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GUYANA

Advanced Mediation

Guyana Court Connected Mediation Project

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Advanced Mediation

Guyana Court Connected Mediation Project

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RTI International
3040 Cornwallis Road
Post Office Box 12194
Research Triangle Park, NC 27709-2194

Prepared by Canadian International Institute of Applied Negotiation
MDR Associates Conflict Resolution Inc.

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Section 1

Negotiation Review

Negotiation Review

Introduction

We negotiate in different forms, in different ways as we move through our daily lives whether in our personal or professional lives.

Negotiation is considered by many to be the cornerstone of consensual approaches to dispute resolution.

In dispute resolution in the legal context, it is by far the most commonly used alternative to trial. Research in Canada and in the United States confirms that 90–95 percent of cases are settled by negotiation between counsel prior to trial.

Negotiation can be viewed as a conflict resolution process that embraces both cooperation and competition in a search for agreement.

Negotiation is now considered both an art and a science. There are quite prescriptive approaches to negotiation being taught across the country.

Definition of Negotiation

“It is a back and forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed.”

From: Getting to Yes: Negotiating Agreement without Giving In. Roger Fisher and William Ury.

Some Key Elements of Negotiation

- The Communication is Explicit
- The Communication is Reciprocal
- The Communication Takes Place Directly Between the Parties
- The Process is Designed
- The Intended Objective is an Agreement
- The Interests Represented are in Competition
- It is a Complex Relationship Which is a Mixture of Cooperation and Conflict

From: Negotiating World Order: The Artisanry and Architecture of Global Diplomacy. Alan Henrikson.

Seven Elements of Negotiation

1. ALTERNATIVES
 - a. (BATNA)
2. INTERESTS
3. OBJECTIVE CRITERIA
 - a. (LEGITIMACY)
4. OPTIONS
5. COMMUNICATION
6. RELATIONSHIP
7. COMMITMENT

From: Getting to Yes: Negotiating Agreement without Giving In. Roger Fisher and William Ury.

Characteristics of Positional vs. Interest-based Negotiations

POSITIONAL		INTEREST-BASED
ME vs. YOU or US vs. THEM	ATTITUDE	US vs. the ISSUE (or the problem)
Be really conflict focused, particularly what you will say or do next.	FOCUS	Keep the conflict in context to the overall, ongoing relationship.
Get really stuck on your viewpoint. Your solution/position is obviously right.	FLEXIBILITY	Be open to various possible solutions that could come up.
Manipulate the other to view. Hide your feelings. Add lots of pressure, particularly time pressures.	GENUINENESS	Be honest with what is going on for you. Communicate openly and authentically.
Be positional and take strong stands. Say things like, "I'm not prepared to..." and "This is my bottom line..."	DEGREE OF OPENNESS	Be open about your interests and your needs, as well as theirs.
Get angry and cut off contact with the other party if they don't see things your way.	CONTACT	Keep making contact even if you haven't reached agreement yet.
Take on issues personally. Add some colour, get self-righteous.	ISSUES	The issues are just that—issues— and you don't take them personally.
You look for someone to come out the winner and someone the loser.	OUTCOME	You look for mutual benefit.
Who gives in first.	CRITERIA	Independent of the will of either party.
Damaged or destroyed.	RELATIONSHIP	Sustained or enhanced.

Negotiation Styles

It can be helpful to reflect on various negotiation styles and to develop ways to recognize them. The negotiator can then react more effectively during his/her negotiations.

Negotiation styles can be divided into three main categories: 1) cooperative (“soft”), 2) competitive (“hard”), and 3) principled. A description of some of the bargaining traits and main characteristics of these three styles are set out in the charts below.

Bargaining Traits:

Co-operative (“soft”)	Competitive (“hard”)	Principled
Reasonable opening position	Extreme opening position	Focus on mutual interests, not positions
Trusts people	Distrusts people	Trusts people but not blindly
Protects people	Attacks people	Respects people—separates the people from the problem
Concedes facts	Exaggerates facts	Seeks fair statement of facts
Full (sometimes unilateral) disclosure	Selective disclosure	Balanced exchange of information
High flexibility	Low flexibility	Explores interests to create multiple options
Repeated unilateral (sometimes large) concessions	Incremental (small) concessions	Focus on mutual interests, not positions
Seeks to keep peace	Ignores environment	Seeks to create balanced and professional environment

Description of Styles/Personality Types:

Lose-win	Win-lose	Win-win
Accommodating	Controlling	Collaborative
Passive	Aggressive	Assertive

Goal of Negotiation:

Agreement (at almost any cost)	Victory (maximize own gains)	Win-win (maximize gains of all parties)
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Risks and Limitations of Negotiations Styles

Cooperative (“soft”)

- Can be viewed as weak
- Unilateral concession making is risky—maximize losses or minimize gains
- May sacrifice own interests in hope of a better relationship
- Vulnerable to exploitation
- Subject to adverse emotional reaction if feel exploited by other negotiator
- Goal or objectives may be vague or confused—i.e. put getting an agreement ahead of getting a good agreement

Competitive (“hard”)

- Can generate increased tension and mistrust between negotiators
- Impairs relationships
- Can result in poor communication and/or breakdown of negotiation
- Can be viewed as domineering and unfair
- Can provoke retaliation and escalation of behaviour counterproductive to reaching agreement
- Can take more time and resources to reach agreement—inefficient
- Produces high rate of impasse
- Adverse effect on future negotiations between same negotiators

Principled

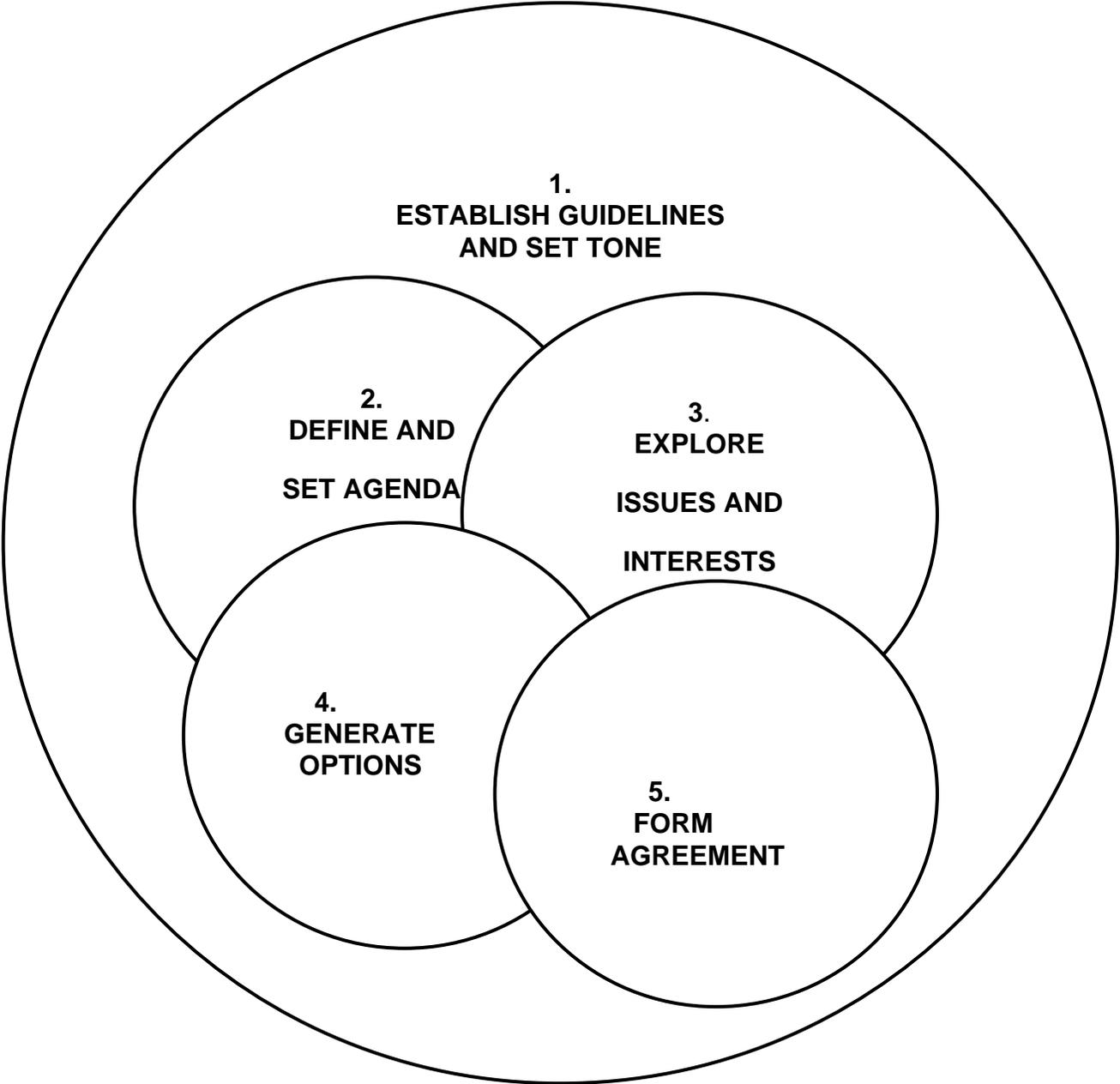
- Similar risks as in cooperative style but to a lesser degree

The Negotiation Process

PHASE I	PHASE II	
Pre-Session Preparation	Negotiation Session	
Prepare to negotiate <ul style="list-style-type: none"> • Gather Information • Hunch their needs and interests, explore mine • Develop my BATNA*/WATNA**, hunch theirs • Set time/location 	Stage 1	Establish the guidelines and set the tone <ul style="list-style-type: none"> • Invoke collaborative/team approach • Confirm time, breaks, minutes • Determine authority • Build relationship (trust) • Focus on process
	Stage 2	Define the issues and set the agenda <ul style="list-style-type: none"> • Set goal for each session • Clarify issues from both sides • Form agenda and prioritize
	Stage 3	Explore issues and interests <ul style="list-style-type: none"> • Gather and exchange information • Specify your interests and get theirs • Identify common interests • Separate each issue from the others • Form neutral goal statement
	Stage 4	Problem solve and form the agreement <ul style="list-style-type: none"> • General options • Determine criteria for fairness
	Stage 5	Form agreement <ul style="list-style-type: none"> • Specify who will do what, when, where, and to what degree (i.e. be specific) • Write agreement • Determine criteria for evaluation

* BATNA – Best Alternative to a Negotiated Settlement

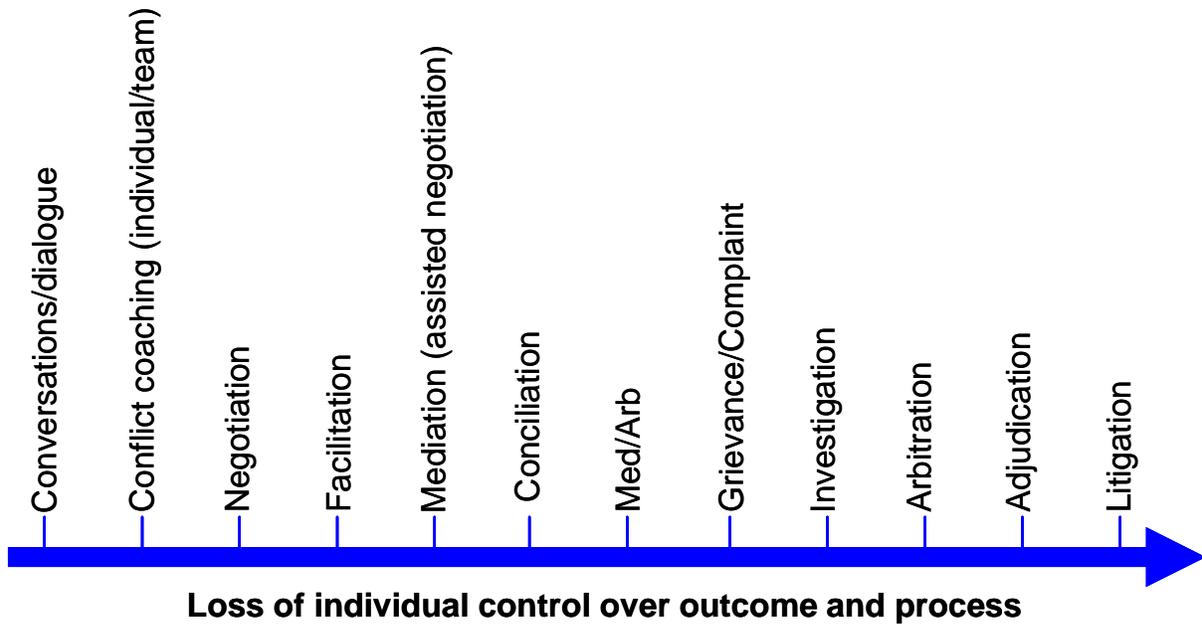
** WATNA – Worst Alternative to a Negotiated Settlement



Section 2

Mediation

Dispute Resolution/Conflict Management Spectrum



Informal

- voluntary
- interests-based
- collaborative
- less expensive
- private
- high potential for win-win
- relationships central

Formal

- mandatory
- legal rights-based
- adversarial
- more expensive
- public
- high potential for win-lose
- relationships peripheral

Definition

A voluntary process for resolving disputes in which an acceptable, impartial, and neutral third party, who has no authoritative decision-making power, assists in a face-to-face meeting of the disputing parties with the basic aim of having them reach a mutually beneficial agreement.

As friends, parents, neighbours, or coworkers, it is not uncommon for us to be called upon to intervene in disputes involving others. Usually we play the role of arbitrator or decision maker. There are times, however, when it is maybe more useful to help the parties resolve their own dispute without making decisions for them. This requires us to provide mediating functions.

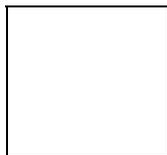
Mediation as we knew it in the past has, for the most part, been used to resolve labour, political, and organizational disputes. Now, mediation is being used to resolve family, public policy, and neighbourhood disputes to name just a few.

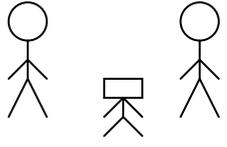
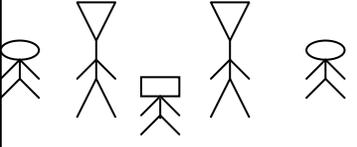
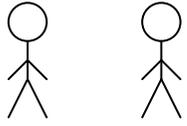
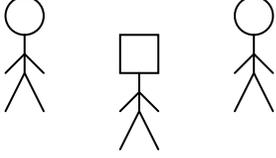
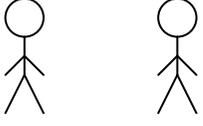
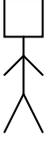
Mediation as a procedure brings people together to talk about their conflict and accept responsibility by requiring them to communicate and by working together to find their own solution to the problem. Most importantly, the dispute is solved jointly.

For mediation to occur, the parties must be willing to talk face-to-face. Communication is open, shared, and takes place between the parties. The objective is to reach a mutually satisfactory agreement, and one that meets personal standards of fairness.

A key role of the mediator is to assist each side in the dispute to understand the other's perspective. An important task is the identification of shared interests in addition to those upon which the parties disagree.

Roles within Three Basic Processes



	Negotiation	Mediation	Arbitration
CONSENSUAL			
IMPOSED			
IMPOSED			



PARTY TO THE DISPUTE



REPRESENTATIVE/ADVOCATE OF PARTY



THIRD PARTY NEUTRAL

Merits of Mediation

Educational—Mediation teaches the potential of a reparative and restorative form of dealing with disputes.

Economical—Mediation is generally less expensive than other options for dispute resolution.

Productive—In an era when it may take one or more years to get a court date, and multiple years if a case is appealed, mediation provides a more timely way of resolving disputes.

Convenient—Mediation session can usually be scheduled at times that are convenient for both parties and at their earliest convenience.

Satisfactory Outcomes—People are more satisfied with solutions that have been mutually agreed upon than those that are imposed by a third party.

