- Get permission to convey information or proposals to the other party:

The Mediation Process:

V. Issue Identification and Agenda Setting

Summary

Not all information relevant to the case or necessary for settlement is revealed in the parties' opening statements. During the issue identification phase, the mediator works to help the parties define all the relevant information needed for the parties to generate their own ideas and options for settlement. The mediator does this through effective questioning which attempts to reveal the underlying interests of both parties. Tools used by the mediator during this phase include: open-ended questions; requests for clarification; leading questions; open-focused questions; either/or questions/closed end questions. During this phase, the mediator tries to separate the people from the problem and to focus on interests, not positions. While maintaining control over the process, the mediator may also encourage the disputing parties to ask questions of each other. The mediator then organizes the identified issues into an agenda that sets out the direction of the remainder of the mediation.

V. Issue Identification and Agenda Setting

Issue Identification

- During the story-telling stage take notes about the concerns each person raises.
- Summarize the concerns of each party.
- Define a list of issues on newsprint:
- Create one joint problem list
- Frame issues neutrally: basic categories, e.g., financial concerns, property issues, communication issues
- Parties help create the list
- Separate issues, interests and positions. Set aside issues that are symptoms of deeper causes; focus on concerns meriting long-term remedial actions.
    - Issues are topics or problem statements that a party would like to discuss within the context of the mediation. They may focus on substantive, procedural or psychological problems.
    - Interests are the needs that a party wants satisfied. They usually underlie issues and positions.
    - Positions are specific proposals or solutions that parties adopt to meet their interests or needs.
- Note common goals and interests.
- Try to get each party to interact with the other party's perception of the problem. Role reversals.
- Feedback. Ask if the identified issues accurately reflect the problems they want to work on.

V. Issue Identification and Agenda Setting

Setting the Agenda

Summary

Once the issues have been identified, setting the agenda is a strategic move for the mediator. The mediator defines the issues and lists them in the order in which they will be addressed. He/she attempts to do this in a way that minimizes the dispute. The method of approach here often sets the tone for the rest of the mediation. Sometimes, for example, a positive tone is set by achieving success on smaller issues at the beginning of the negotiation. The mediator needs to be flexible in relation to the agenda, ready to depart from it and move to another issue of problems arise.

1. Determining Factors. Things to consider when setting the agenda.

- Number and complexity of issues.
- Understanding of the issues. Some issues are not mediatable (moral issues), theft of property, guilt or innocence.
- Clarity of the presentation of the parties. Do we move into private session right away?
- The degree of persuasion. How much persuasion will be necessary to resolve the issue?
- Degree of barriers to collaboration. Are there reasons why these parties cannot collaborate. Teachers and students?
- Degree of resistance to cooperation. Some people don't care and therefore won't negotiate. Think about agenda setting. "If you are resistant to cooperating, if you are only interested in financial restitution, then let's talk about it."

2. Options for Agenda Setting

- Mediator chooses a starting point
    - Easiest first
    - Rank by importance
    - Separate long-term and short-term problems
- Parties choose a starting point
    - Alternate choice
    - Party agreement

V. Issue Identification and Agenda Setting

Eight Strategies for Agenda Setting

- **Ad Hoc Development:** order agenda as they go. One party proposes, the other party concurs; item is discussed in entirety until a conclusion is reached.

- **Simple Agenda**: Issues are taken one at a time in an order proposed by one or both parties.

- **Alternating Choices of Items:** Parties alternate who chooses the topic of discussion.

- **Rank by Importance:** Parties pick the one or two items most important to them and place them at the head of the agenda.

- **Principled Agenda:** Parties jointly establish principles that form the framework for settlement and then work out the details of how these principles will be applied to the specific agenda items. Fairly high level of abstraction and generalization.

- **Least Difficult Item First:** Small, self-contained, less difficult issues are chosen first to assure agreement early in the agreement and to promote the habit of agreement.

