
AFSA TRAINING COURSE

IN COLLABORATION WITH THE UNIVERSITY OF PRETORIA

MEDIATION



The Arbitration Foundation of Southern Africa
NPC

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DOCUMENT CONTENT

- COURSE CONTENT
- PRE-TRAINING ASSIGNMENT
- MEDIATION TRAINING, DELEGATES WORKBOOK
- RESOURCE MATERIAL
 - Letter - Rules Board for Courts of Law
 - Rules Board for Courts of Law Act, 1985
 - Rule 41A - Uniform Rules of Court
 - Hoffman Chapter
- MEDIATOR'S JOURNAL

COURSE OUTLINE

- Understanding Principles and Process of Mediation
- Role, Function and Ethical Duties of the Mediator
- Developing the Communication Skills of the Mediator
- Working Through Diversity, Assumptions, Prejudices and Biases in Mediation
- Building the Mediator's Toolkit for Practice

MEDIATION TRAINING

PRE-TRAINING ASSIGNMENT

Dear Delegate,

Thank you for your enrolment in the Mediation Training as hosted by the Arbitration Foundation of South Africa. In preparation for this training please complete the following questionnaire. You must submit your written assignment in-person or via the Learning Management System before the course commences.

Question 1:

Please provide your understanding of the following dispute resolution methods:

- a) Litigation:
- b) Negotiation:
- c) Mediation:
- d) Arbitration:

Question 2:

Please provide an example of a recent negotiation you were involved in, the events of the negotiation and the outcome of such negotiation. You may change names and confidential details if necessary. (no word limit)

Question 3:

Please provide an example of any involvement you may have had with mediation or pre-trial conferences. You may change names and confidential details if necessary. (no word limit)

Name:

Firm/Company:

Designation:

Date of submission:

Mediation Pre-Training Assignment 2026
Trainer: V Srikison

MEDIATION TRAINING, DELEGATE'S WORKBOOK

Prepared and Presented by Adv. Veerash Srikison



The Arbitration Foundation of Southern Africa
NPC

Mediation Training

Duration: 5 Days

Delegate's Workbook

Presented by : Veerash Srikison

Contents

Session 1: Introduction to Dispute Resolution	<u>4</u>
Session 2: The Analysis of Conflict.....	<u>9</u>
Session 3: Communication Styles	<u>22</u>
Session 4: Mediation	<u>26</u>
Session 5 The Mediator.....	<u>35</u>
Session 6 How to Apply the Communication Skills of a Mediator	<u>44</u>
Session 7 The Mediation Process	<u>57</u>
Session 8 Introduction & Opening Statements.....	<u>65</u>
Session 9 Exploring and Analysing the Dispute	<u>69</u>
Session 10 Generating Options	<u>75</u>
Session 11: Facilitating the Mediation.....	<u>88</u>
Session 12: Breaking Deadlock (<i>Impasse</i>).....	<u>100</u>
Session 13: Close the Mediation - Resolution.....	<u>109</u>
Recommended Reading List	<u>118</u>

SESSION 1

INTRODUCTION TO DISPUTE RESOLUTION

Key Learning Points:

- 1) What is Alternate Dispute Resolution (ADR)?
- 2) What is Mediation
- 3) Various styles of Mediation
- 4) Characteristics of Mediation
- 5) The Role of the Mediator



- Individually record your response to the following question:

What are you hoping to learn from participating in this class

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Aims and Benefits

- Improve skills in achieving your desired outcomes while maintaining good relationships.
- Increase your confidence as a mediator.
- Develop effective communication skills
- Understanding the strategy behind successful preparation
- Decrease anxiety and deadlock when facing difficult mediations.
- Know that mediation is a process.
- That you understand how facilitative mediation forms part of a legal process and the principles are understood.

Notes

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Alternate Dispute Resolution

Alternative Dispute Resolution comprises various approaches for resolving disputes in a non-confrontational way, ranging from negotiation between the two parties, a multi-party negotiation, through mediation, consensus building, to arbitration and adjudication.

Arbitration:

- Process whereby parties to a dispute agree to submit their dispute to a third party who will decide their case.
- The arbitrator has the power of decision in the dispute.
- It is private and less formal than litigation.
- Arbitrator could be a professional and knowledgeable in the issues involved.

Facilitation:

- A third party offers their services to bring the parties together and encourages them to negotiate.
- The facilitator does not get involved in the issues for the dispute, only in the process.

Notes

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Negotiation:

- The parties agree to discuss and reach an agreement amongst themselves or through their representatives.
- The parties have control of the process and the outcome
- It can be a process of joint-problem solving on a disputed or potentially disputed issue.
- According to the Harvard Law School *“Negotiation is the process of discussion between two or more disputants, who seek to find a solution to a common problem, one that meets their needs and interests acceptably.”*

Mediation:

- This is a process in which an impartial third party encourages and facilitates in an informal way the negotiation between the parties to the dispute.
- The mediator does not have the power to impose a solution on the parties.
- The mediator has control over the process but the decisions and outcomes are in the control of the parties.
- *“Mediation is the management of other people's negotiation”* - John Haynes

Notes

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SESSION 2

THE ANALYSIS OF CONFLICT

Key Learning Points:

- 1) Understanding conflict management styles
- 2) Ways to manage conflict
- 3) The benefits of active listening
- 4) Identify how to work more effectively with each personality style while negotiating
- 5) Identify your personality style





Conflict Management Styles

Your goal is to understand the state the parties enter a dispute in. It is important for you to know, where they are in this dispute.

Merging two groups together can lead to friction between the groups.

Conflict happens. How you respond to and resolve conflict will limit or enable your success as a mediator.