Confidential/Private

Benefits of Mediation to the Parties

- Opportunity to be directly involved in the resolving of their own conflicts.
- A space is created for them to tell their story and the impact of the situation on them.
- Opportunity to clarify misunderstandings, perceptions, and assumptions to discover new information.
- Space is created for dialogue with the other party in a “safe” environment.
- Opportunity to gain understanding of the other party’s motivation or reasons for behaviour or decisions.
- Potential to let go of a sense of grievance.
- Potential for all issues inherent to the dispute to be resolved—not just the substantive issues.
- Outcome is tailor-made and decided upon to mutual satisfaction of parties.
- Less cost in time and money and possibly emotional energy.

Conditions that Favour The Mediation Option Over Other Dispute Resolution Processes

- Parties want and are ready to devote the time and effort required to resolve the dispute themselves.
- Parties are interdependent and must rely on mutual cooperation for both to meet their goals and/or interests.
- Communication is severely strained (if not broken down) and emotions are tense.
- Parties have actual or perceived incompatible interests that they have been unable to reconcile.
- No other appropriate or acceptable structured forum exists within which their dialogue can take place.
- Serious disagreement over data exists.
- Parties are more interested in change for the future than about punishment, revenge, or being publicly vindicated.
- One or both parties are uncomfortable confronting the other without someone else present and/or assisting.
- Formal or rights-based proceedings are not a viable option.

Functions of a Mediator

1. Monitor Process
 - Analyze what is happening
 - Identify nonproductive patterns of conflict and educate the parties by describing these nonproductive patterns to them
 - Be aware of power imbalances or perceived power imbalances
 - Point out progress being made during the mediation (This encourages the parties to continue this difficult process)
2. Manage Interaction
 - Help parties get to the table
 - Arrange setting
 - Set tone (informal, open, positive)
 - Introduce process and rules
 - Develop and work through agenda
 - Set the order of the discussions
 - Keep track of time
3. Communication
 - Maintain channels of communication
 - "Across the table"
 - "Shuttle Diplomacy"
 - Help parties vent and deal with emotions in a safe and less threatening environment
 - Help parties refocus on resolution
 - Express his/her reality
 - Appreciate reality of the other
 - Work toward mutuality
 - Help parties interpret and understand each other
 - Help parties save face
 - Create collaborative context for conflict resolution
4. Substantive
 - Help parties clarify issues and interests
 - Offer positive suggestions/options
 - Discourage extreme positions

- Remind parties to consider their BATNA
- Require use of objective standards
- Reality checking

The General Objectives of a Mediator

1. Be regarded by the parties as an effective listener.
2. Provide authoritative direction on the process of mediation.
3. Be vigilant in NOT investing in the content of the dispute or encouraging a particular outcome.
4. Provide baseline procedural information and encourage information about the possibility of future action by either party.
5. Watch for signs that the matter could usefully be referred for other expert assistance (e.g., accounting, actuary, engineer, lawyer).
6. Build trust, facilitate communication, clarify perceptions, and unmask assumptions.
7. Show affirmation of the interests identified by each party.
8. Summarize and categorize the content of each party's view of the dispute.
9. Assist disputants in saving face.
10. Be able to interpret proposals in terms of the listener's interests and objectives.
11. Help the parties generate imaginative options for a mutually acceptable outcome.

Temptations for Mediators

1. Have all the answers.
2. Give advice.
3. Take sides.
4. Use sloppy or indirect language.
5. Be uncomfortable with silence.
6. Need to be successful by reaching an agreement.
7. Keep the lid on.
8. Take ownership of the problem.
9. Take control of the problem solving.
10. Be afraid of a display of emotion.

**Remember:
No agreement is better than...
a mediator's agreement.**

Positions • Issues • Interests

An analytical look at any given dispute would determine that the parties have formulated positions, that something has happened involving the parties, and that the parties have some concerns, fears, or interests concerning what has happened.

As mediators, we must be able to separate out the positions, the issue(s) at hand, and the interests of each party.

Issues:

- The topic to be discussed or problem to be solved.
 - E.g., The environmental impact of the proposed mine
- The impact on the local community

Positions:

A proposed solution that the party thinks will satisfy her/his interests or needs—what each party initially wants as an outcome.

Positional statements usually start with:

- I won't, I will, You should, I want, We need
- You have to, You must, I refuse to, I want
 - Eg. "He needs to apologize for calling me a tree-hugger."
- "I won't give another minute to this Board as a volunteer."

These statements often:

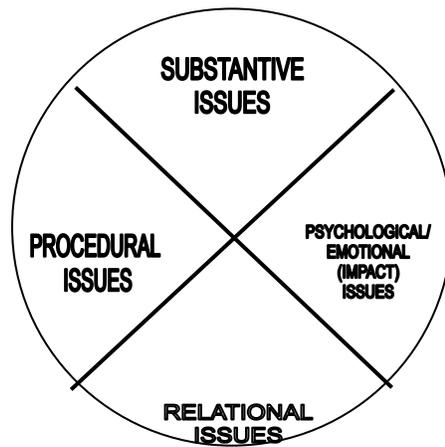
- Increase defensiveness
- Create resistance/opposition
- Are perceived to meet the person's needs.

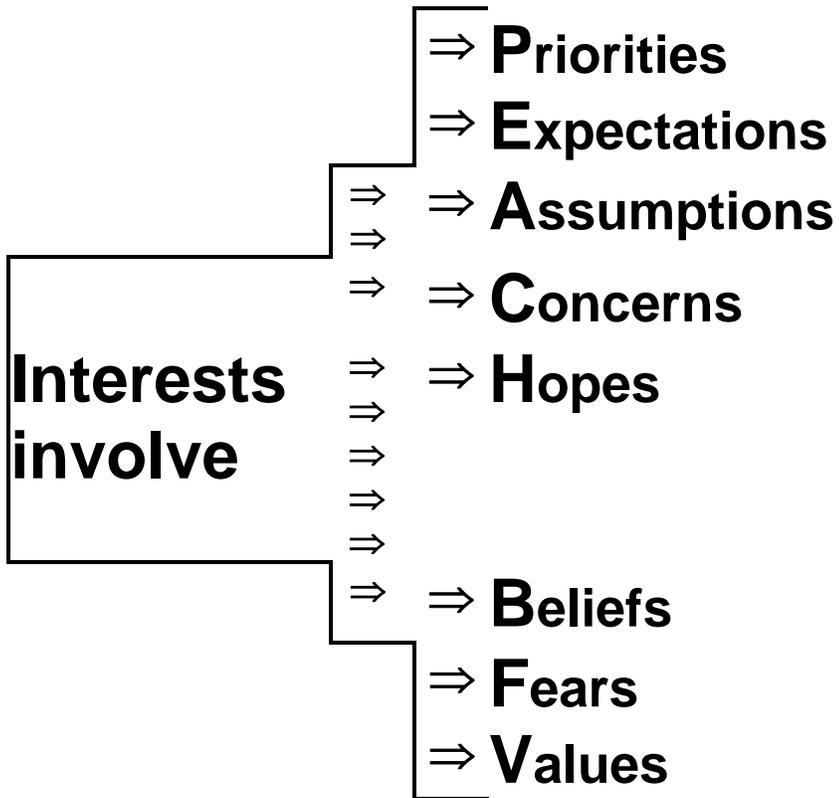
Interests:

The parties' underlying reasons for arriving at their positions—needs, wants, concerns, fears. Interests may be tangible (e.g., property) or psychological/emotional (e.g., recognition, approval).

Interests involve “PEACH BFVs” (Priorities, Expectations, Assumptions, Concerns, Beliefs, Fears, Values).

Types of Issues

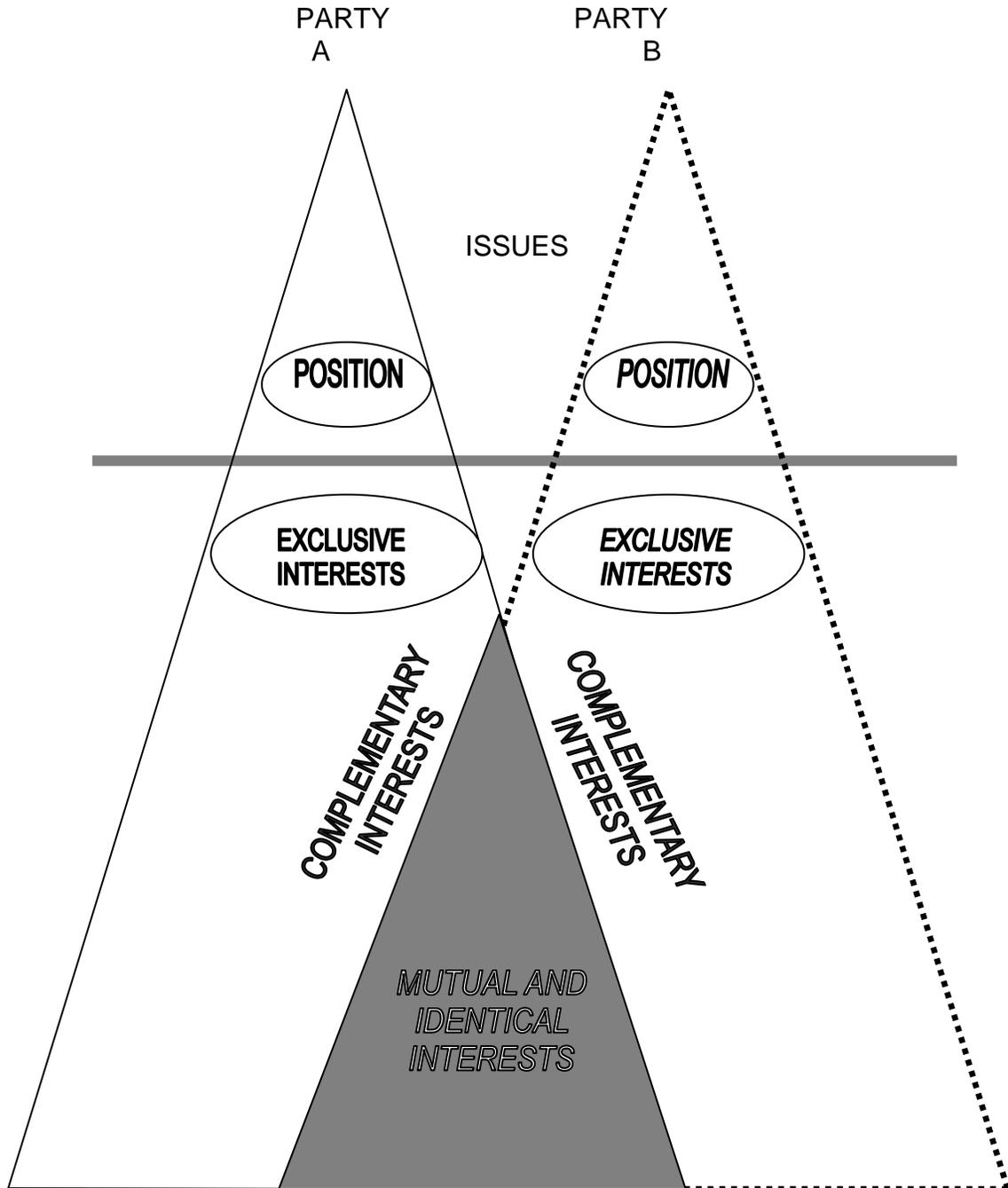




Some Common Interests We Have

Acceptance	Opportunity for Input	Relaxation
Fulfillment	Autonomy	Consistency
Accountability	Privacy	Satisfaction
Independence	Belonging	Efficiency
Achievement	Recognition	Safety
Knowledge	Clarity	Fairness
Acknowledgment	Responsibility	Security
Love	Commitment	Freedom from Fear
Affection	Respect	Trust
Nurturance	Competency	Understanding
Appreciation		Validation

Moving from Positions to Interests

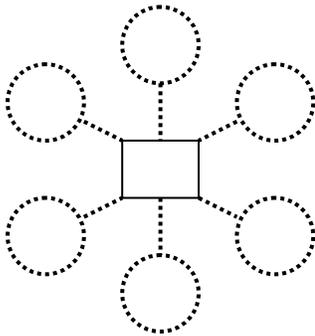


Some Common Feelings We Have

Affectionate	Empathetic	Imposed upon	Satisfied
Angry	Energetic	Infuriated	Relieved
Annoyed	Enervated	Intimidated	Resentful
Anxious	Exasperated	Isolated	Sad
Blissful	Fearful	Jealous	Scared
Blue	Flustered	Jumpy	Shocked
Burdened	Foolish	Kind	Spiteful
Charmed	Frantic	Left-out	Stunned
Cheated	Grief-stricken	Loving	Stupid
Cheerful	Guilty	Melancholy	Sympathetic
Condemned	Happy	Miserable	Tense
Contented	Helpful	Nervous	Terrible
Crushed	Helpless	O.K.	Thwarted
Defeated	High	Outraged	Tired
Depressed	Hopeful	Peaceful	Torn
Despairing	Hopeless	Persecuted	Trapped
Distraught	Horrible	Powerless	Troubled
Disturbed	Humiliated	Pressured	Vulnerable
Dominated	Hurt	Put upon	Weepy
Eager	Hysterical	Rejected	Wonderful
Embarrassed	Ignored	Relaxed	Worried

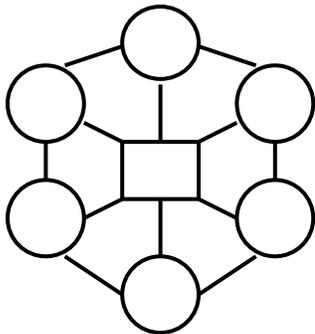
Three-Phase Mediation Model

CONVENING (PRE-NEGOTIATION)



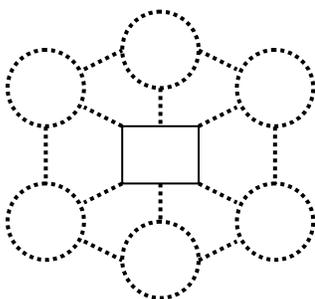
- Who are the parties?
- What are the issues?
- What is the power balance?
- Is there willingness to mediate?
- Explain roles, process
- Deal with Agreement to Mediate

ASSISTED NEGOTIATION



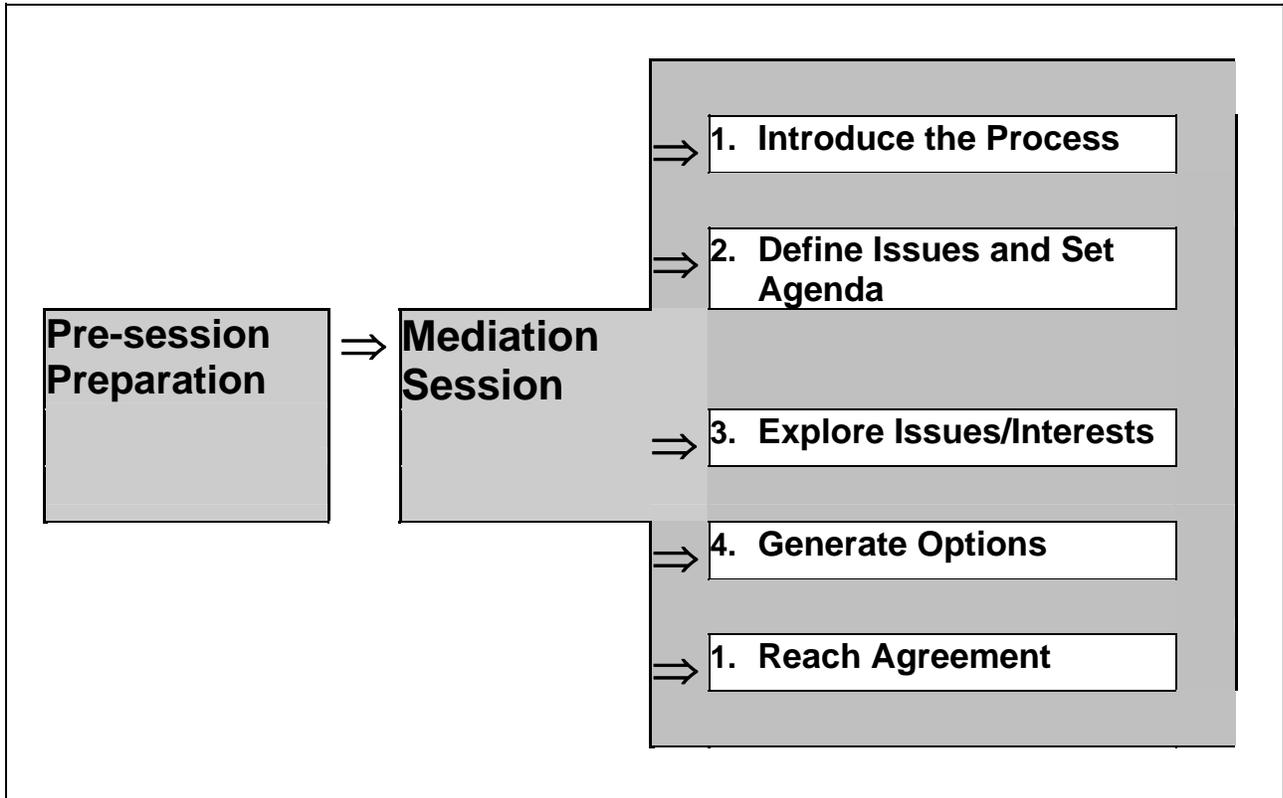
- A neutral helps the parties negotiate a resolution
- Systems to resolve implementation disputes are designed together and built into the agreement