- **Building-Block or Contingent Agenda:** Agenda is set based upon decisions about what issues lay the groundwork or foundation for further or later decisions or agreements.

- **Trade-Offs or Packaging**: Parties formulate combinations of issues and offers (packages) in return for concessions from the other party

The Mediation Process:

VI. Option Generation

Summary

The next stage of the mediation begins with both parties generating options that could potentially settle the agenda items under discussion. The mediator explains that an essential part of the mediation is for both parties to identify and consider all options before solutions can be agreed on or decisions can be made. The mediator encourages creative option generation through brainstorming and lateral thinking techniques. The mediator may also think about options during this time, but shares them only if the parties have been unsuccessful at generating their own alternatives. If the mediator generates her/his own options, they are shared only as ideas or with option phrases such as "Some people in this situation do," or "what about . . ." When options have been generated, the parties then examine the options and begin the negotiation phase of the mediation.

VI. Option Generation

Generating Options

1. Parties come to the mediation prepared with options that would satisfy them in this dispute.

2. Brainstorming: generating options within the mediation.

- The purpose of brainstorming is to generate as many ideas as possible in a short period of time, unhindered by the threat of critical evaluation.
- Explain the purpose. Stress that evaluation will come later, that all ideas are welcome, both serious and non-serious.
- **Frame the problem in a "how-to" format: "How can we locate money to pay the partnership debts?"**
- Welcome each idea and list it on newsprint or on a blackboard, discourage any evaluative responses.
- Encourage participants to modify previous responses.
- Keep the process short (5 to 10 minutes).

3. Brainstorm on 3x5 cards

4. Use experts or others present who are not the key disputants to generate options.

VI. Option Generation

Mediator Practice Pointers for Generating Options

- Generate options for only one issue at a time
- Help the parties to "brainstorm"
- Remind parties of the issues
- Be impersonal when identifying other ideas
- When offering options, make several and have no preferences
- Start with an easy issue
- When parties reject an idea, ask for a substitute

Tools for Evaluating Options

- **Plus/Minus Chart.** Create a chart divided down the middle. On one side list the advantages of a given option, on the other side list the disadvantages. A simple tool for organizing the discussion.
- **Helping/Hindering Forces Chart.** Similar set up to Plus/Minus Chart but focus on factors or influences that might help or hinder the implementation of a given option. Explore ways to weaken hindering forces and to strengthen helping forces.
- **Anticipated Impact Chart.** For each option, list possible impact on each person involved including feelings about self/others, money and time.
- **List Criteria for Solution.** Before discussing the merits of options, create a list of criteria for evaluating them.

The Mediation Process:

VII. Negotiation and Bargaining

"Negotiation is the highest form of communication used by the lowest number of people."

John F. Kennedy

Summary

The negotiation phase of the mediation begins with an assessment of the options previously generated to determine how well they satisfy interests, to determine whether better options are available and to modify options so that they satisfy interest more completely. Through negotiation (e.g., incremental convergence of positions, trade-offs, package settlements) the parties move toward a final agreement on the issues in dispute.

VII. Negotiation and Bargaining

Mediator techniques to assist parties in identifying their underlying interests

- **Ask "Why" questions**. Through "why" questions, questions that directly inquire into the concerns or interests underlying positions, a mediator can help opposing parties develop understanding. Another version of this question focuses on concerns: "What are your basic concerns in wanting . . .?"

- **Ask "Why not" questions**. A mediator can help parties uncover interests by asking questions that uncover what stands in the way of a given party agreeing to a specific proposal. Before trying to change someone's mind, try to find out where his or her mind is now.

- **Indirectly raise the possibility of multiple interests**. Often multiple interests stand behind a given position. After one interest has been identified a mediator can help parties stay with the interest-identification process for a while before moving on to bargaining.