Embrace Conflict as a Source of Growth and Transformation.

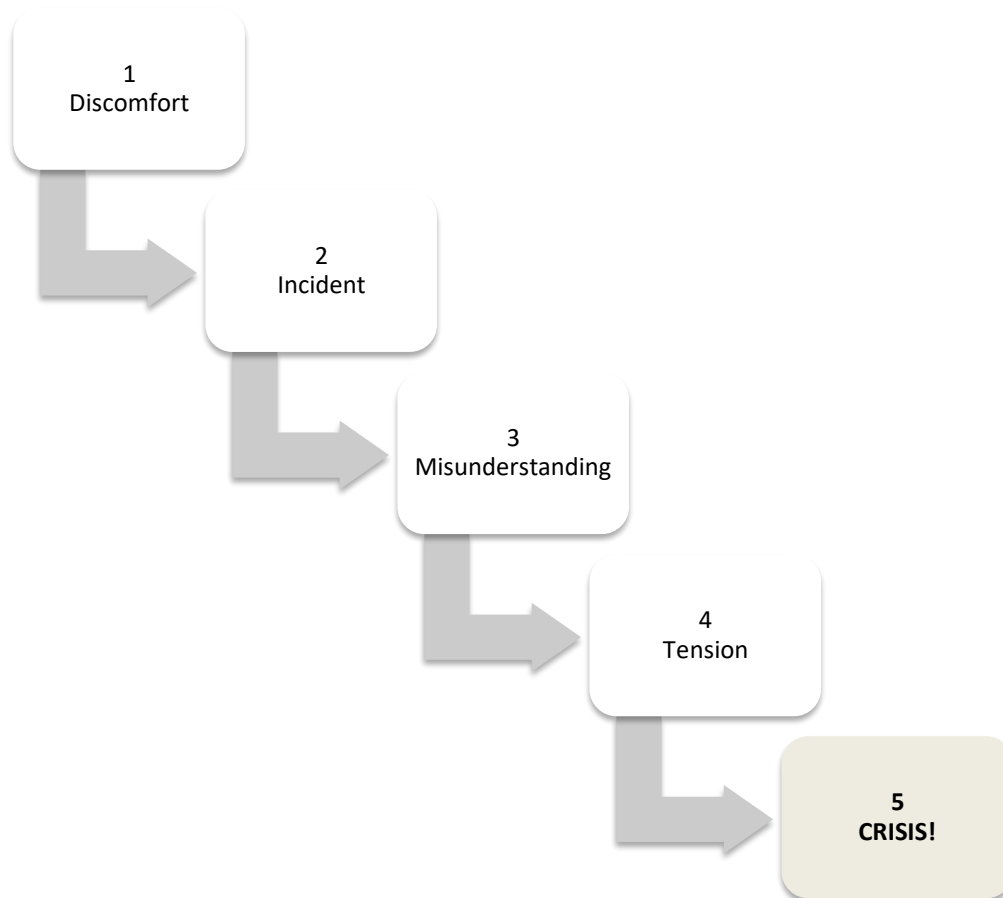
Conflict can come from a variety of sources:

- ▶ Goals.
- ▶ Personality conflicts.
- ▶ Scarce resources.
- ▶ Styles
- ▶ Values.

Notes

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Levels of Conflict



Notes

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Discomfort

Perhaps nothing is said yet. Things don't feel right. It may be difficult to identify what the problem is, a gut feeling

Incident

An exchange occurs without any lasting internal reaction. Something occurred and that has left you upset, irritated or with a result you didn't want.

Misunderstanding

Motives and facts are often confused or misperceived. Your thoughts keep returning frequently to the problem.

Tension

Relationships are weighed down by negative attitudes and fixed opinions, a source of constant worry and concern.

Crisis

Behaviour is affected, normal functioning becomes difficult, extreme gestures are contemplated or executed. The clues are obvious – there is unresolved conflict.

Notes

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Dynamics of Conflict

Remember your goal is to understand what state the parties enter mediation in.

Escalating behavior – what you notice-

- ▶ Raising voices
- ▶ Stopping listening
- ▶ Focus on blaming/shaming instead of resolving
- ▶ Threatening, ignoring, dismissing
- ▶ Asserting power
- ▶ Not taking responsibility
- ▶ Cutting someone off
- ▶ Not taking responsibility
- ▶ Sarcasm, contempt, defensiveness, disrespect, insulting

Notes

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Outcomes of Escalation of Conflict Levels

What do you notice:

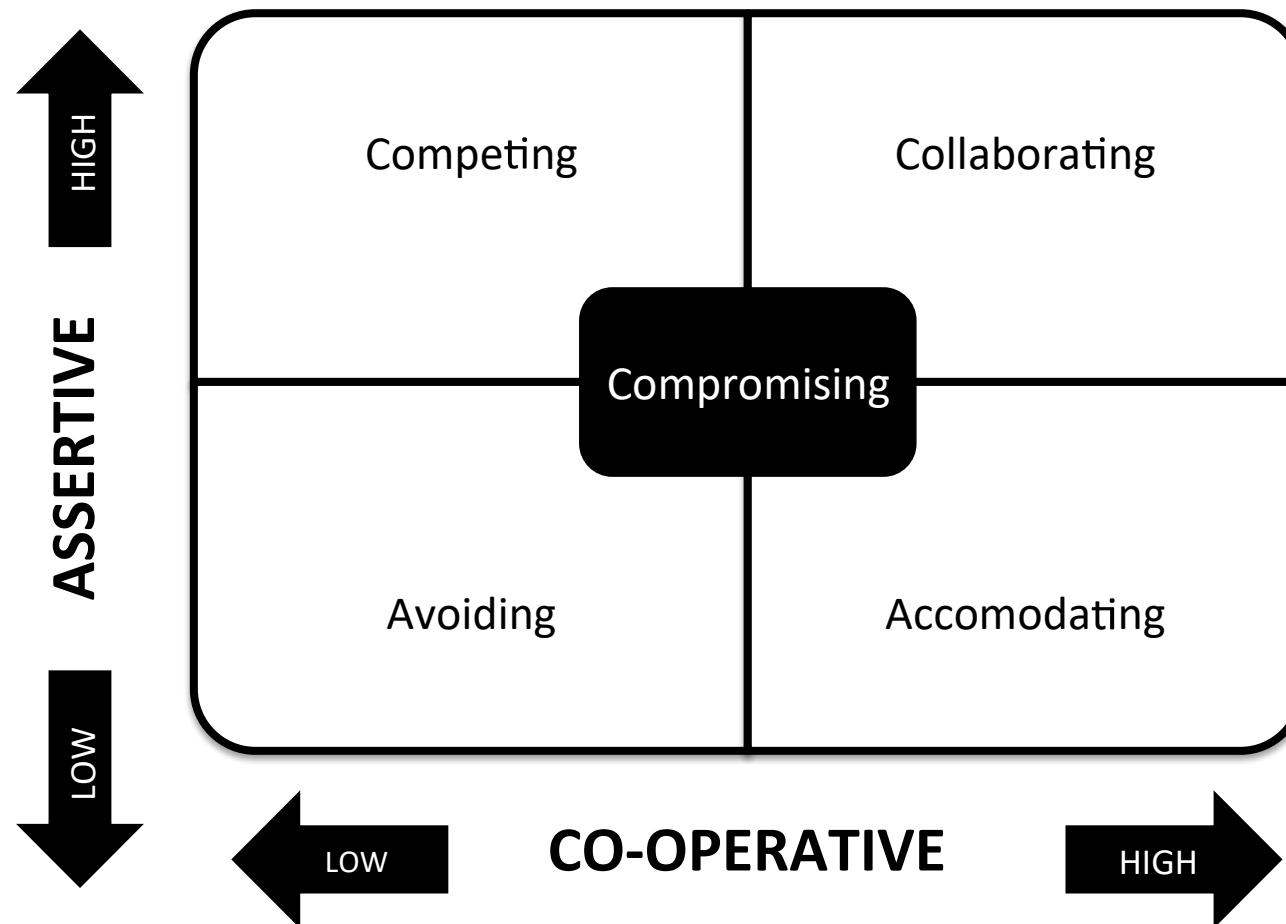
- ▶ People stop talking, disengage
- ▶ Conflict widens, others get involved
- ▶ Legal battles
- ▶ Unilateral action
- ▶ Sabotage
- ▶ People give up or they get stressed
- ▶ People become irrational/make bad decisions
- ▶ Conflict reaches a point of no return.

Notes

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Thomas-Kilmann Conflict Model Instrument

This model organises 5 conflict management styles based on two dimensions: *Assertive and Co-operative*.





Responses to Conflict

It is important to understand one's own reaction to conflict. Carolyn Dickson discusses five reactions to conflict:

Denial or withdrawal	Pretend it doesn't exist
Avoidance	Change the topic, avoid confrontation
Accommodating	Giving in, make everyone else happy, peace and harmony
Force	Never wrong, power and control
Negotiation	Reach a settlement by conference, discussion, or compromise

We have all had the experiences of handling conflict both constructively and destructively. The outcomes of conflicts handled constructively are so much more attractive that it is hard to imagine we would settle for less.

Notes

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- You will conduct a self-assessment on your conflict style.

[illegible]



Cultural and Identity aspects

It is part of your role as the facilitator to be aware of many cultural factors which may impact the negotiation:

- ▶ time
- ▶ language
- ▶ body signs
- ▶ style
- ▶ space
- ▶ symbols,
- ▶ collective responsibility and
- ▶ the tradition of the social system.

Notes

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Men are better negotiators than women.

Men are more in control in a negotiation than women.

Women do not know how to ask for what they want.

Men are more strategic than women.

Women are more emotional than men.

These are generalisations and will depend on the person's personality and not just their gender.

Therefore, they will not apply to all women and all men.

[illegible]



Culture Based Negotiation Style

Two different orientations to time exist across the world: monochronic and polychronic.

Monochronic

Monochronic approaches to time are linear, sequential and involve focusing on one thing at a time. These approaches are most common in the European-influenced cultures of the United States, Germany, Switzerland, and Scandinavia. Japanese people also tend toward this end of the time continuum.

Polychronic

Polychronic orientations to time involve simultaneous occurrences of many things and the involvement of many people. The time it takes to complete an interaction is elastic, and more important than any schedule. This orientation is most common in Mediterranean and Latin cultures including France, Italy, Greece, and Mexico, as well as some Eastern and African cultures.

Notes

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SESSION 3

COMMUNICATION STYLES

Key Learning Points:

- 1) Active Listening
- 2) Paraphrasing
- 3) Repeating
- 4) Summarising
- 5) Questioning





How to Improve Your Active Listening

The way to improve your active listening skills is through practice. You should not allow yourself to become distracted by things that may be going on around you. Try to make a conscious effort to hear not only the words, but to truly hear what the other person is saying.

Genuine active listening will:

- ▶ Encourage the speaker to keep talking
- ▶ Indicate that you are following the conversation
- ▶ Set a comfortable tone
- ▶ Signal to the speaker that you are attentive and interested.

Notes

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Active Listening

As the mediator you need to identify your capabilities of listening actively and to constantly improve your skill set.