IMPLEMENTATION AND FOLLOW UP



- Commitments are honoured
- Linkages with existing institutional mechanisms are made
- Disputes (if any) arising during implementation are resolved

The Mediation Process



Step 1: Introduce the Process

OBJECTIVES	KEY ACTIONS
• To open the meeting	• Greet and welcome
• To build confidence and trust	• Seat parties, encourage • Explain your role/their role
• To explain what parties can expect to happen	• Outline the process • Speak to the potential agreement • Determine authority to settle
• To set parameters for the meeting	• Explain - confidentiality/notetaking - time lines - caucusing
• To solicit commitment	• Set guidelines, get commitment • Ask for questions • Get parties to commit

Step 2: Define Issues and Set Agenda

OBJECTIVES	KEY ACTIONS
• To provide opportunity for parties to tell their story	• Invite opening overview • Attend to the parties • Watch for impact on each other
• To ensure that parties begin to feel heard and understood	• Restate/reflect/clarify
• To give parties opportunity to have an exchange of information	• Invite reactions • Ask clarifying questions to draw out specifics • Listen for and note issues, interests • Maintain respectful exchange
• To frame the issues and set an agenda	• Call a short break (if necessary) • Frame issues neutrality and write up • Assist parties to prioritize into an agenda

Step 3: Explore Issues/Interests

OBJECTIVES	KEY ACTIONS
<ul style="list-style-type: none"> • To generate “complete” information 	<ul style="list-style-type: none"> • Begin with first issue • Ask party to give more information • Ask open-ended questions • Restate/reflect/clarify/summarize
<ul style="list-style-type: none"> • To generate understanding between parties 	<ul style="list-style-type: none"> • Clarify intent/impact • Clarify assumptions, perceptions, attributions • Articulate new information • Ask probing questions
<ul style="list-style-type: none"> • To build a common account 	<ul style="list-style-type: none"> • Articulate interests • Reframe positions to interests, negatives to positives
<ul style="list-style-type: none"> • To have each party articulate what is important for them • To assist parties to move from positions to interests • To assist parties to shift to a different cognitive space 	<ul style="list-style-type: none"> • Ask parties to restate what they hear from the other party • Bring parties to present • Summarize common, complementary, opposing interests

Step 4: Generate Options

OBJECTIVES	KEY ACTIONS
<ul style="list-style-type: none"> • To create options to meet interests 	<ul style="list-style-type: none"> • Assist parties to brainstorm options • Bring parties to future thinking
<ul style="list-style-type: none"> • To evaluate options and choose viable ones 	<ul style="list-style-type: none"> • Check for “doability” of options • Test options against criteria (fair, wise, and efficient) • Track viable options • Act as agent of reality
<ul style="list-style-type: none"> • To put options into concrete actions 	<ul style="list-style-type: none"> • Concretize options re: what, who, when, where

Step 5: Reach Agreement

OBJECTIVES

- To package chosen options into an agreement
- To check agreement terms regarding their short- and long-term implications
- To have parties commit to and sign the agreement
- To validate parties for their achievement
- To bring closure to the meeting



KEY ACTIONS

- Take a break and write the agreement
- Check with parties to determine agreement with written terms
- Reality check the terms
- Assist parties to visualize long- and short-term implications
- Revise if necessary
- Construct a contingency and a dispute resolution clause
- Give to parties for reading
- Invite parties to sign and date
- Give copy to each party
- Compliment parties on their hard work
- Offer congratulations to parties
- Thank parties for their trust in you
- See the parties out



The Mediation Session

MEDIATION SESSION	OBJECTIVES
STEP 1 Introduce the Process	<ul style="list-style-type: none"> • To open the meeting • To start building confidence • To explain what parties can expect to happen • To set parameters for the meeting • To solicit commitment
STEP 2 Define Issues and Set Agenda	<ul style="list-style-type: none"> • To provide opportunity for each to tell his/her story • To ensure that parties begin to feel heard and understood • To give parties opportunity to have an exchange of information • To frame the issues and set an agenda
STEP 3 Explore Issues/ Interests	<ul style="list-style-type: none"> • To generate "complete" information • To generate understanding between parties • To build a common account • To have each party articulate what is important for them • To assist parties to move from positions to interests • To assist parties to shift to a different cognitive space
STEP 4 Generate Options	<ul style="list-style-type: none"> • To create options to meet interests • To evaluate options and choose viable ones • To put options into concrete actions
STEP 5 Reach Agreement	<ul style="list-style-type: none"> • To package chosen options into an agreement • To check agreement terms regarding their short- and long-term implications; to revise if necessary • To validate parties for their achievement • To bring closure to the meeting

When is Mediation Appropriate?

The Nature of Parties:

Are they:

- Motivated to mediate?
- Able to be responsible for self?
- Willing to deal directly with each other?
- Willing to deal directly with conflict?
- Willing to work toward mutually acceptable decisions?
- Given the authority to settle?

The Nature of the Dispute

The more that the following characteristics are present, the greater the likelihood of success:

- There is, or may be, an ongoing relationship.
- There is limited number of parties.
- There are multiple needs and wants of the parties, which will allow for the development of creative solutions.
- Settlement is pressured by external factors (transaction costs, emotional costs, time, unpredictable outcomes, need for privacy, effect of continuing dispute on others, etc.)
- The hostility level between the parties is not prohibitive.
- The parties have a past history of cooperation or joint problem solving.

Power—its use and abuse in mediation

One common objection about mediation is its perceived impotence as a dispute resolution option in situations of disputant power imbalance. Every mediator should consider the issue of power and its abuse, and certain principles and practices applied during mediation, to meet the risks inherent in power imbalance.

At the same time, debate has long continued over the meaning and identity of power imbalances; whether they are ever penetrable; whether they ipso facto, define a failed mediation; whether attempting to set them right necessitates the mediator sacrificing neutrality. Some argue that certain relationships (those founded in domestic abuse, for instance) are inherently imbalanced and can never be fairly negotiated, even with skilled assistance. Others insist that an experienced mediator can always outbalance an otherwise overpowering disputant and that this feature is one of mediation's greatest advantages.

Another aspect of the power debate has been the proper use of mediator power and influence. When does the mediator become overly influential so as to fatally flaw impartiality or neutrality? How far can the mediator go?

There are certainly situations where power imbalances are so severe that no mediator can even the scale without destroying the mediator's credibility and base of authority. At the same time, an overwhelming majority of imbalances in disputant power are manageable by the mediator. Indeed, no mediation is without some degree of power imbalance.

Mediator Power and Influence

A mediator possesses enormous power both by virtue of the role as an objective third party and by virtue of the status as a chosen professional. The mediator is unchallenged in authority over the process; parties give the authority by contract and by consent. Few mediators experience this power being challenged by disputants in the mediation.

This power gives the mediator's words and attitude great importance to disputants throughout the mediation process. Thus, when mediators assert their capacity to produce an intended and foreseen effect, it is often successful.

The issue for mediators, especially if they are facilitative as opposed to directive, is thus not how to exert mediator power effectively, but how to limit it.

Clearly as a basic rule, the mediator should never use power to alter the substantive outcome of the negotiation. Likewise, the mediator should use power and influence in a way that encourages consensus while enhancing impartiality.

The mediator's power is derived by her role in:

Managing the process:

- sequencing stages
- ordering agenda
- framing issues
- settling goals
- making transitions

Managing communication:

- by the structure (what, how, when, where)
- by the means (e.g., using active listening, reframing, reflection, etc.)

Managing the body language and physical space:

- exhibiting relaxation
- calling for a breather
- overseeing the room set up

Managing timing:

- starting
- finishing
- duration
- resolution framing
- implementation of resolution
- evaluation
- review

Managing information exchange:

- clarifying
- defining process terms or industry specifications
- asking difficult questions
- making general suggestions if asked by parties

Managing doubt:

- reality testing
- looking at hypotheticals
- reviewing the parties' BATNAs

Managing the emotional climate:

- intervening
- confronting
- using immediacy
- calling breaks
- using humour
- terminating

Tips for Mediators in Balancing Power Between Disputants

A first principle in balancing power between parties in mediation is not to try in those cases where the power imbalance is too severe.

When acting as mediator, the test to apply is to ask yourself the following question:

“Will my attempts to balance power in this mediation unduly compromise one or both parties’ interests or cause their negotiation to become unconsensual?”

If the answer to this question is “Yes” then decide what needs to be done to ensure equitable power in terms of resources, skills, and information. If this cannot be ensured, then explain to the parties that you as the mediator have come to the conclusion that negotiation cannot be productively used by the parties to resolve their issues.

If the answer to this question is “No” here are some methods for “balancing” power between the parties at the table.

- Use resource people (counsellors, accountants, lawyers).
- Use caucus to check that people understand the implications of certain solutions.
- Explore unidentified resources that the lower power party has.
- Enforce ground rules.
- Use a support person or advocate to be with the lower party person.
- Slow down the pace.
- Intervene using “immediacy” to point out the power structure that is currently playing out.
- Share information by asking the data holder to give it up.
- Consider dress and other trappings (formal or informal, uniforms, names and titles).
- Manage body language.
- Assist the party with lower power in expressing his/her views.
- Emphasize mutuality and the importance of the negotiation relationship to all negotiators.

Convening a Mediation

Questions to Ask

The first tough questions mediators initially ask themselves are

- Should they be involved in a particular situation?
- Is the area of the dispute, or the parties themselves, linked to them in any way?

Mediation can be used in a broad range of situations but there are times when it may not be appropriate. Some questions to ask are

- Is each party capable of articulating his or her interests?
- Is there a power imbalance in terms of information or resources, which could be intimidating or inhibiting?
- Does the issue arise from policy factors or organizational structures beyond the control of the parties?
- Are there others who play an integral part but who are unwilling to participate in mediation?
- Do both parties have an investment in the resolution of the dispute?

Objectives of the Convening Process

Some objectives of the convening process are

1. Help parties gain confidence and trust in the mediation process
2. Motivate parties to face and resolve the conflict
3. Explain what will happen and correct misunderstandings
4. Deal with confidentiality and parties' rights to due process
5. Clarify the role of the mediator
6. Secure agreement to mediate.

Favourable Conditions for Convening a Mediation

Mediation is most effective under the following conditions (absence does not make successful mediation impossible, just that disputes are resolved less frequently):

1. The parties have cooperated on some issues in the past and do not have a long history of adversarial relations or prior litigation
2. The parties have, or may have, an ongoing relationship
3. There is a desire to settle the dispute

4. There is some external pressure to settle (time, diminishing benefit, unpredictable outcomes, transaction costs, emotional costs)
5. The hostility and anger of the parties toward each other is not prohibitive
6. The number of parties involved in the dispute is limited
7. There are adequate resources to effect a solution (limited resources tend to create more competitive relationships).

Role of the Convenor

The main functions of the convenor are

1. Internal champion for the appropriate process.
2. Serves as a conflict analyst regarding the parties and the issues to assess if mediation is appropriate.
3. A contract manager with the mediators and the implementation phase.
4. A link between the interpersonal and the system.

General Duties of the Convenor

When an individual acts as a convenor for his/her organization or a mediation service, the following are general duties that the convenor may have:

1. maintain and manage a mediation roster
2. inform the parties
3. contract with the parties
4. appoint the mediator
5. manage the reporting
6. administer the mediation service as per the mandate.

Specific Tasks of the Convenor

- I. Conducting an Intake
- II. Convening the Parties
- III. Informing the Mediators

I. Conducting an Intake

What the Parties Need to Know

- how mediation works
- purpose of mediation
- role of mediator
- who attends
- who is in charge of decision making
- limits of confidentiality
- time frames
- fees
- value of mediation and consequences of not attending
- recourse if mediation is not successful

What the Mediator Needs to Know

- name and contact information
- who are the stakeholders
- overall nature of dispute but not all the details
- brief history and actions taken to date
- special needs
- safety issues

Assess Suitability

- willingness to participate
- incentives to settle
- competency—physical, emotional, psychological
- power relations

- legal, policy, or human rights consideration

Assign Tasks

- prepare to think about what is to be negotiated and their BATNAS's
- organize relevant written documents

II. Convening the Parties (in separate meetings)

- Set a comfortable climate.
- Describe mediation and its benefits.
- Outline the role of the mediator and roles of others that are participating.
- Find out what has happened from this party's perspective.
- Ask what the party needs to happen in order for this situation to be resolved.
- Ask the party what s/he thinks they could do to help resolve the situation.
- Deal with who is the mediator.
- Solicit and answer any questions about mediation from the party.
- Advise the party to come to the mediation with a short summary of what has happened from her/his perspective.

Inform the party of the time and place of the mediation.

III. Informing the Mediators

- Provide mediators with names of the parties and a short overview of the situation.
- Solicit and answer mediators' questions.

Elements of an Effective Convenor

1. Life experience
2. Ability to form a rapport with people over the telephone
3. A nonjudgmental attitude
4. Training in mediation skills and theory
5. Experience in mediating
6. Strong communication skills
7. Ability to pay attention to details
8. Ability to discern

The Caucus {tc "THE CAUCUS " \ 2}

The caucus is a private meeting held between a mediator and each of the disputing parties. The main goals are to uncover resistance to communications between the parties and to promote positive communication and movement toward reaching an agreement.

Purpose of a Caucus {tc "Purpose of a Caucus " \ 3}

- Allow a breather or cooling-off period.
- Challenge each side's perspective.
- Assist each side check the reality of his/her position.
- Encourage the sharing of information.
- Explore new possibilities of movement.
- Discover concerns that have not surfaced in joint sessions.
- Clarify perceptions and uncover resistance to movement.
- Determine if there are mediator-party issues which should be addressed.
- Suggest ways to promote movement.
- Allow strong feelings to be expressed in private.
- Lay out mediator's perception of the situation to help change views.
- Identify important issues.
- Allow parties to discuss options while not under the scrutiny of the other party.

Calling a Caucus {tc "Calling a Caucus " \ 3}

- Have a specific purpose in mind when calling a caucus.
- Always caucus with both sides.

- Be aware of the length of time spent with each party and be certain that each is not left alone too long.
- Clarify the issue of confidentiality in relation to the information shared in caucus.
- If information generated in caucus is to be kept confidential, be certain that you clarify with the parties what is or is not to be kept confidential and take special note of that which is to be kept confidential.
- Maintain an environment of informality and flexibility in the caucus sessions.
- Encourage the parties to seek information and anything else that would assist them in continuing.