- **Reframe statements in terms of basic human needs**. Often the most powerful interests are basic human needs (security, economic well being, a sense of belonging, recognition and control over one's life). When a mediator, through the techniques of active listening, hears such needs expressed in the statements of either party, he/she can reframe the statement with specific reference to the need or the feeling. "In this demand for a new house, I hear you saying that future security for you and your children is an important issue. Is that right?"

- **Use active listening skills.** Open-ended questions, open-focused questions, summary, restatement and reframing of the participants' statements in a way that identifies their interests, followed by feedback questions can effectively uncover interests.

- **Make a list.** As interests are identified, the mediator can list them on newsprint in view of both parties so that they remain visible throughout the mediation. Such a list may help participants rank their own and the other's interests and stimulate ideas to meet them.

- **Build trust**. From the beginning, by establishing a process that builds trust (expertise, confidentiality, neutrality, rapport, and legitimization of both parties) the mediator encourages open communication of concerns and interests. To build trust:

    - Encourage consistent statements that do not contradict previous statements.
    - Encourage parties to demonstrate that they will follow through with their promises (or else they will incur some cost).
    - Discourage the parties from threatening behavior including unrealistic promises or expectations.
    - Encourage the parties to make incremental agreements along the way (agree on issues, process, lunch menu, etc.).

- **Decreasing Party Perceptual Barriers**

    - Identify perceptions held by the parties.
    - Assess whether the perceptions are correct or incorrect.
    - Assess whether the perceptions are hindering settlement.
    - Assist parties to revise their perceptions.

VII. Negotiation and Bargaining

The Role of the Mediator during the Negotiation Phase

- Be a reality tester. Does this really work?
- Probe to determine if solution meets needs and interests.
- Assist parties in evaluating options. "What part of this solution is a problem for you?"
- Assist parties in evaluating long- and short-term impacts of proposed settlements.
- Question whether parties have better options than those raised in the negotiation
- Help parties determine and understand their BATNA and WATNA.
- Help parties improve their options to better satisfy needs and interests.
- Help parties see the benefits of settling or not settling. "How might this agreement be good for you?"
- Help parties see the costs of settling or not settling.
- Help parties determine if the settlement of an option creates a desirable or undesirable precedent.

The Mediation Process:

VIII. Agreement and Close

Summary

In this last stage of the mediation, the mediator guides the participants to a final settlement. As the parties negotiate directly toward a specific agreement, the mediator is careful to note particular details of the agreement and to congratulate participants on progress. The mediator also insures that all issues previously identified are covered by the settlement. When the mediation is drawing to a close, because the settlement belongs to the parties, not the mediator, the mediator should determine from the parties, in as much as possible, whether they are satisfied with the procedure, and whether they are psychologically and substantively satisfied with the settlement. As the agreement is finalized the mediator should ascertain whether it can be determined from the agreement alone, who will do what, when, where, how and how much? The shape of the agreement can take several forms, from oral to written, and is often determined by the purpose of and context within which the mediation takes place. Enforceable agreements are normally written and signed by the parties. The mediator ends the mediation (closure) by asking for final comments from participants, by making sure that everyone has a copy of the agreement, or with a recommendation that the parties reschedule if an agreement has not been reached. After the mediator's closing remarks, the parties shake hands and the mediation is over.