Active listening skills:

Ability to get the story

- Encourage the speaker
- Ask open-ended questions
- Draw out background/context

Probe/Clarify

- Clarify and check your understanding
- Use questions to take the speaker a step further

Listen for Emotions

- Beware of non-verbal cues; hesitation, change in tone, body language.
- Name the emotion in a way that validates it.
- Allow venting

Notes

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Summarise

- Make a story out of what you have heard, include the facts, issues, concerns, feelings, perceptions
- Capture what is important to the speaker
- Check accuracy

Value Silence

- Shows respect for the person speaking
- Allows people to hear themselves and each other
- Allows you to watch the non-verbal cues
- Let's people answer question fully without interruption.

Questioning: The 6 W's

- Who
- What
- Why
- How
- Where
- When

Notes

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SESSION 4

MEDIATION

Key Learning Points:

- 1) Why do we need mediation?
- 2) The styles of mediation
- 3) How to work with the styles on a continuum
- 4) Core Principles of Mediation





Why do we need Mediation?

- Mediation requires the parties to take responsibility for the process, explore underneath their individual positions, and to help them identify shared interest to bring their positions closer together.
- Mediation repairs the relationship for the parties involved and in so doing restores a healthier environment for all around who are affected by the fallout from the conflict.
- The Mediator is an independent third party, who facilitates this dialogue to helping the parties to reach a satisfactory outcome.
- Mediation is different from adversarial processes, as the focus is on the need and interest of the parties. The emphasis being on helping both parties take responsibility for the outcome.

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Styles of Mediation

Continuum of Mediator Styles



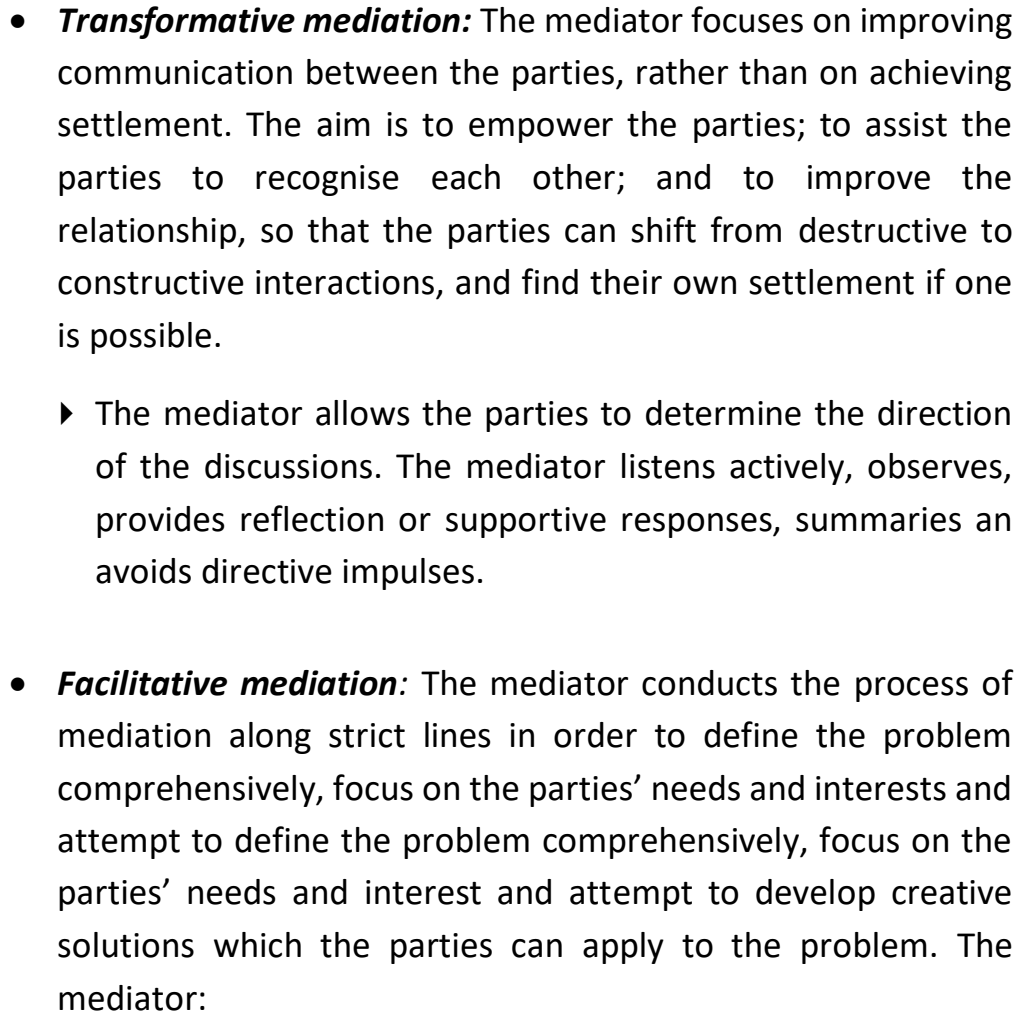
The particular skills and techniques use by mediators will depend in part on which model of mediation they are providing to the parties. There are many kinds of mediation and here it is convenient to refer to five models, each of which is associated with a different mediator roll.