During the Caucus

- Keep in mind your original goals but be flexible in pursuing new ideas and allow for creative problem solving.
- Keep the responsibility for problem solving on the parties, resist efforts to have it thrust on you.
- Emphasize strengths—caucusing allows for positive feedback, joint sessions may not.
- Maintain the delicate balance between working to build trust and continuing to communicate your impartiality.
- Be clear what information parties want kept confidential in the joint sessions.

After the Caucus

- How you reopen the joint session after a caucus is important. Choose an approach appropriate for the information, proposals, and emotions shared.
- Be discriminating about what information you share in the joint session. It can facilitate or jeopardize the session. Judgement, timing, and respect for privacy are crucial factors.

In Summary

1. Have a clear purpose when calling a caucus.
2. Prepare parties by explaining caucus in Step 1–Introduction of the Process.
3. Announce and explain procedures clearly.
4. Get in and get out in an expedient manner.
 - maintain sensitivity to time
 - check out information to be shared and by whom
 - plan how to restart the joint session.

Writing Agreements in Mediation

At the Beginning

- Determine what is being achieved today and whether there can be a final agreement that is to be signed by the parties.
- Is the agreement to be a draft that requires ratification—by whom and by when?

During the Session

- Take notes.
- Make lists, develop options, and record these on a flip chart or working paper.
- Keep the jointly developed information in front of people.

As an Agreement Takes Shape

- Note key elements.
- Get details, clarification, and specifics.
- Include a "what-if" clause (i.e., "What if something breaks down, doesn't happen?").
- Include a dispute resolution clause.

Drafting the Agreement

- If necessary take a break to do the fine-tuning and ensure both sides agree (do not reopen the negotiations, ask only for comments on accuracy and for approval).
- Ensure parties' rights to obtain independent advice if appropriate, before signing.
- Ask parties to sign and give each a copy.

Points to Remember When Writing an Agreement

- Use simple language.
- Avoid jargon.
- Ensure consistency by
 - accurately reflecting what the parties agreed to
 - being internally consistent and avoiding ambiguous words
 - not using two or more words to mean the same thing.
- Avoid ambiguity by
 - choosing descriptive adjectives carefully
 - specifying who, where, what, when, how
 - writing out dollar figures, e.g., two hundred thousand dollars (\$200,000)
 - ensuring that definitions used to clarify are understood.
- People are most likely to live up to a settlement that they themselves have created.

Self Evaluation after you Mediate

Stage One—Introduction of the Process

- Was a comfortable environment created?
- Was I able to develop rapport?
- Did I outline the roles thoroughly?

Stage Two—Defining Issues and Setting the Agenda

- Was I able to get the disputants talking?
- What helped get the issues out?
- What were the obstacles?
- Did I deal with the people problems appropriately and productively?
- Did I summarize and clarify all the issues?
- Did I get their commitment to proceed on those issues?

Stage Three—Exploring Issues and Interests

- Did I get the disputants working together?
- Did the disputants understand how their behaviour was affecting productivity?
- Were the disputants able to hear one another's perspectives and concerns?
- Was I able to clearly identify the common ground?

Stage Four—Generating Options

- Did we look at objective criteria for options?
- Was there any resistance to looking at options for resolution?
- Did the disputants fully understand what they were in agreement of?
- Did they work together to create the best possible solution that met some or all of their needs to the greatest possible degree?
- When they had challenges with possible options, were they able to remain responsible and fair? Did we fully explore the implication of the options?
- Did we cover all possible options for implementation?

Stage Five—Writing Agreements

- What will I do differently next time I mediate?
- Was the agreement drafted in clear and simple language?
- Was the language consistent?
- Was I able to assist the parties in visualizing long- and short-term implications?

- What did I learn from this mediation that I can apply next time?
- Did I acknowledge parties' hard work?

Post Mediation Feedback and Follow-Up

One of the ways to monitor your effectiveness and whether you are meeting your clients' needs is through follow-up.

The following might be some of the information to record in a separate form for both parties:

File No. _____

Case _____

Names _____

Date of Mediation _____

Time Spent on Follow-up _____

Have the disputants answer the following questions:

1. How is the agreement holding up?
2. Any comments on the mediation process?
3. Did you feel our services were helpful?
4. Would you recommend mediation to others to resolve their differences?
5. If so, why? If not, Why not?

Co-Mediation

Why Co-mediate?

- It is easier to listen and observe when freed from the active mediator's role.
- Mediating is intense and can be physically, intellectually, and emotionally draining; co-mediating lightens the load.
- Co-mediators can be chosen to better reflect the disputants (gender, culture, race, profession, etc.), which often helps the parties feel at ease.
- Co-mediation demonstrates cooperative teamwork in action. When one mediator is unsure of how to proceed or wants to check out an idea, s/he can turn to the co-mediator. This enhances the process, alleviates pressure, and models cooperation.
- Co-mediating can provide invaluable training for an inexperienced mediator or a process of peer review for experienced mediators.

Guidelines for Co-mediation

- Prepare ahead.
- Discuss what strategies and signals you plan to use.
- Decide how the opening statements will be divided.
- Be sure both of you talk early in the session to obtain "voice legitimacy."
- Discuss how to balance your involvement—one mediator should not dominate while the other is largely silent.
- Discuss how to interrupt each other without causing tension.
- Decide on ways to work together.
- Discuss your strengths and weaknesses. Look for ways to support each other.
- Work out how to deal with your differences.

Selecting a Mediator

What are the characteristics that counsel should look for when seeking an effective mediator?

- Original ideas
- A sense of appropriate humour
- The ability to act unobtrusively
- The capacity to make a disputant feel that he or she is “one of us” in the sense of being informal but not partisan
- The ability to inspire respect as an authority
- The willingness to be vigorous salesperson when the situation warrants it
- Control over personal feelings
- A positive attitude towards mediation
- The ability to understand quickly the complexities of a dispute
- A substantive knowledge about the field.

(Christopher Moore, 1983, unpublished)

A mediator should have training, be experienced, and be able to demonstrate the development of considerable skills executing the theory of interest-based, integrated negotiation. Depending on the subject matter or context of the dispute, there may be a code of conduct, set of base-level standards, or professional association the mediator should acknowledge.

Mediator Skill Checklist

PERSONAL AND COMMUNICATION STYLES

COMMENTS

1. Active listening: attention to verbal and nonverbal cues
2. Using clear language
3. Asking neutral questions
4. Remaining patient
5. Remaining nonjudgmental

ROLES AND RULES: SETTING THE STAGE

1. Explaining the role of the mediator
2. Explaining the mediation process
3. Creating a comfortable place for mediation to happen

Handling situations (e.g., differences re: confidentiality) as they arise

FACTS AND FEELINGS: DEFINING AND EXPLORING ISSUES

1. Framing issues
2. Listening/notetaking skills
3. Ability to be objective and nonjudgmental
4. Using active listening
5. Clarifying issues
6. Moving to interests

FINDING SOLUTIONS

1. Using active listening
2. Getting ideas for resolution
3. Using reality testing
4. Ability to summarize and write the agreement

APPENDIX Agreement to Mediate

Mediation Agreement

The parties agree to enter into a mediation process and have engaged _____ as mediator. The parties and the mediator agree as follows:

1. **Process.** Mediation is an informal settlement process. The parties confirm their intention to participate in this mediation process in good faith in order to seek a consensual resolution of the matters between them.
2. **Mediator.** The mediator is an independent neutral facilitator who will assist the parties to negotiate their own voluntary settlement of the issues if that is possible. The mediator is not providing legal advice, legal representation, or any other form of professional advice.
3. **Authority to Settle.** Appropriate representatives with full, unqualified authority to settle the dispute will attend the mediation conference.
4. **Inadmissibility.** To promote communication and settlement discussion, all statements and offers made during the mediation are inadmissible for any purposes in any legal proceeding, arbitration, or other proceedings. The parties will not subpoena or otherwise require the mediator to testify, produce records, or notes in any further proceedings.
5. **Confidentiality.** Mediation is a confidential process and the parties and their advisors agree not to disclose information about the mediation without permission to any third party except as required to enforce any agreement or settlement reached. The mediator will not voluntarily, and without permission of both parties, disclose to anyone who is not a party, or a party's advisor, anything said or done or any material submitted to the mediator except as required by law or on an anonymous basis for research or educational purposes.
6. **Independent Advice.** The parties are responsible for obtaining their own independent legal and other professional advice. The mediator has no duty to assert to protect any party's rights or to raise issues not raised by the parties themselves.
7. **Termination.** The mediation conference may be terminated by any party or the mediator at any time.
8. **Fees and Disbursements.** The parties agree to share the costs of mediation. The lawyers undertake the payment of their party's share of the mediator's account. \$_____ cancellation fee for cancellations within 72 hours of the first session. General rate: \$_____ for preparation and mediations plus disbursements and GST.

Dated at _____, this ____ day of _____, 2005.

Signature (Party)

Signature (Representative)

Signature (Party)

Signature (Representative)

Mediator

Date

Section 3
Advanced Considerations for
Negotiators & Mediators

Section 3A
Essential Communication Skills

Communication

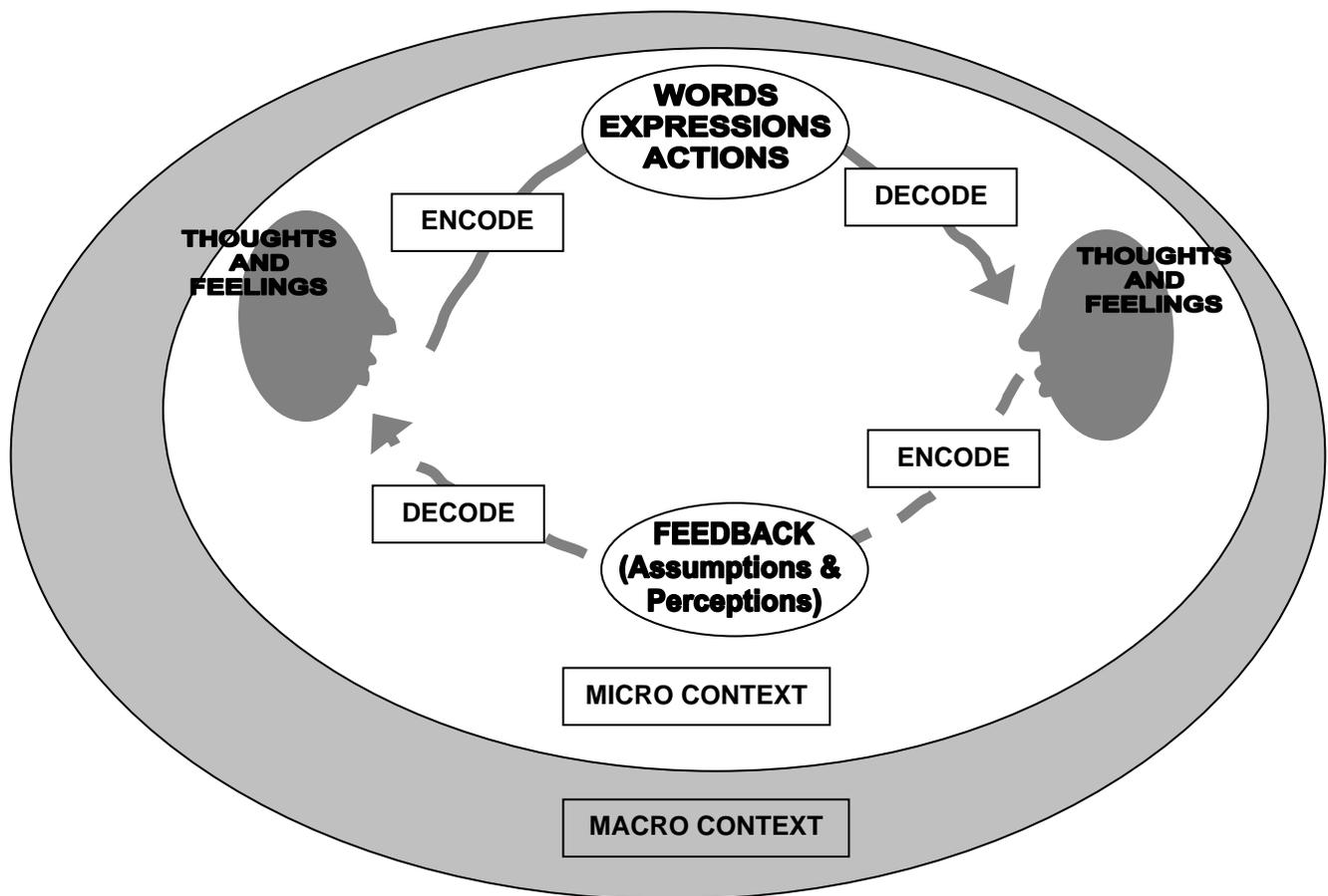
Effective communication is essential for managing conflict and for resolving disputes in the workplace. Managers, supervisors, and staff alike must be able to hear and understand one another and they must demonstrate that they do so.

Communicating is not just talking and listening; it requires that we understand the other person. Communication skills need to be learned and refined.

Communication is a complex process that involves the sender, the message, the receiver, the situation or environment (when, where, and how the communication occurs), and the feedback that one person receives as s/he talks and then listens to another.

Factors that may influence communication to be misunderstood are assumption, perception, inference, and projection. In fact, communication can get us into conflict. We need effective communication skills and strategies to get us out of conflict and to resolve disputes.

Communication Model



Structuring Communication

The way communication occurs has an impact on the outcome of any negotiation. Communication can be structured by negotiators and mediators to help create positive interactions and climates for successful outcomes.

The following are components of the communication process:

1. **What** is communicated.
Substantive information, procedural information, information about the negotiator's emotional state.
2. **How** the message is communicated.
The medium: written, oral (in person or by phone), etc. and the sender's syntax
3. **By whom** the message is communicated.
4. **To whom** the message is delivered.
Variables to consider
 - Who has the power to decide?
 - Who is psychologically ready to hear the message?
 - Who are the moderates in the group?
 - To whom in the bureaucratic hierarchy should the message be addressed?
 - What is the protocol for delivering the messages?
5. **When** the message is delivered.
Is it too soon to make the offer? Are the preconditions to a positive reception present?
6. **Where** the message is delivered.
 - Private session or joint session?
 - In public or on camera?
 - Formal or informal setting?
 - Etc.

From *The Mediation Process*, second edition, Christopher W. Moore.