VIII. Agreement and Close

Possible Outcomes to a Dispute

- **The Comprehensive Agreement**. All substantive issues are resolved; all psychological interests are satisfied.
- **The Acceptable Agreement.** Certain trades of interests or values have been made such that the total package is mutually acceptable.
- **Compromise:** "Sort of win, sort of lose." Parties share gains and losses in order to reach an agreement.
- **Trial Settlement.** Unable to reach a permanent solution, parties agree to a temporary settlement that will be evaluated at a later date.
- **Alternate Settlement.** Parties agree to a settlement in which they alternate when their interests are met. They can both have satisfaction but not all the time and not at the same time.
- **Procedural Solution.** Parties agree to a process for resolving an unresolved substantive issue.
- **Defined Spheres of Influence.** Parties decide who will have exclusive decision-making authority over a defined area.
- **Delayed Decisions.** Parties agree to delay a decision until a later time (e.g., when emotionality is lessened; when additional facts are available; when more support is available).
- **Partial Settlement.** Parties agree on many issues, but continue to disagree on others.
- **Agree to Disagree.** Issue is not dropped, but will not be pursued at this time. Parties still disagree.
- **Mutual Resignation.** Parties agree to drop the issues in dispute.
- **Arbitrary Settlement.** Parties flip a coin or draw straws or use any other mechanical means to reach an agreement.
- **Non-binding Decision.** Parties request compliance but do not require it.
- **Refer Options to a Third Party Decision-Maker.** Parties turn to a judge or an arbiter or a third party decision-maker to settle options they have generated.
- **Impasse**. Parties cannot decide and negotiations are stalled.
- **Continued Negotiations.** Parties agree to continue negotiating.
- **Shift to Another ADR Procedure.** Unable to reach a negotiated settlement, the parties turn to another process to resolve their dispute.

VIII. Agreement and Close

Who Drafts the Agreement? Options.

- The Mediator
- The Mediator with the Parties
- One of the Parties
- The Parties Together
- The Attorney(s) for the Party or Parties

When Draft the Agreement?

- During the session with joint input from parties as agreement on each issue is reached
- After or between sessions
- At the end of the negotiation phase, draft terms of the final agreement

What Form Should the Agreement Take?

- An oral agreement
- An informal memorandum of understanding
- A formal legal contract

What Is the Purpose of the Agreement?

- To clarify points on which the parties agree
- To define precisely the exchanges that the parties have agreed to make
- To establish a permanent record of the settlement to which the parties can refer in the future
- To define terms of future performance
- To create a standard by which the parties' compliance with the agreement can be measured

VIII. Agreement and Close

Assessing Settlement Options

Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem-Solving." *UCLA Law Review* 31:754, 1985.

- Does the settlement option satisfy the party's total set of substantive interests, goals and objectives in both the short and long term?
- Has the settlement been achieved in a manner that is congruent in the parties' desires to participate and affect a negotiated settlement?
- Does the settlement option promote the relationship and meet the psychological interests of both parties?
- Have the parties explored all possible settlement options that might either make each other better off, or make one party better off with no adverse consequence to the other party?
- Has the settlement been achieved by the lowest possible costs (time, money, energy) relative to the desirability of the result?
- Is the settlement implementable, or has it only raised more problems that need to be solved?
- Are the parties committed to the settlement so that there is a high degree of compliance or follow-through on the agreement without regret?
- Is the settlement option "fair" or "just?" Have the parties considered the legitimacy of each other's claims and made any adjustments they feel are humanely or morally indicated?
- Is the settlement option equal, or superior, to that available through other means of dispute resolution?
- Does the settlement allow one or both parties to increase the predictability of the outcome of the dispute and minimize unnecessary risks?

VIII. Agreement and Close

Mediator Strategies with "Unfair" Agreements

Two competing ethical considerations affect this issue: (1) the mediator's duty to be neutral or impartial; (2) the mediator's obligation to help parties achieve a fair, fully informed settlement. Once a mediator provides advice or information to a party who may be agreeing to something unfair, the mediator could be seen as an advocate, violating neutrality. If, however, a mediator remains silent when a party is about to agree to a settlement that is unconscionable, he/she could be deemed in violation of the ethical standard of fairness. A mediator can address this issue in several ways.

- While for reasons of neutrality, a mediator may not wish to express directly to a party her/his concerns about the fairness of an agreement, he/she can help disputants evaluate their relative positions against objective standards.

- The mediator serves as a check, though not necessarily a guarantor, against unfairness and intimidation by serving as an agent of reality, by helping parties probe whether their positions are realistic, and by asking what practical effects will flow from their choices or outcomes.

- Particularly when an unfair outcome may affect other parties, such as the public or children, in the case of divorce, the mediator has a responsibility to promote reasonableness.