- **Settlement mediation:** The mediator encourages the parties to reach a point of compromise between their positional claims through various forms of persuasion, 'reality testing' and pressure, without any significant emphasis on the process of decision-making.
 - ▶ The mediator's tactic is to go back and forth and pressure the parties to settle without regard to the stages of the mediation.
- **Evaluative mediation:** The mediator guides and advises the parties on the basis of his or her expertise with a view to the parties reaching a settlement which accords with their legal rights and obligations, industry norms, or other objective standards.
 - ▶ The mediator encourages compromise through various forms of persuasion, 'reality testing' and pressure
 - ▶ The mediator guides and advises parties using his or her knowledge and expertise so that parties reach settlement in line with their legal rights and obligations, industry norms, other objective standards.
 - ▶ SMART model of evaluation as part of reality-testing

Notes

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- ▶ values empowerment and transformation of how parties interact with each other
- ▶ relationship and communication transformed during mediation
- ▶ recognition of each other's' needs and viewpoints
- ▶ works with parties together – only they can give recognition and take responsibility for dispute
- ▶ moving from past to future, negative to positive, blame to contribution and common ground
- ▶ not necessarily about written agreement

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The focus of this training is on facilitative mediation. The outcome should provide the following understanding of the Facilitative Mediation Principles:

1. Staged process – voluntary at every stage
2. Explore and understand different perceptions and feelings between people in conflict
3. Resolve conflict and re-establish working relationships
4. Prevent further escalation to dispute
5. Takes place early in the life of a conflict or dispute
6. Process is informal and flexible
7. Mediator must achieve high levels of rapport with parties

Notes

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Core Principles of Mediation

- Voluntary
- Confidentiality
- Without prejudice
- Mediator is an impartial person
- Resolve disputes
- Flexibility and informality
- The parties determine the content of the discussion
- Parties determine the outcome of the conflict or dispute
- The mediator manages the process
- Preservation of the relationship

Notes

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When Is Facilitative Mediation Favourable?

- Conflict between individuals
- On-going relationship is desirable
- Ideally early on in the conflict before formal action has been taken
- When people want to resolve issues
- When the issues are in the parties' control
- When parties are emotionally able to deal with the mediation
- Looking for a different option or different approach
- When the stakes are high
- Management support and sponsors.

Notes

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SESSION 5

THE MEDIATOR

Key Learning Points:

- 1) Code of Ethics for the Mediator
- 2) Conduct of the Mediator
- 3) The functions of the Mediator
- 4) Role of the Mediator





Code of Ethics for Mediators

- Act with honesty, impartiality and independence;
- Conduct himself/herself in a manner that is fair to all parties and must not be swayed by fear, favour or by self-interest;
- Avoid entering into any financial, business or social relationship, which is likely to compromise their impartiality, or which might reasonably create a perception of partiality or bias;
- Not assert influence on any person involved in the process by any improper means whatsoever, including the giving or receiving of gifts or other inducements.

Conflict of Interest:

- Every mediator must disclose at any stage any interest or relationship that is likely to affect his/her impartiality or which might bring about a perception of partiality including:
- any direct financial or personal interest in the matter; and
- any existing or past financial business, professional, family or social relationship which is likely to compromise impartiality.

Notes

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- After disclosure the mediator may continue to mediate a matter if both parties agree. Provided that the mediator must withdraw if the conflict of interest may unduly influence the mediation process.

Obligations of the mediator during the mediation Proceedings

- Every mediator must respect freedom of conscience, belief and expression and must avoid and dissociate himself or herself from comments or conduct that is racist, sexist or otherwise inconsistent with the Bill of Rights in the Constitution.
- Every mediator must conduct proceedings fairly, diligently and in a fair manner.
- A mediator must ensure that the parties and their representatives act in accordance with commonly accepted decorum ie. respect, politeness, controlled behaviour.
- A mediator must be patient and courteous to legal practitioners, parties and the public, must act courteously and respect the dignity of others.

Notes

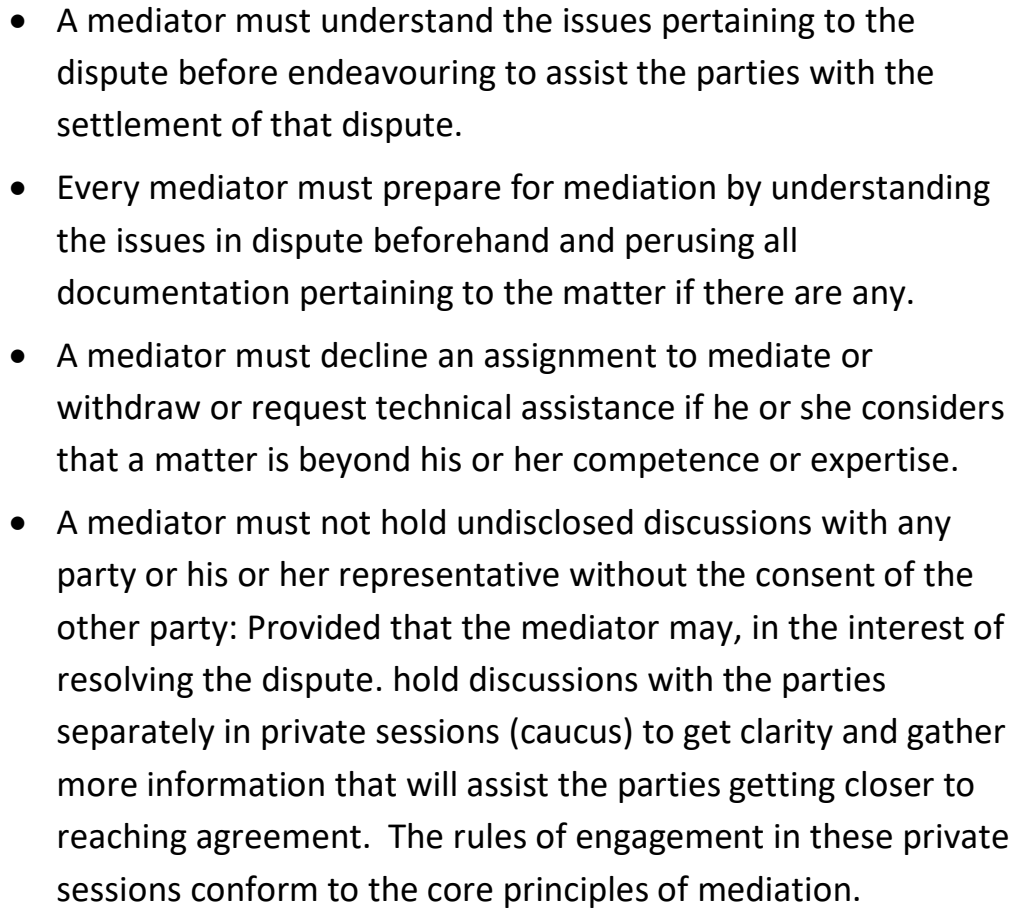
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- Every mediator must respect the right to equality before the law and the right of equal protection and benefit of the law.
- Every mediator must observe religious, gender and cultural rights.
- Every mediator must be punctual for a mediation session and keep to time limits, if any, set by the parties.
- Every mediator must be impartial and must not make any decisions or findings of law or fact or determine the credibility of any person participating in the mediation.
- A mediator must inform the parties that all discussions and disclosures, whether oral or written, made during the mediation session are confidential and inadmissible as evidence in any court, except for those that are included in a settlement agreement or are otherwise discoverable (presented by way of evidence as proof/knowledge) in terms of the rules of court or ordered by a court.
- Every mediator must at the beginning of and during the proceedings ensure that he or she understands the positions, needs, and expectations of the parties involved in a dispute.