Nonverbal Communication

We communicate significantly more through nonverbal than through verbal communication. The message received has more to do with what we do than with what we say. It has been estimated that

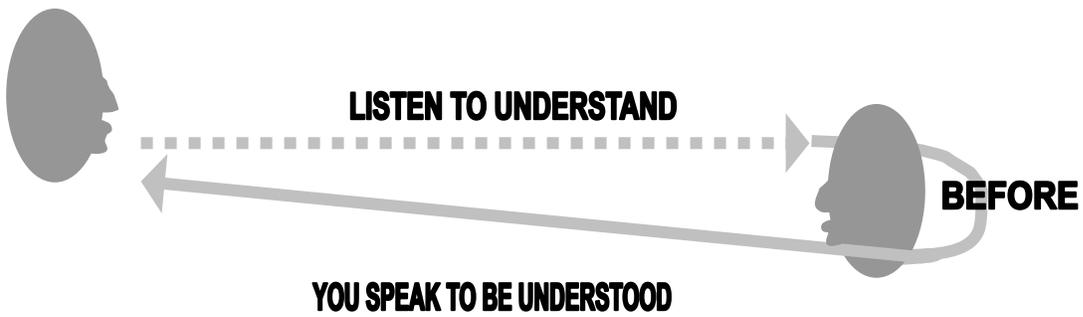
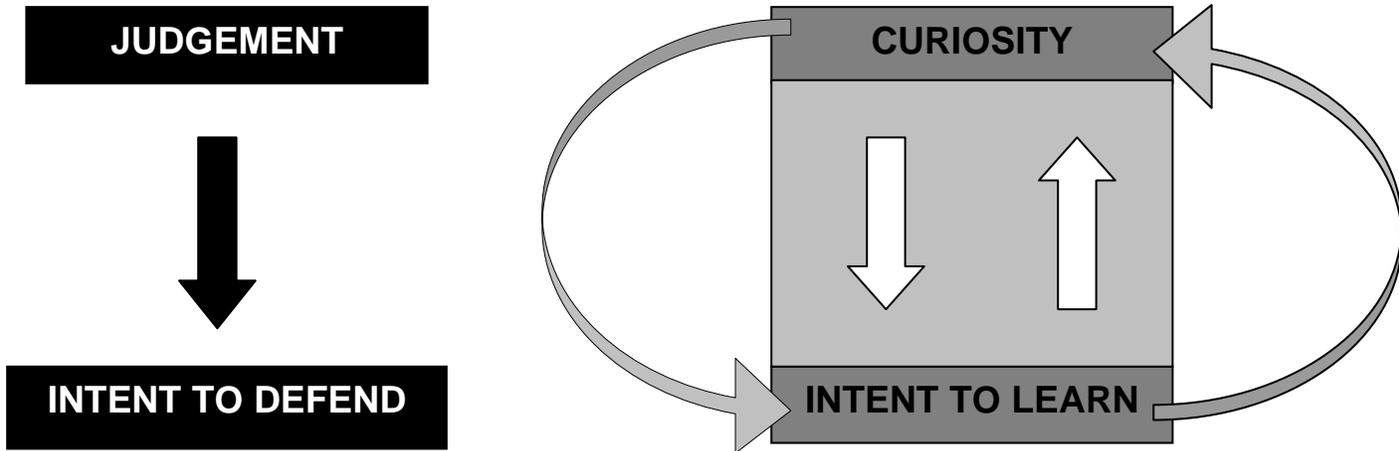
- 7% is through verbal expression
- 38% comes by way of voice tone, volume, and clarity
- 55% of what is communicated comes from body movement and facial expression.

Moore describes some forms of nonverbal communication as follows:

1. Gestures, Eye Contact, and Demeanor.
 - Pointing at someone, rolling of the eyes, sighing, staring or lack of eye contact, rigid body posture, hand wringing, turning away, moving forward, retreating, etc.
2. Use of Space
 - Physical positioning of the parties, distance between the parties or between the parties and the mediator, placement of objects between the parties, formality or informality of the negotiation setting, etc.
3. Use of Objects
 - Negotiators' and mediators' clothing, bringing contested objects to the table, financial records, ownership documents, presence of weapons, etc.

From *The Mediation Process*, second edition, Christopher W. Moore.

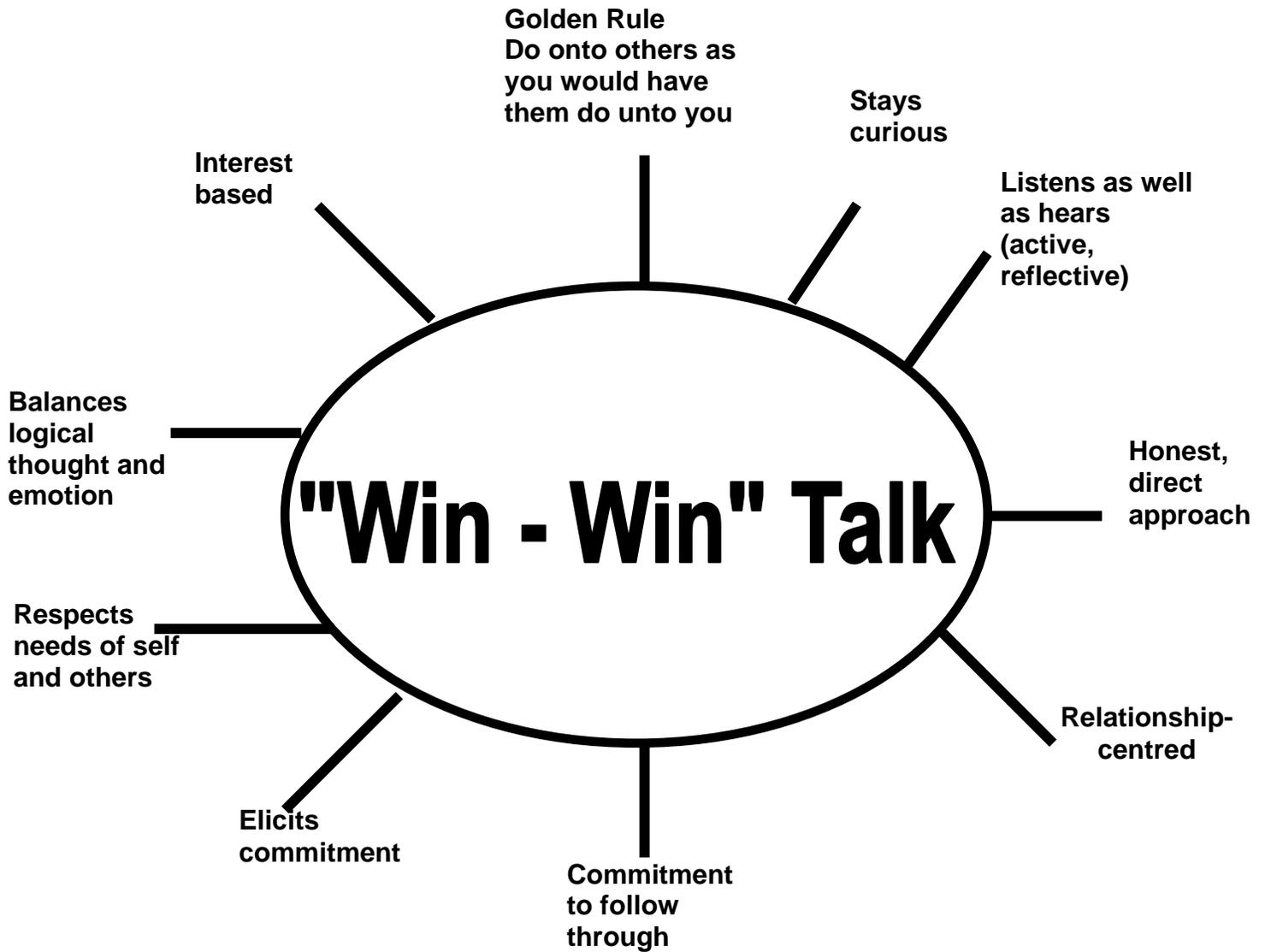
Shift from Judgement to Curiosity



Three Basic Styles of Communication

<p>PASSIVE STYLE</p>	<p>In the passive style, people are likely to:</p> <ul style="list-style-type: none"> - express feelings, thoughts, and wishes indirectly; - smile a lot; - subordinate their needs to those of others; - listen most of the time; - use disclaimers, e.g. I'm no expert.....; - find it difficult to make requests; - find it difficult to say "no" to requests; - use a soft, weak, voice; - rely on others to guess what they want to say; and - find eye contact difficult.
<p>AGGRESSIVE STYLE</p>	<p>In the aggressive style, people are likely to:</p> <ul style="list-style-type: none"> - state what they think, what they want, and how they feel often at the expense of others' rights and feelings; - use sarcasm or humorous put-downs; - often point a finger of blame; - go on the attack if they don't get their way; - often begin sentences with "you"; - make use of absolute terms such as "always", "never"; - move with an air of superiority and strength; - have posture of a solid rock—feet planted apart, hands on hips, jaw clenched and jutting out; and - not listen because they know they are right.
<p>ASSERTIVE STYLE</p>	<p>In the assertive style, people are likely to:</p> <ul style="list-style-type: none"> - make direct statements regarding their feelings, thoughts, and wishes; - stand up for their rights while taking into account the rights and feelings of others; - listen attentively; - let others know that they are understood; - make direct requests and direct refusals; - deal effectively with criticism without becoming hostile or defensive; - assume an air of assured strength and empathy; - use a voice that is relaxed, well-modulated, and firm; and <p>have a posture that is balanced and erect.</p>

"Win-Win" Talk



Active Listening

Effective listening skills are absolutely crucial to the effective management of conflict. The goal is to show you hear and understand the other person, and that you are interested in what the other person is saying.

Principles of Effective Listening {tc "Principles of Effective Listening " V 3}

- Listen for feelings as well as content
- Focus on the issues
- Listen with empathy
- Show positive regard and respect for the other person
- Listen attentively without judgement
- Restate/reflect back to show that you are listening
- Clarify what you don't understand or are unsure about
- Encourage further discussion through nonverbal responses

Effective Listening Tools

Effective listening requires you to listen for the main ideas and feelings, ask questions to be sure you understand, and restate/reflect what you hear so the speaker can clarify any misunderstandings.

RESTATE

To restate is to say in your own words the main content of the message. The three purposes of restating are: 1) to let the other person know that you have heard what they have said, 2) to ensure that you have interpreted the message correctly, and 3) to help the speaker clarify in her/his own mind what s/he has said. Be careful about using such beginning phrases as: "So what I hear you saying is....." or "I think I understand you to mean....." Often these phrases can sound too contrived.

E.g., *"You find it difficult to focus on your work when a group of people are talking at the coffee station."*

REFLECT

To reflect is to hear the feeling or emotion being expressed by the speaker and to name it for the speaker. The speaker will feel understood and acknowledged. The main purpose of reflecting is to show that you understand how the person feels and what their concerns are. Reflecting is a key listening tool to use in order to de-escalate anger and frustration, for example.

E.g. *"Not being able to meet deadlines is really frustrating for you."*

CLARIFY

To clarify is to ask a question or to make an inquiring statement about something that the speaker has said. It deals with information already heard as opposed to searching for new information. It helps you understand what has been said. It can help the speaker to explain further.

E.g. *What's the connection between the coffee station and your focusing on your work?*

SUMMARIZE

To summarize is to restate the main ideas. The purpose of summarizing is to synthesize the important ideas and facts in order to review progress and thus establish a base for continuing the discussion. It is particularly helpful when dialogue is "going around in circles."

E.g. *"The main reasons for considering an alternate work schedule are....."*

ENCOURAGE

To encourage is to make a statement that conveys interest in what the person is saying. The purpose is to prompt the person to continue talking. It's important that you use neutral language that does not agree or disagree with the speaker.

E.g. *"I am interested in hearing more about what happened, let's talk."*

VALIDATE

To validate is to make a statement that demonstrates the importance of their ideas, values, efforts, and feelings. The main purpose of this tool is to acknowledge the value of the other person and/or to show appreciation for their efforts and actions.

E.g. *"Everyone worked really hard this morning to get to the root of this problem. Thank you!"*

Assertive Statements

Assertive statements commonly known as **"I" messages** are a way of making known a situation that is problematic for you in a way that does not blame and does not use attacking labels. It lets the other person know what has happened, how you feel about it, and why. It may also let the other person know what needs to happen to change things from your perspective.

The use of an assertive statement will not resolve conflict; rather, it will open up communication on a particular situation and lead to further discussion.

The opposite of an assertive statement is a "you" message. "You" messages often blames or attacks the other person thereby resulting in defensiveness, often leading to the familiar pattern of attack and defend.

Assertive messages have three parts:

1. I feel.....(your feelings).
2. When.....(the situation or behaviour).
3. Because.....(the effect on you).

Examples:

- I become frustrated when materials are taken from my desk as they are not there when I need them.
- I was disappointed when our appointment was cancelled as I was depending on assistance with the client.
- I get annoyed when I have to work late because it costs me more for day care.

Probing Questions

When working out conflict, probing questions are used when you want to find out more information about something that the speaker has said or to expand the information on the table. A probing question encourages the other party to elaborate on the specific issue. The use of these open-ended questions is helpful in finding out what is important to the other person about a specific issue.

Probing questions are open-ended questions that start with what, when, how, where, who, and on the rare occasion, why. Asking questions with "why" often leads people to become defensive as they sense their message is being questioned. **It is essential to guard against the use of probing questions as leading questions. The purpose is to gather more information and to learn, not to take the speaker in a direction that you judge appropriate.**

Examples of Probing Questions

- When do you anticipate the report will be ready?
- What is important about that for you?
- Where did you get that idea?
- How will you finance the project?
- What would make it possible for you to work late?
- How would that change the situation?
- In what way would that be helpful?

Types of Probing Questions

The following are categories and examples of different kinds of open-ended questions that are asked for the specific reason indicated:

Broadening Questions

Purpose:

- useful when beginning a session or opening a discussion
- gives the respondent free reign to talk and share whatever information or point of view is most relevant to him/her
- are encouraging and nonthreatening
- additional information or unstated issues can surface
- opens the door for further discussion

Examples:

- What else happened when...
- Say more about that...
- What is your point of view on that?
- How did you react to that?
- Tell me more about...

Clarifying Questions

Purpose:

- to clarify vague or unspecified terms
- to move from the general (e.g., always, never, every, all) to the specific

Examples:

- What do you mean when you say that s/he is irresponsible?
- Can you give an example of a time when s/he is pushy and demanding?
- What does respectful behaviour look like to you?
- When you say s/he is a "lazy slob" to what are you specifically referring?

Explaining Questions

Purpose:

- to understand generally the reasoning behind a person's position, perspective, or point of view
- encourage reflection
- provides understanding

Examples:

- What causes you to think that s/he should...?
- What makes that upsetting for you?
- How did you decide on that consequence?
- What questions did you have for...?

Interest-based Questions

Purpose:

- to examine specifically a person's interests—concerns and fears, hopes, expectations, assumptions, and values
- encourages understanding and hunching of underlying interests or priorities behind a person's position

Examples:

- What concerns you about...
- What do you fear will happen if...
- What were you expecting when...
- What do you hope your relationship will be like in the future...
- How were you hoping s/he would respond?
- What did you think his/her intention was?
- What did you think caused him/her to do that?
- What do you value about...
- What was that like for you?

Challenging Questions

Purpose:

- to challenge and confront a person's reasoning
- to create a shift or change in a person's position or point of view

Examples:

- I'm confused, how does having her reporting her activities daily to you fit into taking responsibility?
- How does your interest in respectful communication fit into how you are talking to Gerri right now?
- On one hand you're saying honesty is important, on the other you're refusing to talk to her about your concerns. I don't understand. What is happening?

- When you say you can't . I'm curious, what do you think would happen if you did ?

Brainstorming Questions

Purpose:

- to consider alternatives or options
- to develop new ideas
- useful when issues and interests have been explored and identified

Examples:

- In what other ways do you think this could be handled?
- What are some ideas/alternatives that you can think of?
- Given is important to you, in what ways do you think this interest could be satisfied?
- What other possibilities can you think of?
- How do you think this could be dealt with differently?

Consequential Questions

Purpose:

- to explore the consequences of a decision and what would happen next
- to examine the outcome of a choice or behaviour
- useful for reality testing

Examples:

- What do you think will happen if...
- How do you think s/he will feel and/or react?
- Who do you think will be affected? What will that be like for you?

Nondefensive Responses

When attacked verbally or blamed, our habitual response is one of defense. A nondefensive response can break this cycle of “attack and defend.” Asking an inquiring or clarifying question, when attacked in a conflict situation, helps to de-escalate the other person’s anger (frustration, etc).

Examples:

Attack: “You’re like everyone else in the Department; it’s impossible to get any service.”

N-D Response: “What is it that has upset you regarding our service?”

Attack: “Your work habits are atrocious!”

N-D Response: “What is it about my work habits that don’t work for you?”

Reframing

Reframing is a “rewording technique” that assists in identifying the underlying values, hopes, and expectations of the person with whom you are communicating. When reframing, you are hunching and identifying the underlying interests behind a person’s position. It can also be used to address assertions that are accusatory or negative.

Reframing:

- deals with blaming and accusations
- shifts a person from a negative to a more positive goal
- identifies interests
- emphasizes the use of neutral and objective language

How to Reframe

1. Listen, and then restate in your own words what you have heard.
2. Listen for confirmation of the accuracy of your restatement, then hunch the perceived need or interest.
3. Reframe the negative assertion or the position naming the unmet need or the interest giving the reframe a future focus.

Sometimes the unmet need is so obvious; you can reframe from the person’s original statement.