- In situations in which an outcome or a compromise may result in harm, whether by the intention or greed of one party or by ignorance, a mediator can facilitate recognition of this possibility without specifically giving advice, through specific questions that lead participants to reach the desired conclusion on the basis of their own thought processes.

- A mediator may also suggest or insist that an agreement that seems unfair be reviewed by the parties' attorneys or by another independent party before it is finalized.

- If no other alternative seems appropriate, the mediator, as the one in charge of the process, may simply end the mediation, refusing to be a party to an unconscionable settlement.

- Another safeguard is to include in all mediated agreements a stipulation that for whatever reasons, if in the future either party feels that the agreement is unfair desires to change, they agree to return to mediation.

- Some mediators consider their duty to be fair to override their responsibility to be neutral and will simply provide the needed information to a party about to be harmed, even though others might deem the act unethical.

VIII. Agreement and Close

Strong and Weak Agreements

Stronger Agreements Are:

- **Substantive.** They define specific exchanges that result from negotiations (money, time, services, etc.)
- **Clear and Specific.** Details are set out clearly in their final form.
- **Comprehensive.** They resolve all the issues in dispute.
- **Permanent and Unconditional.** They provide for the termination of the dispute without recourse to further conditional performance by one or both parties.
- **Binding.** Parties agree to be bound by the terms. They identify consequences if a party does not comply.
- **Positive in Tone**
- **Contain a Balance of Concessions**

Weaker Agreements Are:

- **Partial**. Not all issues in dispute are resolved.
- **Provisional.** Temporary decisions may be subject to later revisions.
- **In-Principle**. General agreements with details to be worked out later.
- **Contingent.** The resolution depends on the provision of additional information or future performance by one or both parties.
- **Non-binding.** The agreement is a recommendation to which none of the parties guarantees adherence.

VIII. Agreement and Close

Specific Components to Include in the Settlement Document
(adapted from "Mediation," CDR Associates, 1986)

1. Date of Agreement

2. Name and Addresses of Parties

3. Recitals:

- Background about the parties' relationship
- Reasons for the agreement
- Issues to be settled by the agreement
- Previous agreements that may influence the current settlement
- Data about assets and liabilities (if applicable)
- Statements relating the recitals to the rest of the agreement

4. Introductory Clauses:

- General
    - Statement that the recitals are correct
    - Statement of governing laws, rules, standards
    - Statement that each party has had an opportunity to consult a lawyer as to her/his rights
    - Definition of terms to be used in the agreement
    - Statement that the agreement constitutes a full and final settlement of all the issues
    - Release by the parties of all claims arising out of their previous relationship except those described in the agreement.
- Personal
    - Statement about future relationship
    - Non-harassment statement (if applicable)
    - Statement that the agreement does not bar future action by the parties should any one of them violate the terms of the agreement

5. Clauses that Outline Specific Promises or Exchanges

- Detailed description of performances and exchanges (amounts, time, place, form)

VII. Agreement and Close

6. Provision of a Method to Resolve Future Disputes

- A Mediation or Arbitration Clause

7. Description of Implementation and/or Monitoring Procedures

- Who, when, standards or criteria, steps in case of violation

8. Summary or Conclusion Paragraph

- Statement of the parties' intent to follow through on the agreement

9. Signature of Parties

- Full legal names

10. Signatures of Witnesses (if appropriate)

- Dates of signing under signatures

11. Appendices/Attachments/Documents

Special Topics in Mediation

Breaking Impasse: Methods

- **Use Time Constraints.** Establishing one or more deadlines sometimes helps to move the negotiation process along. Deadlines such as a time or a date by which a settlement offer must be accepted can motivate the other party to respond. A negotiator who sets a deadline must be willing to stick with it or else risk a loss of credibility for future deadlines. The use of interim deadlines or milestones can help parties sense movement and progress in long, complex negotiations.