Notes

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The Functions of the Mediator

- Help to co-ordinate the meeting
- Introduce the parties
- Explain the process to the parties
- Set the agenda and the rules.
- Open communication channels.
- Gain the confidence and trust of the parties.
- Gather information and identify obstacles.
- Allow the parties to express feelings and vent emotions.
- Be aware of the emotional climate during the mediation.
- Help the parties identify and understand their interests and priorities.
- Help the parties with brainstorming creative options and solutions.
- Help in defining acceptable objective criteria.
- Help the parties understand the limitations of their demands through “reality testing”
- Help in evaluating alternatives.
- Allow the party to move forward according to the needs and pace of the parties.
- Help in crafting an agreement.

Notes

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Role of the Mediator

The mediator's ultimate role is to assist parties to reach agreement in an impartial, unbiased manner. In serving this ultimate end, the mediator may take on any or all of the following roles:

Role	Description
Convener	The mediator may assist in contacting the party(ies) to arrange for an introductory meeting.
Educator	The mediator educates the parties about the mediation process, conflict resolution alternatives, issues that are typically addressed, options and principles that may be considered, court standards, etc.
Communication Facilitator	The mediator seeks to ensure that each party is fully heard in the mediation.
Translator	When necessary, the mediator can help by rephrasing or reframing communication so that they are better understood and received.

Notes

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Role	Description
Questioner and Clarifier	The mediator probes issues to ensure that the participants and the mediator have a full understanding.
Process Advisor	The mediator can suggest procedures for making progress in mediation discussions, which may include caucus meetings, consultation with outside legal counsel and consultation with substantive experts.
Angle of Realities	The mediator may exercise his or her discretion to play devil's advocate with one or both parties as to the practicality of solutions they are considering or the extent to which certain options are consistent with participants stated goals, interests and positive intentions.

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Role	Description
Catalyst	By offering options for consideration, stimulating new perspectives and offering reference points for consideration. The mediator serves as a stimulant for the parties reaching agreement.
Responsible Detail Person	The mediator manages and keeps track of all necessary information, writes up the parties' agreement, and may assist the parties to implement their agreement.
Exploring	Different types of questions to expand ideas or options.
Summarising	Capturing essential statements and aims to focus on tasks and priorities.
Mutualising	Verbalising common ground through paraphrasing and summary.

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SESSION 6

HOW TO APPLY THE COMMUNICATION SKILLS OF A MEDIATOR

Key Learning Points:

- 1) Application of the communication skills set required for Mediation
- 2) Develop insight into Social Context & Diversity awareness
- 3) Reaction vs Response
- 4) Tone of Voice
- 5) Asking effective questions that clarifies information not cross-examines or interrogates the parties to the dispute





Skill set

Sometimes conflict seems overwhelming, confusing and unmanageable – both for the disputants and for the mediators. Underneath the anger there is often fear, pain and feelings of powerlessness.

Mediators may find it helpful to focus on five kinds of skills:

People & Diplomacy Skills

- Connect with both parties
- Acknowledge their feelings without seeking causes and reasons
- Create an atmosphere that is supportive and friendly
- Use humour only if appropriate
- Being culturally aware

Process Skills

- Structure the session
- Identify the issues
- Clarify the urgency and time scale/s
- Agree the priorities and agenda with both parties
- Plan relevant tasks
- Collect the information needed from both parties equally

Notes

[illegible]



Problem Solving Skills

- Emphasize common concerns and common interest
- Focus on the present and future rather than the past
- Give information to help the parties reach informed decisions
- Separate different types of issues
- Focus on roles and concerns
- Identify and evaluate options from each party's perspective
- Reframe
- Brainstorm
- Summarise and refocus

Decision-Making Skills

Decision-making is the act of choosing between a number of alternatives. In the wider process of problem solving, decision making involves choosing between possible solutions to a problem. Decisions can be made through either an intuitive or reasoned process, or a combination of the two. There are usually a number of stages to any structured decision-making.