Example:

(Other person): “You have no right to go into my office and take files from my desk.”

(You): “You are upset that some of your files are missing.”

(Other person): “You bet I am.”

(You-internally): “Looks like I got that one right. Sounds like privacy is at issue here.”

(You): “It’s important to you that your privacy is respected.”

Summary of Communication Skills and Strategies

ACKNOWLEDGE	This issue is really important to you.
RESPECT	She knows her job. I'll give her that.
ENCOURAGE	Say more about that.
NONVERBAL REASSURANCE	Attending, nodding, eye contact.
CLARIFY INTENT	Clearly, Ann's intent was to...
STATE ASSUMPTION	My thinking around that was....
VALIDATION	You've both worked hard this morning.
SILENCE	
PROBING QUESTIONS	What...? How...?
EMPATHIC RESPONSE	You are frustrated by the delay in a response.
SUMMARIZE	What I've heard so far is...
REFRAME	So, you value...
CONTENT TO PROCESS SHIFT	You are both becoming defensive and not listening to each other.
GENUINENESS	I'm really confused about...
HUMOUR	
MOMENTARY DELAY	You are looking rushed. Take a moment or two to think about it.
REASSURE	Most conflict can be worked out.

Section 3B

Opening Statements

OPENING STATEMENTS

Opening statements are brief speeches or monologues made by the parties or the mediator or the parties' representatives.

Negotiator's Opening Statements

In preparing for a negotiation, parties should carefully think about their opening statements. To have the most effective impact, a party needs to state both their concerns and the other party's concerns as joint concerns.

In considering your opening statement, be careful to use "and" not "but." Any statement before the word "but" is seen as less important than the statement following it.

For example, a supervisor tells her staff that the content of her report was excellent but she needed to work on presentation—likely all that the staff person will hear is she needs to work on presentation.

In contrast with "but" using the word "and" opens up possibilities.

Consider an example:

Consider a workplace dispute between two colleagues about access to resource material. Tiiu routinely keeps resource material in her office as her job requires her to have ready access to the material. Tiiu also works off-site and often takes resource material out of the office to her off-site location. Fatima also requires access to the resource material and has become frustrated that she cannot access the material when she needs to. Fatima, working on a deadline, has gone into Tiiu's office to find resource materials she needs. Tiiu has accused Fatima of stealing.

Consider:

Tiiu's opening statement: "I want to work out an arrangement where we share the resources we need but I don't want you invading my private space and taking material."

Contrast With:

Tiiu's opening statement: "I want to work out an arrangement that allows each of us access to resources we need and respects work deadlines and privacy."

Mediator's Opening Statement

A mediator makes an opening statement for the purpose of outlining the basic premises of the mediation and to set the tone for the mediation. One of the primary tasks of a mediator is to manage the interaction of the negotiators. Opening statements are also made by each of the parties to the mediator and/or by their representatives. Effective opening statements by the mediator and by each of the parties can have a strong positive impact on the mediation.

In his or her opening statement, the mediator

- Makes face-to-face introductions.
- Introduces the process and the rules—identifies procedural guidelines that will help parties develop efficient negotiations.
- Sets a positive tone for the mediation.
- Educates the parties about the process and describes the problem-solving process to be used. For example
 - Each person will talk and describe the situation from his/her perspective;
 - Topics for discussion will be mutually agreed upon
 - Agenda items will be developed jointly
 - All needs will be discussed
 - Parties will look for solutions that are mutually satisfactory
 - Agree on use of caucus, breaks, time to consult with other parties.
- Deals with issues of “voluntariness.”
- Educates the parties about using effective communication, for example, using effective listening skills, checking assumptions, speaking for themselves, the importance of checking emotions.
- Obtains a commitment to begin the process.

Often in mediation, a party’s opening statements are vague, rambling, or positional. In such circumstances, the mediator will often need to reframe the opening statements to more neutral language that is acceptable to both parties.

Consider the earlier scenario:

Tiiu’s opening statement: “I’m here to deal with the issue of Fatima stealing resource material from my office. I want her to stop invading my privacy.”

Fatima’s opening statement: “I resent Tiiu accusing me of stealing. I want Tiiu to stop hoarding the resource material. The resource material does not belong to Tiiu—it belongs to everyone in the department. I want to be able to access the materials when I need them.”

Mediator: “It sounds like you want this mediation to deal with issues of privacy and timely access to the information you need to successfully complete your work.”

Opening Statements Where Representatives Are Present

If parties have representation at the mediation (e.g., lawyers, union representatives, etc.), it is quite common for the mediator to invite each representative to deliver an opening statement, often followed by a reply statement from the representative who had spoken first.

Contrary to this approach, it may be more productive to invite the parties to commence the negotiation process, as opposed to their representatives.

If representatives make the opening statements

- It may send a signal that they will take a more active role than the parties in the mediation. This should not happen. Mediation is generally most effective when the parties lead the negotiations. There are many other stages in the dispute resolution process where representatives can take the lead and be productive.
- It may define the dispute in legal or technical jargon and may not allow the parties to define the dispute in their own terms, terms that have more meaning to them. It is not uncommon to see a glazed look come over the eyes of the parties when for example, lawyers speak in “legalese.” The parties simply are often unable to understand or relate to the language of the representatives.
- Representatives’ prepared opening statements often focus extensively on the diverse positions of the parties, that is, what the parties say they want. However, at this early stage, the mediator wants to gain an understanding and wants each of the parties to begin to gain an understanding of the various issues and priorities in the minds of all of the parties. An early focus on positions detracts from this purpose and may needlessly derail the process or, at the least, require the mediator and the parties to expend time and energy putting discussions back onto a more productive basis.

Whenever possible, the parties should make the opening statements. Some of the main reasons for this are as follows:

- Symbolically, it thrusts the primary responsibility for the conduct of the mediation onto the parties. This is where it belongs. Mediation is all about the parties taking responsibility for the resolution of their own problem.
- It immediately engages the parties actively in the process. Attending at mediation is a strange and difficult undertaking for most people. Allowing people direct involvement early, in a safe environment, helps them release their tension and begin to focus on the matters at hand.
- It allows all involved in the mediation to see and hear how each party defines the situation in his or her own terms. The presenting problem takes definition and meaning from the standpoint of those directly involved in the dispute, not from some external source. This is of great benefit to both the mediator and the representatives in their efforts to assist the parties in arriving at a resolution.
- Usually, the parties will identify what is most important to them at this early stage in the mediation process. This is contrasted with the "shotgun" approach often followed (and for good reason in other settings) by representatives. For example, it is not unusual for the opening remarks of the parties to differ from the positions taken or issues identified in the pleadings or other material prepared by legal counsel in court

connected mediations. The issues, and the prioritization of them, can often be clarified directly by the parties at this early stage in the mediation.

How Representatives Can Assist at the Opening Stages

If the parties are to take the lead at the commencement of the negotiations in the mediation, what then is the role of the representatives at this stage? Some of the more important ways in which representatives can assist are as follows:

- Representatives can play a supportive role in assisting the client if the client is having difficulty in expressing him or herself, or in helping the client refocus if his or her behaviour is not helpful in moving the process forward effectively.
- Representatives can help “fill in the gaps” of areas overlooked by the client who is, understandably often quite nervous at this early stage of the mediation.
- Representatives, if they are lawyers, can raise the legal aspects or implications of the presenting problem. These can include both legal hurdles to settlement and opportunities for settlement based on the lawyers’ specialized legal training and knowledge. This kind of input could be especially important in court-connected mediations where the parties are negotiating in the shadow of the courthouse.

Section 3C
Agenda Formation

AGENDA FORMATION

There are many benefits to having agreement on what is to be discussed in any meeting. In negotiations, it is of particular importance for the parties to know why they are meeting, and what the individual and joint goals are. Advanced consultations between the parties are essential to setting a robust agenda that both sides will adhere to. This process also helps to ensure that the parties on each side will think about the issues to be discussed, and do some thinking about the interests and approach of the other side. In this way, **surprises** can be avoided, and **trust** and **understanding** built.

There are two aspects to agenda formation—**PROCESS** and **SUBSTANCE**

Parties need to be clear on the negotiation **PROCESS** and to know the following information about the meeting:

- **WHEN** will it take place—exact date and time
- **WHERE**—actual location, with directions if hard to find
- **HOW LONG** will it last? How much time do the parties have, how long has the room been booked for, etc.
- **WHO WILL BE PRESENT**—This is significant if you are close to reaching agreement and need principals present who have authority to close the deal. Also this provides an opportunity to invite parties who should be present—to provide additional information, to provide support, or because they are affected by the outcome. Find out if any party will be attending via teleconference. Ensure appropriate technology is at the location.
- **A SEATING PLAN**—This is sometimes more significant than you might imagine!
- **WILL THERE BE A THIRD PARTY NEUTRAL (TPN) AS FACILITATOR?** If so, the person chosen must be acceptable to all, and responsibility for paying the TPN must be shared appropriately between or among parties.
- **IF NO TPN, WHO WILL LEAD OFF** the discussion? Some advance work on this issue may enhance listening with a view to hearing, rather than listening defensively or in frustration because you planned to start first.
- **ENSURE EVERYONE HAS A VOICE**, a presence at the table.

It is a nice touch for the party “hosting” the meeting to provide water, juice, coffee, and energy snacks (nuts, dried fruit, cheese & crackers). Also have a flip chart or whiteboard, markers, and any other necessary equipment in the meeting room.

Once these details are worked out, actual agenda items can be negotiated, and goals defined, to get at the **SUBSTANCE** of the meeting. We recommend a joint written agenda, either printed ahead of time, or written up on a flip chart at the start of the

session. If you are using a TPN, that person will facilitate, or the person chosen by mutual agreement in advance will lead off and be the person to write on the flip charts.

- Define **SHORT-TERM** and **LONGER-TERM GOALS**—for this meeting, for this process, for the resolution of the dispute.
- **LIST AGENDA ITEMS** for each side, and get agreement by both sides that these are valid items. Often there are overlapping issues, so clarify on the written agenda that discussion on these items has been requested by **BOTH** sides. If items are complex, break them down into manageable components, as subitems under the main heading.
- **IDENTIFY** which item to start with. Some people like to discuss which may be easiest to resolve, and agree to start there.
- **DECIDE** if you want a “go-round” to introduce parties and their affiliation to each other, particularly if new members have been added since the last meeting. Get agreement on how much time each person has to speak, and be vigilant in monitoring the time. If you need more than 6 minutes to express your ideas on a topic, you are probably repeating yourself.
- As items are discussed to a productive outcome, list the outcome on a separate flip chart and cross off the heading on the main written agenda. If impasse occurs, show issues discussed, whether other info is required, and seek agreement to “park” the item, pending resolution of other items. Often, issues are so interrelated, they need to be decided in context, so “parking” issues acknowledges this and provides a list to return to once the other agenda items are completed.
- **WHERE DO WE GO FROM HERE?** At the end of the meeting, agree on next steps, what information is to be obtained by whom, and when/where the next meeting will be held.

Section 3D

Positions, Issues, Interests

POSITIONS • ISSUES • INTERESTS

An analytical look at any given dispute would determine that the parties have formulated positions, that something has happened involving the parties, and that the parties have some concerns, fears, or interests concerning what has happened.

As mediators, we must be able to separate out the positions, the issue(s) at hand, and the interests of each party.

ISSUES: The topic to be discussed or problem to be solved.

- E.g., The environmental impact of the proposed mine
- The impact on the local community

POSITIONS: A proposed solution that the party thinks will satisfy her/his interests or needs—what each party initially wants as an outcome.

Positional statements usually start with

I won't, I will, You should, I want, We need

You have to, You must, I refuse to, I want

- E.g. "He needs to apologize for calling me a tree-hugger."
- "I won't give another minute to this Board as a volunteer."

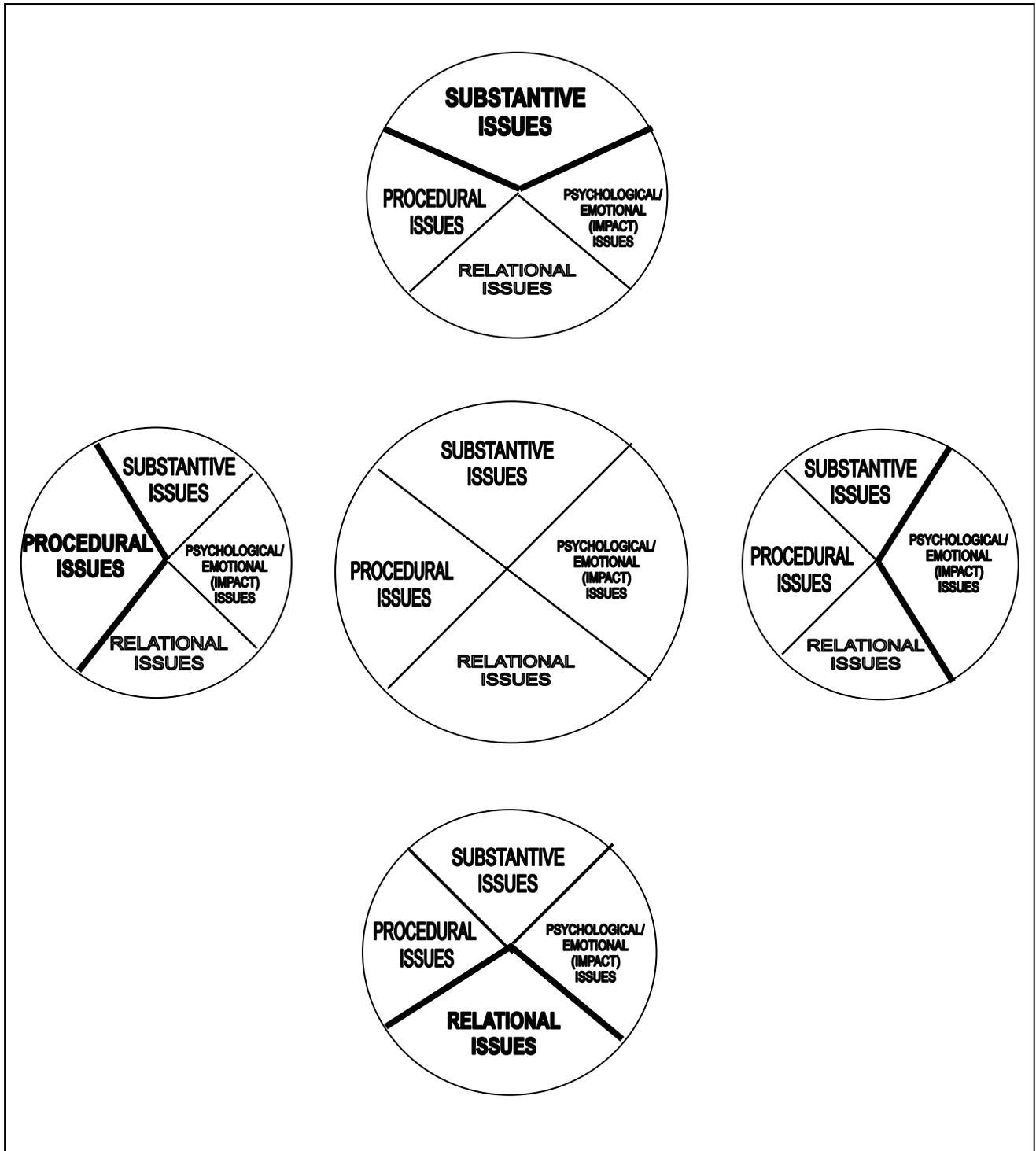
These statements often:

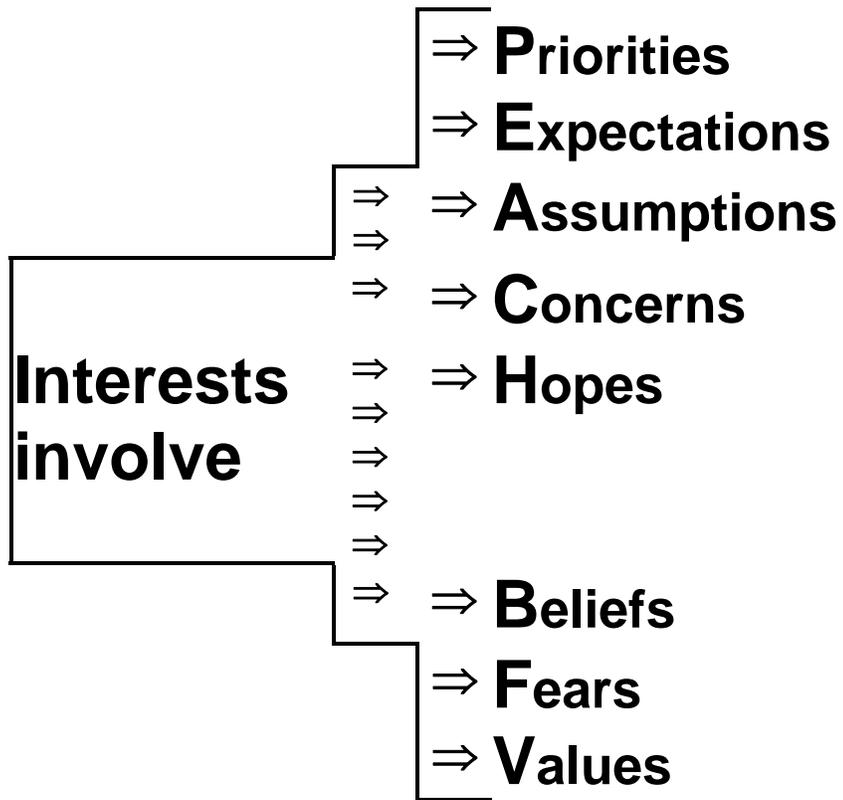
- Increase defensiveness
- Create resistance/opposition
- Are perceived to meet the person's needs.