- **Reality Test**. An analysis of the risks and benefits of a settlement will often break impasse. Often after new facts are learned about the other side, time taken alone or with one's client to reassess one's own position in the light of the new facts can move parties closer to a settlement. Even narrowing the gap can increase the likelihood of settlement. Reality testing can take place with one's own client, or with opposing counsel, in which the attorneys discuss the merits of the case.

- **Use Experts.** When valuation is an obstacle, for example, in a personal injury case, the use of an expert to determine the extent of an injury and the costs associated with it can move a negotiation past impasse. Experts should be respected by both sides; choosing them may involve a negotiation within the negotiation. Creating a joint list of acceptable experts can be helpful.

- **Adjourn the Negotiation.** Sometimes, after negotiating for long periods of time or over difficult, sensitive or technical issues, a negotiation can reach an impasse simply because the parties are physically tired or emotionally and mentally drained. Adjourning the negotiation, so that both sides can regroup and rest, can engender fresh approaches and new energy to work when the negotiation reconvenes.

- **Encourage the Disclosure of New Information**

- **Clarify Facts**

- **Help Parties Save Face**

- **Consider a New or Different Issue**

- **Focus on the Process**

- **Use Media for Community Pressure Change Mediators**

- **Change Negotiators**

- **Redefine the Issues**

- **Change to a Principled Negotiation Style**

Breaking Impasse: Methods

More Impasse Breaking Techniques (Eric Dalton)

- Move people
- Change the scenery
- Food
- Humor: carefully
- Attorney only caucus
- Recess
- Reconvene together
- Confess to being stuck
- Suggest: “We may have reached a fatal impasse.”
- Review options
- Retrace progress
- Consider the value of today
- Review party initial goals
- Focus on future relationship
- Acknowledge all are trying

Special Topics in Mediation

Confidentiality

Purposes of Confidentiality

- Insures that trust is established between mediator and participants
- Creates a context of safety
- Encourages parties to disclose information and to share underlying interests and needs
- Legally required
- Texas ADR act mandates mediator confidentiality
    - Settlement offers cannot be used as proof of liability in a trial of a lawsuit
    - Offers to compromise are inadmissible at trial as proof of liability
    - Court may order parties to maintain confidentiality, through a protective order
- Protects the mediator by preserving neutrality
- Preserves mediator boundaries: time (court testimony); later involvement in case

Exceptions to or Limits of Confidentiality (Most of these limits are debatable)

- Parties feel freer to misrepresent fact, to lie, to be dishonest
- No check on the mediator's conduct (should the public be allowed to observe the process?)
- It may be against public policy to preserve confidentiality
- When someone may be physically harmed there is a duty to inform
- When there is child abuse there is a duty to inform
- When the court orders the mediator to disclose (e.g., in some instances where a criminal defendant needs the testimony of a mediator as a defense)
- When the courts dictate the level of confidentiality allowed in a mediation
- Where the mediator suspects wrong-doing or criminal action
- When the mediator has a duty to defend the rights of parties not present at the mediation (e.g. children in a divorce/custody mediation)
- If a matter is otherwise discoverable, the fact that it was discussed in mediation does not protect it from discovery in a later lawsuit

Confidentiality (Continued)

Issues

- Attorneys have a duty to report unethical behavior of other attorneys. Does an attorney functioning as a mediator have a duty to report and attorney advocate's misconduct?

- Once a duty to disclose information gained in mediation is established, to whom should disclosure be made? The other party? The court?

- Once a duty to disclose is established, how much information should be disclosed?

- Does a mediator have a claim of privilege (can the mediator claim the privilege of confidentiality in a court case) even if the parties involved effect a waiver of confidentiality? Does the mediator hold the privilege only on behalf of the parties?