- Listing all possible solutions/options
- Setting a time scale and deciding who is responsible for the decision

Notes

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- Information gathering
- Deciding on values, or in other words what is important
- Weighting up the pros and cons of each course action
- Making the decision

Reactions vs Responses

Fools react, the wise respond – measure your ability to stay silent while someone is speaking.

Then respond in a measured manner using your mediation communication skills.

Tone of Voice:

It's not what you say but how you say it.

Notes

[illegible]

Listening Skills

Response	Expression	Aims
Body language	Eye contact, facial expressions, posture, gestures, tone of voice	To show full attention and interest
Clarification	“Could you say a bit more about.....explain more about.....”	To check correct understanding encourage fuller explanation
Acknowledgement	“I realise you are feeling very upset....”	To help people see you have heard and understood
Reframing	Expressing the positive concern or feeling underlying a negative statement	To shift from confrontation to problem solving
Exploring	Different types of questions	To expand ideas or options
Summarising	Capturing essential statements and aims	To focus on tasks and priorities



As a mediator, it is likely that you will be working with parties from a range of diverse backgrounds.

Diversity is not just about race, gender, sex, age, background, class, disability, personality or sexual orientation. In its literal sense, it means difference, and in our communities, there are many factors that make each of us different and individual. The role of values, culture, attitudes and power are all important considerations, and each of these has the potential to disadvantage or negatively affect individuals or groups.

Assumptions and prejudice about particular individuals or groups can lead to their needs and perspectives not being recognised.

- Willing to accept diversity in society and respecting the culture and rituals of other people for eg. religious practices that require a person to be excused from the session.
- Being non-judgmental

[illegible]



- Having an open mind
- Having empathy and understanding
- Showing flexibility and adaptability
- Being sensitive
- Having enthusiasm: being engaged and motivated
- Being creative in order to find alternative solutions and approaches

Communication is by far the most problematic area for many parties.

It is beneficial to start with the concepts of cultural competence and cultural adaptability. These concepts help individuals interact across cultures without judgment. This ability enables them to approach communication issues with more patience and stronger desire to reach an understanding that works for everyone and that is inclusive. They are not so concerned about doing it “their way” but focus more on finding middle ground that respects and include everyone.

Notes

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Principles of Intervention:

The purpose of intervention in mediation is:

- To facilitate the process
- To encourage the parties to participate fully in exploring their differences
- To sustain conversation
- To keep moving forward
- To support your partnership with the parties

When and how to intervene:

- The level of intervention will be determined by the stage of the process and what is happening between the parties, and will generally be somewhere between giving space and encouraging. Making demands, issuing warnings and forcing are inappropriate.

Notes

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- Intervention should be exercise in a way that is balanced (fair, even handed, consistent) and structured step by step, moving from less directive to more directive, as appropriate). As a mediator, you can exercise control by:
- **Describing** what you are noticing, seeing or hearing using neutral, non-blaming language
- **Explaining** its effect on process and progress
- **Empathising** – show that you understand how others feel and the positive intention behind their behaviour
- **Motivating** them to take an alternative approach by giving direction as to more appropriate behaviours.
- **Asking open-ended questions:**
 - Why?
 - To get the speaker to give you as much useful information as possible eg. "please tell me more..."
 - More information = better decisions

Notes

[illegible]

- How?
 - Ask for stories, backgrounds, interests
 - Ask “Why” questions
 - Ask “What if” questions
 - Frame questions from their perspective
 - Keep them open-ended

Avoid the following types of questions:

- Cross-examination
- Rapid-fire
- Trap
- Un-answerable
- Rhetorical
- Questions that imply bias/disapproval

Notes

[illegible]



Remember to Reframe to show that you are actively listening.

Listen to the statement

- Try not to react emotionally
- Ask open-ended questions to understand deeper

Reframe the statement

- Use neutral language
- Include key elements of the original
- Include a way to move forward
- Acknowledge the emotions of the speaker

Reframing examples:

When you hear:

- “That will never work! That’s ridiculous!”
- Response – “It sounds like you believe there is a better way to meet everyone’s interests. Any suggestions?”

Notes

[illegible]



When you hear:

- “We’re not getting anywhere!”
- Response – “It seems as though...is getting in the way of possible resolution. Can you propose an option?”

When you hear:

- “Yes, BUT if you don’t...we will all fail”
- Response – “Yes, AND if you can find a way to ...(talk about substantive issues) you will succeed.”

Choose to respond not react:

- Reactions are instinctive, whereas responses are intellectual.
- Between the stimuli (what happens to me) and the response (what happens through me) if there is no gap, it creates a reaction.
- But, between the stimuli and the response, if I use the gap to think and contemplate, then I can respond thoughtfully.

Notes

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- *"An intelligent person responds; a fool reacts."*
- Reactions are always instinctive,
- Responses are always well thought of, just and right to save a situation from going out of hands, to avoid cracks in relationship, to avoid taking decisions in anger, anxiety, stress or hurry.

Notes

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SESSION 7

THE MEDIATION PROCESS

Key Learning Points:

- 1) Stages in the Mediation
- 2) Intake and Preparation
- 3) Online Mediation





Stages in the Mediation Process

As a mediator, you will eventually create your own style but it is useful to have a broad understanding of what the process should feel like when you start out. Remember that mediation is flexible and does not proceed rigidly. You will move between joint sessions and private sessions (caucus) depending on the flow of information you are receiving from the parties and the nature of the issues in dispute.

The stages loop back to each other as you progress through the steps

- Before the mediation - takes place usually the day before the mediation
- Opening the mediation and opening statements.
- Exploring and analysing the dispute.
- Generating options for consideration.
- Choosing options and negotiating.
- Finalising agreement or confirming a deadlock.
- Follow-up - takes place a day after the mediation has ended.