INTERESTS: The parties' underlying reasons for arriving at their positions—needs, wants, concerns, fears. Interests may be tangible (e.g., property) or psychological/emotional (e.g., recognition, approval).

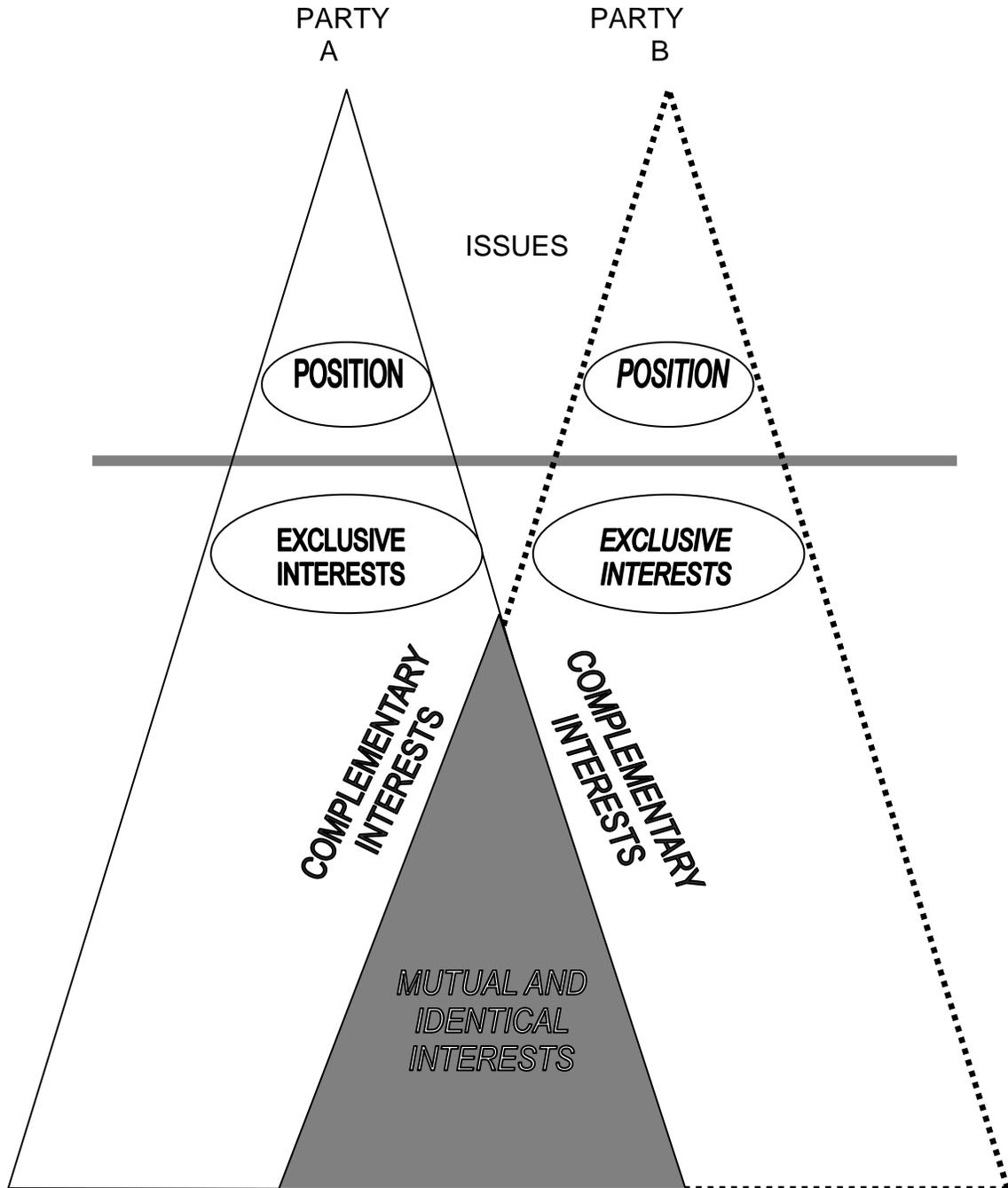
Interests involve “PEACH BFVs” (Priorities, Expectations, Assumptions, Concerns, Beliefs, Fears, Values).

TYPES OF ISSUES





MOVING FROM POSITIONS TO INTERESTS



SOME COMMON INTERESTS WE HAVE

Acceptance
Fulfillment
Accountability
Independence
Achievement
Knowledge
Acknowledgment
Love
Affection
Nurturance
Appreciation

Opportunity for Input
Autonomy
Privacy
Belonging
Recognition
Clarity
Responsibility
Commitment
Respect
Competency
Relaxation

Consistency
Satisfaction
Efficiency
Safety
Fairness
Security
Freedom from Fear
Trust
Understanding
Validation

Feeling Words

Affectionate	Empathetic	Imposed upon	Satisfied
Angry	Energetic	Infuriated	Relieved
Annoyed	Enervated	Intimidated	Resentful
Anxious	Exasperated	Isolated	Sad
Blissful	Fearful	Jealous	Scared
Blue	Flustered	Jumpy	Shocked
Burdened	Foolish	Kind	Spiteful
Charmed	Frantic	Left-out	Stunned
Cheated	Grief-stricken	Loving	Stupid
Cheerful	Guilty	Melancholy	Sympathetic
Condemned	Happy	Miserable	Tense
Contented	Helpful	Nervous	Terrible
Crushed	Helpless	O.K.	Thwarted
Defeated	High	Outraged	Tired
Depressed	Hopeful	Peaceful	Torn
Despairing	Hopeless	Persecuted	Trapped
Distraught	Horrible	Powerless	Troubled
Disturbed	Humiliated	Pressured	Vulnerable
Dominated	Hurt	Put upon	Weepy
Eager	Hysterical	Rejected	Wonderful
Embarrassed	Ignored	Relaxed	Worried

Section 3E

Generating Options

GENERATING OPTIONS

At a certain stage (hopefully early) in the negotiation, matters start moving forward. Rather than the parties focusing on past wrongs or restating positional concerns, etc., they start surfacing their interests and thinking about how to reach agreement. As discussion continues, ideas are often brought out, either for resolving the issue at hand or the dispute in general. Occasionally, parties need prompting to do this, as there may be reluctance to put proposals on the table, through fear of having them dismissed because they come from “their side” (reactive devaluation) or through fear of “showing their hand” before the other part shows theirs. There are two techniques for breaking this sort of impasse, which are called LISTING and BRAINSTORMING

LISTING

Invite each party in turn to write a solution or positive action plan—it may address a tiny piece of the dispute, or be highly detailed—no matter, get them all written up. If no forward-looking strategies are evident, or parties are reluctant to divulge, the chair of the meeting, whether facilitator or mediator, can use simple techniques to generate options. These techniques are almost all questions such as

“What would need to happen to make this dispute go away?”

“How might you do things differently in the future, to ensure this sort of problem is not repeated?”

“What would work for you to move things forward?”

You can think of many other types of questions that have the same effect. As the questions are posed to each side, write up the responses. Identify common interests and common proposals, even if hyper-reframing is necessary to do this! Check with both sides to ensure that you are hearing them correctly. This has the added benefit of getting them to repeat or confirm your restating or rephrasing of what they said.

BRAINSTORMING

When nothing of a positive or forward moving nature is occurring, take a time out and play a game to break the impasse and ease tension. It is called “Brainstorming.” Pick any simple conflict, for example, whether there should be a beige or peach lampshade in the living room, and tell the parties they all actually want a beige one, but the mythical other party (not present in the room) wants peach. Get the parties to disengage the analytical part of their brain and focus on how they could get their way, then blurt out the first thing that enters their head, without any critical judgment as to whether it will work, whether the other side will think it stupid, or whether it makes any sense. Write out all ideas on the flip chart.

Focus on a substantive issue to be resolved in the conflict at hand—do the same exercise with throwing out any and all ideas, without testing or analyzing them, record them all, and review to see if any of them might work for a part of the conflict. This may not generate totally viable outcomes, but often parts of the ideas generated are useful as a springboard for further discussion.

You do not need to “play the game” described above if you think the parties will not identify or participate in it. The key to successful brainstorming is to generate ideas rapidly and to withhold idea evaluation until later.

There is a “2 C rule” in brainstorming: No commitment and no criticism.

Brainstorming can be conducted either in joint session or in caucus. It can be done by all disputants together, within a team, or by subgroups composed of representatives from each party.

The mediator or negotiator begins the process by framing one of the issues in the dispute as a problem and often asks a “how” question in terms of “How can this problem be solved?” The responses are then captured on a flip chart or whiteboard for later consideration. It is often helpful to ask participants to refrain from making totally outrageous or self-serving statements.

After as many options as possible have been developed in the brainstorming session, the mediator can then assist the parties to categorize the options and list them under the appropriate headings. Duplicated or unworkable ideas can be eliminated. If someone suggests that an option is not workable, the mediator might ask for another option.

The option selection and development process can then continue by refining or discarding options as the parties see fit.

Section 3F Caucus

THE CAUCUS

The caucus is a private meeting held between a mediator and each of the disputing parties. The main goals are to uncover resistance to communications between the parties and to promote positive communication and movement towards reaching an agreement.

Goals of a Caucus

- Allow expressions of strong feelings in a private and safe setting.
- Prevent manipulative use of emotions.
- Plan for a different way of expressing emotions in a manner that will not damage relationships.
- Allow a breather or cooling-off period.
- Challenge each side's perspective.
- Assist each side to check the reality of his/her position.
- Encourage the sharing of information.
- Explore new possibilities of movement.
- Discover concerns that have not surfaced in joint sessions.
- Create doubt about the accuracy of the other's perception.
- Clarify perceptions and uncover resistance to movement.
- Develop strategy to test perceptions.
- Determine if there are mediator-party issues which should be addressed.
- Suggest ways to promote movement.
- Lay out mediator's perception of the situation to help change views.
- Identify important issues.
- Allow parties to discuss options while not under the scrutiny of the other party.
- Design communication syntax or formulation of wording that will be acceptable to the other party.

Calling a Caucus

- Have a specific purpose in mind when calling a caucus.
- Always caucus with both sides.
- Be aware of the length of time spent with each party and be certain that each is not left alone too long.
- Clarify the issue of confidentiality in relation to the information shared in caucus.
- If information generated in caucus is to be kept confidential, be certain that you clarify with the parties what is or is not to be kept confidential and take special note of that which is to be kept confidential.
- Maintain an environment of informality and flexibility in the caucus sessions.

- Encourage the parties to seek information and anything else that would assist them in continuing.

During the Caucus

- Keep in mind your original goals but be flexible in pursuing new ideas and allow for creative problem solving.
- Keep the responsibility for problem solving on the parties, resist efforts to have it thrust on you.
- Emphasize strengths—caucusing allows for positive feedback, joint sessions may not.
- Maintain the delicate balance between working to build trust and continuing to communicate your impartiality.
- Be clear what information parties want kept confidential in the joint sessions.

After the Caucus

- How you reopen the joint session after a caucus is important. Choose an approach appropriate for the information, proposals, and emotions shared.
- Be discriminating about what information you share in the joint session. It can facilitate or jeopardize the session. Judgement, timing, and respect for privacy are crucial factors.

In Summary

1. Have a clear purpose when calling a caucus.
2. Prepare parties by explaining caucus in Step 1—Introduction of the Process.
3. Announce and explain procedures clearly.
4. Get in and get out in an expedient manner.
 - maintain sensitivity to time
 - check out information to be shared and by whom
 - plan how to restart the joint session.

Section 3G

Power

POWER and CONFLICT

All polishing is done by friction. (Mary Parker Follet)

Definitions

Power has been variously defined as: the ability to act, to influence outcome, ability to change, the capacity of one party to produce intended and foreseen effects on others

- The ability to influence a situation and/or people, either through willingness or compliance (Raven & French)
- The control of, or access to, emotional, economic, and physical resources desired by the other person (John Haynes)
- The ability to get what one wants (Parenti)
- The ability to get all that you want from the environment, given what is available (K.B. Karp)
- The ability to cause or prevent change (Rollo May)
- The ability to take one's place in whatever discourse is essential to action and the right to have one's part matter (Carolyn Heilbrun)
- The ability to get things done or to influence outcomes. The ability to affect and be affected by the feelings, attitudes, beliefs, opinions, and behaviour of others (Don Freeman, Lancaster Theological Seminary)

My definition of power is....

Can Power be “Balanced?”

Some authors in the field consider that the image of *balancing power* is a confusing, misleading, and possibly a meaningless concept because the notion of balancing power fails to address the dynamics of power and that the context of power is in the interaction between the negotiators.

It is suggested that the more useful way to view power is to think that people need an *adequate basis of power* to participate effectively in conflict. People need enough power that others must at least consider their concerns and enough power to resist any solution that fundamentally violates their interests.

Considering power in this way does not mean that disputants with adequate power will necessarily “win” or get even a desirable outcome but at the very least they can engage in conflict with the hope of being influential and effective.

From The Dynamics of Conflict Resolution, Bernie Mayer, Jossey-Bass, 2000.

Sources of Power

Mindful that each source can yield power by its presence or its absence, the following is a nonexhaustive list of power sources:

<ul style="list-style-type: none"> • Formal authority • Legal Prerogative • Expert • Information/Knowledge Association • Resources • Rewards and Sanctions • Nuisance • Procedural • Habitual 	<ul style="list-style-type: none"> • Morality • Reward and Punishment • Synergy • Perception • Definitional—Framing of Conflict • Personal Characteristics, e.g. <ul style="list-style-type: none"> <li style="width: 50%;">• Gender <li style="width: 50%;">• Perceptiveness <li style="width: 50%;">• Intelligence <li style="width: 50%;">• Empathy <li style="width: 50%;">• Courage <li style="width: 50%;">• Communication Skills <li style="width: 50%;">• Charisma <li style="width: 50%;">• Physical Stamina and Strength • Concentration
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Kinds of Power

1. Exploitative (power upon)
 - literal use of physical force or threat to use such force with apparent intent to do so
2. Manipulative (power over)
 - use of promises or threats involving the interests, desires, needs, or other wants of the other person(s) or group but short of the use of force; often indirect or implied
3. Competitive (power against)
 - contesting to win against another of relatively equal power by superior application of one's own power or deflection or diminution of the other's power
4. Nutritive (power for)
 - use of one's own power for the empowerment of another or development of the other's power
5. Collaborative/ Integrative (power with)
 - pooling power together to increase the likelihood of mutually desired ends; my power abets yours; allows everyone to use their full knowledge, information, competence, and abilities; allows power to expand

Drawn from Power and Innocence, Rollo May.