Confidentiality Agreements

When developing confidentiality agreements check state laws to determine whether:

- All discussion in or documents prepared for the mediation are inadmissible or are non-discoverable in all proceedings

- Only certain types of notes, information or communications are protected

- The right of confidentiality is absolute or may be subject to a determination of "need" of evidence

- The right of confidentiality applies only to civil proceeding or may be invoked only be certain parties in the mediation

- The right on confidentiality depends on a definition of what constitutes a "qualified" mediation

Special Topics in Mediation

Neutrality and Impartiality

Neutrality (Boundaries)

Neutrality refers to the relationship the mediator has with the disputing parties. If a mediator has had a prior relationship with one of the disputing parties such that the mediator or either party feels that the mediator's performance may be prejudiced (a conflict of interest), the mediator has a duty to withdraw from the mediation. Neutrality also means that the mediator does not expect to gain direct personal benefits or special payments from one of the parties in compensation for favors or preferential treatment granted during the course of the mediation.

Impartiality (Fairness)

Impartiality refers to the attitude of the mediator. Impartiality is freedom from bias or favoritism in either word or action. It refers to the mediator's commitment to help all parties reach a mutually satisfactory agreement. It distinguishes a mediator's process facilitation role from the adversarial role of an attorney. It requires that the mediator raise questions equally with both parties about the fairness, equity and feasibility of a proposed option for settlement.

Fairness in the Process of the Mediation

- Structural Fairness: deals with the balance of power between the disputants
- Process Fairness: deals with how the parties treat each other, the dynamics of the bargaining process, and the procedures used at arriving at an agreement

Fairness in the Result

- If the mediation process is one of self-determination, should the mediator intervene when he/she believes that the result is unfair? Or should the parties be allowed to make their own decisions no matter how unbalanced?

- If the mediator feels so strongly about an issue that he/she may attempt to influence the outcome, she/he should not take the case.

- Where the parties perceive that the mediator is biased, the mediator should voluntarily withdraw from the case.

Special Topics in Mediation

Ground Rules for a Mediation Session

- No physical violence and no weapons allowed in the mediation session
- No screaming or shouting
- No name-calling; no putting down the other party
- No interruptions
- Talk honestly and openly
- Everyone stays in the room until the meeting is over
- Focus on future actions rather than past events
- Mediators will be neutral and impartial
- Mediators will not judge, they will assist in evaluating solutions
- Mediators will direct the flow of the meeting

Balancing Power

Mediator Tips for Balancing Power

- **Short Term Solutions (Parties Already at the Table)**
    - Provide special education or training to prepare the lower party to put forward their perspectives and interests.
    - Use a support person, an advocate or an attorney to be with the lower party during the mediation.
    - Use resource expanders outside the mediation (counselors, accountants, attorneys).
    - Use caucus to reality test and to check that people understand the implication of certain solutions that appear to favor the higher power person.
    - Explore unidentified currencies and resources of the lower party.
    - Explore links of mutual dependence.

- **Long-Term Solutions**
    - Educate and raise public awareness concerning legitimacy of concerns and interests.
    - Develop strategies to demonstrate mutual dependence (boycotts, strikes, non-cooperation).
    - Develop strategies to demonstrate the illegitimacy of the abuse of power (civil disobedience).
    - Use mediation to articulate the legitimacy of lower power party positions and interests.
    - Recognize that mediation may not be the most appropriate conflict resolution strategy.

Special Topics in Mediation

Co-Mediation: Use of Two Mediators Simultaneously

Useful when:

- Conflicts are multidimensional
- Expertise of various types is required
- Gender-balancing needed

Disadvantages include:

- Cost
- Scheduling difficulties
- Inability of Mediators to work as a team
- Confusion of parties

Guidelines for Conducting Co-Mediations

- Choose a mediator who has a complementary style
- Prepare with co-mediator before the session
- Have one mediator contact both clients
- Discuss with co-mediator session strategy to be used jointly by both mediators
- Decide how the responsibilities will be divided
- Discuss potential shifts in strategy that could occur during the mediation
- Determine how you will interrupt one another without causing tension
- Work out signals you will use to call a caucus
- Decide who will lead the first session
- Discuss how you will balance your involvement throughout the mediation
- Discuss your strengths and weakness as mediators
- Discuss if you want to use “tough guy-nice guy” strategies and who will play which role
- Talk about ways to keep each other on track
- Work out your own internal conflict resolution strategies
- Be aware that not everyone is comfortable or proficient working with a co-mediator

Special Topics in Mediation

The Healing Power of Mediation

Mediation can be healing.

Healing is the resolution of physical or emotional pain or illness. Wherever people are in dispute, people are in pain. People in pain are not functioning at their best. People in pain feel disempowered. People in pain are usually not productively meeting their personal or work objectives.

Mediation can be healing because it:

- Legitimizes the thoughts and feelings of people who are in pain due to conflicts or disputes
- Recognizes their interests and concerns
- Empowers them to work out their own solutions
- Often results in the elimination of the causes of the dysfunction or the illness

The healing power of mediation has effects across systems.

- Often, for example, in a business setting the root causes of a conflict involve personal or family issues that employees bring with them into the workplace. When an employee resolves issues of emotional interdependency at home through physical separation, this reality often also surfaces the workplace; the employee distances himself from co-workers. He/she might be perceived as a loner, not a team player or uncooperative. Correspondingly, therefore, effective mediation that addresses the workplace problem can have a positive effect not just for the business, but also for the personal or family systems of the employee.

- Through mediation an employee could learn skills for addressing difficulties in other areas of life. Furthermore, simply the success of working through a difficult dispute in the workplace could have effects that spill over into the employee's personal and family life.

- An effective mediation process in any context is healing because through it people use and develop skills that empower them to meet creatively any difficult situation that may come their way and because the resolution of a conflict in any system decreases anxiety in all the systems in which the individual functions.

Special Topics in Mediation

Working with Attorneys

- Strategy should be determined on a case by case basis.
- Determine strategy during the preliminary phase of the mediation.
- Clarify in advance with attorneys and clients the roles each will play.
- Normally it is best for the process if the case and the mediation belong to the clients and not the attorneys. The parties should participate fully in the mediation.
- Decision-making about settlement options should be left to the client.
- The attorney's interest may be in conflict with those of the client.
- Some mediators request that lawyers take a seat away from the table.
- In many jurisdictions, the mediator has the authority to exclude counsel from the mediation.
- When clients are uneducated or unskilled, power can be balanced through attorney presence at the table.

The Role of Lawyers in Mediation

- Courts should encourage attorneys to advise their clients on the advantages, disadvantages and strategies of using mediation.
- Parties, in consultation with their attorneys, should have the right to decide whether the attorneys should be present at mediation sessions.
- Courts and mediators should work with the bar to educate lawyers about:
- The difference in the lawyer's role in mediation as compared with traditional representation.
- The advantages and disadvantages of active participation by the parties and lawyers in mediation sessions.

Mediator Ethics

General Guidelines for Mediators

- The mediator is not the decision-maker or problem-solver. The Mediator's job is to facilitate discussion and help the parties come to an agreement that they find mutually acceptable. It is not the mediator's job to substitute his or her judgment for that of the parties.

- The mediator is required to keep confidential that which is disclosed in the mediation process.

- The mediator is required to disclose any possible conflicts of interest that he/she may know of as soon as possible.

- The mediator should never use information gained in a mediation setting for personal gain.

- The mediator should be careful to advise parties of the right to consult with legal counsel before entering into any kind of binding agreement.

- The mediator should withdraw if the appearance of the mediator's neutrality has been called into question.

- The mediator should explain his or her qualifications to the parties, and should refrain from accepting a case that he or she is not qualified to handle.

- The mediator should refrain from offering professional advice, but should direct the parties to professionals outside the mediation.

- The mediator should not coerce agreements between parties.

- The mediator should make sure that the parties understand the parameters of the mediation process before beginning.

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