Key Principles/Assumptions about Power

- No one is completely powerless; to be alive is to embody and exercise power.
- Power exists between people. It does not lie in the individual, but in the social relationship.
- Power is not a finite resource nor is it a distributable commodity; it is relational, fluid and difficult to measure.

- Power itself is neither positive nor negative but it can be used constructively or destructively.
- The denial of one's power is a small step away from the abuse of it. It is critical to be aware of, and acknowledge, one's power.
- Significant power inequities become occasions for the abuse of power. Over time, these inequities are destructive to people and relationships.
- For conflict to develop, all involved must have some power.
- Power can only be understood in context.
- Power is fluid.

(John Paul Lederbach; Juliana Birkhoff; and Hocker and Wilmot; Bernie Mayer CDR)

My beliefs and assumptions about power are....

General Principles for Use of Power

Principles of the **use of power** that have been enunciated in the literature include

- Power is always relative
- Power may be real or apparent
- Power may be exerted without action
- The exercise of power is always limited
- Power is exercised successfully only to the extent that it is accepted
- The ends of power cannot be separated from the means
- The exercise of power always entails costs and risks
- Power relationships are not static, but change over time

From The Negotiating Game, Chester L. Karrass.

From my own experience and observations, "principles" I would add...

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Using Power

Wherever people derive their power, there are three primary ways of using it to influence others' behaviour.

1. Normative Approach (Persuasion) (“Do the “Right Thing””)

When one negotiator (or disputant) appeals to the other's values and beliefs and by using values or normative symbols tries to convince the other to do the “right thing.”

2. Utilitarian Approach (Reward) (“The Carrot”)

When one negotiator (or disputant) appeals to the other's self interests and indicates that they will obtain certain tangible benefits if they do what one wishes.

3. Coercive Approach (Punishment) (“The Stick”)

When a negotiator (or disputant) forces the other to agree to something by threatening significant sanctions or by manipulating the external environment to take away their freedom of choice.

From *The Dynamics of Conflict Resolution*, Bernie Mayer.

POWER AND CONFLICT TRANSFORMATION

Consider:

Power is integral to all conflict. Conflict practitioners must become aware of their own power, their assumptions about power, and the values and goals they bring to conflict situations. They must also explicitly assess how power is operating in the conflicted relationships, evaluate their own role, and seek the appropriate process in conflicts of significant power imbalance.

In each conflict situation, it is important to ask questions such as

- What are the sources of power for those in conflict?
- Is there a significant power imbalance?
- Is power being misused or abused?
- How can the less powerful become more empowered?
- What intervention is most appropriate?

(Carolyn Schrock-Shenk, MCS 2000)

Perspectives for Assessing and Working with Power in Negotiations

Mutual Dependence

Emerson has suggested that power is directly linked to the dependence in any relationship. He provides the following equation:

$$P_{ab} = D_{ba}$$

The power (P) of A over B equals the dependence (D) of B on A

The equation can be understood in terms of goals and needs.

- If I need you to reach my goals, then you have power over me for that situation
- This is further refined by noting the importance of the goal and whether there are alternative avenues for reaching it

Questions to Consider for Assessing and Balancing Power

- Who is dependant on whom for meeting what goals?
- Can the person who feels in low power change their goals, or make them less important? (Redefinition)
- Can the lower-power person discover alternative ways of reaching the goals that do not depend on the other? (Considering and improving BATNA)
- In what subtle and implicit ways does the “high”-power person depend on the “low”-power person? What are ways of raising that awareness?

Drawn from Conflict and Transformation, Mennonite Conciliation Service.

THE POWER OF ALTERNATIVES IN NEGOTIATIONS

To a large extent, people’s choices in conflict are determined by their power—the more resources, knowledge, etc. an individual has generally the more choices he or she has.

It is also true that power is defined by choices—the best way to enhance one’s power is to develop better choices.

Developing alternatives is not simply about having a way to opt out of a collaborative process; it is about making it more likely that collaboration can be successful.

Develop Both

- Alternatives to negotiated agreements (options away from the table).
- Alternatives for negotiated agreements (options at the table).

MEDIATOR POWER AND INFLUENCE

Mediators use various means of power and influence to change the dynamics of bargaining. For mediators to be effective they must know how to manage the power the parties exercise and they must know how to exert pressure themselves (Mayer, 1987).

Some ways mediators use power and influence include

1. Management of the Negotiation Process
2. Communication Between and Within Parties
3. Physical Setting in Negotiations
4. Timing in Negotiations
5. Information Exchanged Between the Parties
6. Associates of the Parties
7. Experts
8. Authority
9. Habits of Disputants
10. Parties' Doubts
11. Rewards or Benefits
12. Coercive Influence

From *The Mediation Process Practical Strategies for Resolving Conflict*, second edition, Chris Moore, Jossey-Bass, 1996.

Tips for Mediators in Balancing Power between Disputants

A first principle in balancing power between parties in mediation is not to try in those cases where the power imbalance is too severe.

When acting as mediator, the test to apply is to ask yourself the following question: “Will my attempts to balance power in this mediation unduly compromise one or both parties’ interests or cause their negotiation to become unconsensual?”

If the answer to this question is “Yes” then decide what needs to be done to ensure equitable power in terms of resources, skills, and information. If this cannot be ensured then explain to the parties that you as the mediator have come to the conclusion that negotiation cannot be productively used by the parties to resolve their issues.

If the answer to this question is “No” here are some methods for “balancing” power between the parties at the table:

- Use resource people (counsellors, accountants, lawyers).
- Use caucus to check that people understand the implications of certain solutions.

- Explore unidentified resources that the lower-power party has.
- Enforce ground rules.
- Use a support person or advocate to be with the lower-power party.
- Slow down the pace.
- Intervene using “immediacy” to point out the power structure that is currently playing out.
- Share information by asking the data holder to give it up.
- Consider dress and other trappings (formal or informal, uniforms, names and titles).
- Manage body language.
- Assist the lower-power party in expressing his/her views.
- Emphasize mutuality and the importance of the negotiation relationship to all negotiators.

Implied and Applied Power

The art of successful conflict resolution depends on the ***ability to balance collaborative conflict resolution*** efforts while at the same time preparing for an **adversarial contest**.

Consider these tensions.

1. The tension surrounding the use of information:
 - The more reticent negotiators are to share information, the more difficult it is for them to find creative solutions.
 - If negotiators readily share too much information, they can compromise their ability to prevail later in a rights-based forum.
2. The tension surrounding process:
 - If disputants do not develop their ability to be effective in an adversarial context, they often fail to give others a reason to work collaboratively with them.
 - If disputants focus too much on preparing for an adversarial contest, they will create a momentum that is hard to escape and they will complicate the process of developing the rapport and establishing communication necessary to work collaboratively.

Consider the tensions between information and process when applying power:

- Often, implied power is far more effective than applied power.
- Sometimes, it is important to use power to change a situation, and sometimes it is necessary to show a willingness to use power.

From *The Dynamics of Conflict Resolution*, Bernie Mayer, Jossey-Bass, 2000.

Section 3H Trust

BUILDING TRUST AND CO-OPERATION¹

BASIS OF TRUST

- Experiences of negotiators in past negotiations
- Similarity of current issues to those in past negotiations
- Past experience with a particular opponent
- Rumours or reputation about a current opponent's trustworthiness
- Opponent's current statements or actions

Trust in relationships is usually built incrementally over time. Mediators may assist negotiators in building a trusting relationship by encouraging them to make a variety of moves designed to increase credibility. The moves should be carried out by the parties themselves. The mediator can act as a catalyst in making this happen. Some strategies include:

Negotiator's Moves to Build Trust

- Make consistently congruent statements that are clear and do not contradict previous statements (Creighton, J. Communications. Tulsa, Okla.: Synergy, 1972)
- Perform symbolic actions that demonstrate good faith in bargaining (Fisher, R. International Mediation: A Working Guide New York: International Peace Academy, 1978)
- Place themselves in a subservient position in relation to another party so that they incur a minor risk (Pruitt, D. Negotiation Behavior. San Diego, Calif.: Academic Press, 1981)
- Ask for help, thus acknowledging the need for assistance from other participants (Fisher, R. International Mediation: A Working Guide New York: International Peace Academy, 1978)
- Exhibit a genuine concern to help other participants reach their objectives while retaining the ability to reach their own (Zartman & Berman. The Practical Negotiator. New Haven, Conn.: Yale University Press, 1982)
- Demonstrate that there will be an earlier return of benefits to the agreeing party than had been previously expected (Zartman & Berman. 1982)
- Avoid making threats to an opponent or making promises that are unbelievable or unrealistic (Zartman & Berman. 1982)
- Make incremental agreements in which success can be measured along the way (Fisher, 1978; Zartman & Berman. 1982)

¹ Drawn from *The Mediation Process Practical Strategies for Resolving Conflict*, second edition, Christopher Moore, Jossey-Bass, 1996.

- Demonstrate an understanding of the other side's concern even if they do not agree with those concerns (empathy Moore. 1996)

Some Mediator's Strategies for Building Trust

- Asking questions to modify or clarify a negotiator's perception of the negotiation.
- Assist in helping the negotiator to identify similarities and differences between present and past situation.
- Encourage parties to be future-oriented—the goal is to define a new relationship or future terms of agreement.
- Encourage the parties to defer judgment and limit reliance on past judgments.
- If no trust exists between parties based on past relationships, the mediator identifies a time in the past when they have been in conflict, and have trusted each other.
- If previous relationship and past trust has not been reciprocated, the mediator can assist the parties in determining if the breach of trust arose from a misinterpretation or an unintentional misunderstanding.

Section 3I

Apology

THE ROLE OF APOLOGY IN NEGOTIATIONS

In many cultures, common courtesy teaches us to say “Please,” “Thank you,” and “I’m sorry.” Too often, in tense negotiation sessions, we forget these three things, or replace them by “We demand....,” “It’s about time,” or “You are to blame, not me.”

The usefulness of acknowledging when we have done something wrong has enormous impact on the progress of a negotiation, whether losing our temper during meetings and saying something inappropriate, or in the larger context of taking some responsibility for the source of the conflict. Too often, lawyers mindful of legal liability issues, counsel us not to say “I’m sorry” for fear that it will indicate acceptance of liability. Pride and the need to “win” in a negotiation may mitigate against the simple and sincere use of “Please,” “Thank you,” and “I’m sorry.”

There are many opportunities in a negotiation to thank the other side—for turning up and participating in the meeting, for bringing new information, for obvious efforts towards resolution of the issues by putting in the time and energy and being settlement oriented. Seize opportunities to reflect this by a simple “thank you for.....” Used sparingly and sincerely, these opportunities enhance the possibility of cooperation and build mutual trust and respect between opposing sides.

The role of **apology** is more complex. However, used properly, it is one of the most powerful tools a negotiator can use.

There are many ways to appear to apologize that may be interpreted as insulting or demeaning to others. By trying to avoid supposedly damaging admissions of liability, we often torture the English language and insult or demean others in the process.

E.g. “I’m sorry you are upset about that.”

“I’m sorry things have reached this point.”

Contrast these, and others you can invent or remember, with the more direct statements:

“We were wrong to go ahead without speaking with you first about the problem—I regret we did that.”

“I’m sorry that happened; I apologize for my behaviour.”

“Things have gotten out of hand here. I’m sure that at least half of the problem is my mistake. Can we take a 15-minute break from the table and start again after the break?”

Section 3J

Drafting and Monitoring Agreements

DRAFTING AND MONITORING AGREEMENTS

As agenda items are discussed or tentatively resolved in negotiation, it is useful right from the start to have one text document to reflect agreement. It is even more useful to head this up **“DRAFT AGREEMENT–FOR ONGOING DISCUSSION PURPOSES.”** Parties will feel more willing to set out their agreement if it is **tentative**, or dependent on other items being resolved.

Designate a recorder acceptable to all, or if using a third party neutral (TPN), that person will document what has been agreed. If the negotiation involves a large group of parties, designate one from each side or stakeholder group to form a subcommittee to do the drafting. Circulate the one text to all parties after each session and note where missing information is to be obtained and by whom. The written draft then provides momentum at the start of the next session as people feed in their data, and enables new parties to review the progress to date on what has been agreed to.

BUILDING

It is often helpful to break down issues into **smaller components**. As these pieces are identified throughout the process, **issue-specific headings** are helpful to organize the draft agreement. Some progress may be made on some issues, nothing on others, but at a minimum the recorder can note something under each heading, even if it is only “agreement in principle as to...” In this way, issues are not lost or forgotten, and smaller components are more manageable. Similarly, if a contentious issue creates impasses between the parties, put a heading, leave it blank, and move on to other issues. After most issues are agreed to, there is often momentum to return to the difficult issue that created an impasse, and that blank space under the heading can become the focus of renewed energy in the negotiations. What started out as a deal-breaker may morph into a less significant matter in the context of so many other headings showing agreement.

HELPING PARTIES MAKE OFFERS

As a facilitator, the TPN can focus the discussion on substantive gains, and ask questions such as:

- “What would need to happen, or be added, in order for this proposal to be acceptable to you?”
- “How else might this outcome be achieved?”
- “What would be acceptable as a settlement option?”
- “Can you match this option?”

As the questions are asked, both sides expand their thinking about the settlement option, and if there is a free flow of discussion, both sides may be making offers or concessions to resolve the issues. The TPN must stay alert to spot these, name them, write them out, and keep asking whether anything else would contribute to making this a mutually acceptable outcome. Don't hesitate to ask "what might go wrong with this option," as it is a function of the TPN to reality-check the parties into thoroughly exploring settlement options as to viability and durability.

Be sure to separate **INVENTING** options from **DECIDING** about them.

DRAFTING

Plain and unambiguous wording is essential. The TPN should obtain verification from all parties by reading back or circulating draft wording. Use terms consistently throughout the document. Where possible use the language of the parties themselves. Avoid jargon and "legalese."

PARTIAL/FULL

If the negotiations involve short-term and longer-term issues, you may encourage the parties to document a partial or interim agreement on the issues that are of immediate concern. This partial agreement may refer to other issues still to be resolved, and once the remaining matters are agreed to, you may either draft another partial agreement, or incorporate the earlier one into a more comprehensive agreement on all issues. Where there are many difficult issues, an interim agreement on minor matters is helpful to show parties what agreement looks like, and reinforce the fact that they can in fact reach mutual agreement on some things, which is encouraging.

MONITORING

Establish what level of follow-up parties need or want if there are likely to be difficulties with implementation of the terms of the agreement. Write this out under a separate heading.

IF BREACH

As part of the reality-check function of the TPN, invite the parties to anticipate future problems and how those may be addressed. Always include a **DISPUTE RESOLUTION** clause that binds the parties to further negotiations, direct at first, then with a TPN to assist, either as mediator, or to provide an early neutral evaluation, then possibly to binding arbitration, and only as a last resort, to a court action. Set timelines for parties to notify each other of a supposed breach, and you may wish to include a clause that confirms the agreement remains intact until an amending agreement is signed.

SETTLEMENT CHECKLIST

- **Date** of agreement
- **Names and affiliation** of all signatories to agreement
- **Recitals**—background about the parties’ relationship(s) and the purpose of the agreement; refer to any prior agreements that remain relevant to the new one; set out any laws, rules, or standards that apply to the agreement; set out that the parties warrant the information contained in the agreement is accurate and that full disclosure of all relevant information has occurred
- **Issue-specific headings and a consistent numbering system** enable easy reference to substantive terms
- **Dispute Resolution and Implementation/Monitoring** clauses show intent on how to address future issues that arise
- **Signatures** of parties and witnesses
- **Appendices/attachments/schedules** of information etc.

Section 4

Notes