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Notes

This image shows a full page of handwriting practice paper. It features a series of horizontal dashed lines spaced evenly down the page, providing a guide for letter height and placement. The lines are black and set against a white background. There is no text or other markings on the page.



Before the Mediation

Intake

Please refer to your specific organisations requirements for intake. Below is a generalisation of the intake process for individual mediators.

Use this process to clarify your impartiality, the nature of the process, and its principles. Explain the contents of the Agreement to Mediate and the Opening Statement.

Avoid getting one-sided full accounts during the intake and ask the party who makes the first contact to make it very clear to the other that you are not their representative. This reassurance is best given by one party to the other rather than by us, as it helps to build or maintain trust between them.

If you speak to one party via phone or online ensure that you do the same with the other party. Otherwise, there is a danger of the other one feeling left out or bulldozed. The other party may also have queries and hesitations. If one says that the other one is already informed / willing to come, say you still need a brief call from the other one confirming this, so that you can go ahead with

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setting up an appointment. Do not send out the letters and forms until you have heard from both parties that they are willing to come. If the setting-up is done carefully, we find we have no problems with failed appointments.

Explain that mediators do not tell people what to do or arbitrate between them – they can give neutral information and prepare a summary of proposals that can be turned into a binding agreement after each party has had an opportunity to consult a separate attorney for advice and to check their understanding of its terms.

Mediation is not a ‘soft option’ – both parties need to provide all the relevant facts and objective information– mediation takes time and a full picture is essential for informed decision-making.

Give an idea of the average number of meetings (rarely less than two or three and can be more, if the situation is complicated)
Stress that mediation can stop at any point but the parties must talk to you about any challenges they are experiencing in mediation.

Explain the charges and that parties can agree between themselves how to share them, as sometimes one party pays most of the cost.

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Don't promise "an agreement" – stress that helping parties gather all the necessary information and explore options is very useful, even if they do not reach full agreement.

Preparation

The Mediator must make himself or herself familiar with any documentation or information necessary for that matter but must be cautious about formulating an opinion or possible outcome.

As the mediator you must ensure that you are competent to mediate the issues in dispute. Look for possible conflict of interest or any reason your impartiality may be affected and bring it to the necessary person should it exist.

Prior to the parties arriving for the session the Mediator needs to control the environment (tables, chairs, ventilation, noise, stationary, refreshments).

A reminder may be sent to the parties confirming their session, directions and the details of the mediator and to confirm the members of their party in attendance.

Prepare your opening statement in advance and practice it.

Notes

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Individual task:

- Using the guidelines for the role, function and duties of the mediator, and the information you have received thus far, prepare your opening statement as the mediator explaining your role throughout the process and how the process will take place.

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Online Mediation

Adapting to the Online Forum

Choose the online platform you are comfortable with example, Zoom, Microsoft Teams etc.

Ensure that all parties are comfortable using the online platform, if one or all are uncertain do a tutorial with them to show them how you will be using the platform to conduct the mediation.

Practice using breakout rooms and using document sharing.

Check the stability of your connectivity

Give parties rules of online engagement for instance, no recording or ensure that the environment is secure and remains confidential.

Verify the identity and agency of the parties attending. Do some background checks on who they are and what they look like or ask that they send scanned identity documents.

Update your selected online platform versions regularly and check security standards.

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SESSION 8

INTRODUCTION & OPENING STATEMENTS

Key Learning Points:

- 1) Introduction of the Mediator
- 2) Opening statements
- 3) Develop an agenda



Introduction of the Mediator

- Ensure that both parties understand what mediation is
- Discuss the role of the mediator
- Discuss confidentiality
- Setting housekeeping rules
- Legal issues
- Clarify the process
- Discuss the need for joint or private sessions
- Get the Agreement to Mediate/Dispute Resolution signed (check for your organisation's procedural requirements)

The mediator's opening statement ends with asking one of the parties to share why they are at mediation and for their opening statement, paraphrasing and moving on to the next party.

During the process after the opening statements from everyone, it is a mediator's job to gather as much information about the parties and their issues, creating an agenda to help facilitate them towards a mutually beneficial agreement. Doing that, involves more than asking questions. It also includes observing non-verbal clues.

Notes



Opening Statements from each party

The next stage of the mediation meeting is for each party to have a short, uninterrupted period, to tell his or her side of the story. This includes explaining: the conflict from his or her perspective; how he or she sees the issues in dispute; how he or she has been affected by the conflict; and what he or she would like to achieve from the mediation process.

Following the opening statement by each party, the mediator summarises what the parties have said, including the facts and feelings that they have expressed.

PS – remind parties about the confidentiality principle.

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Develop an Agenda

The parties have informed you of their version and reasons what brought them to mediation. They have stated their positions and maybe their interests and needs.

The Mediator must now lend a degree of structure to these issues in order to facilitate communication between the parties with the eye on a mutually beneficial outcome. Facilitate putting agendas on the “board” and highlight any mutual issues.

The Mediator must ask what outcomes they hope to achieve and their thoughts on drafting an Agreement.

The next step for the mediator is to gather as much information about the parties and their issues in order to help facilitate them towards a mutually beneficial agreement. Doing that involves more than asking questions. It also includes observing non-verbal clues.

The creation of an agenda adds to the tools of the mediator. Using the agenda, the mediator moves between the issues in dispute and uses the agenda to overcome impasse on specific issues.

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SESSION 9

EXPLORING AND ANALYSING THE DISPUTE

Key Learning Points:

- 1) Identifying positions, interests and needs
- 2) Confidentiality during sessions
- 3) Analysing the dispute





Exploring the Dispute

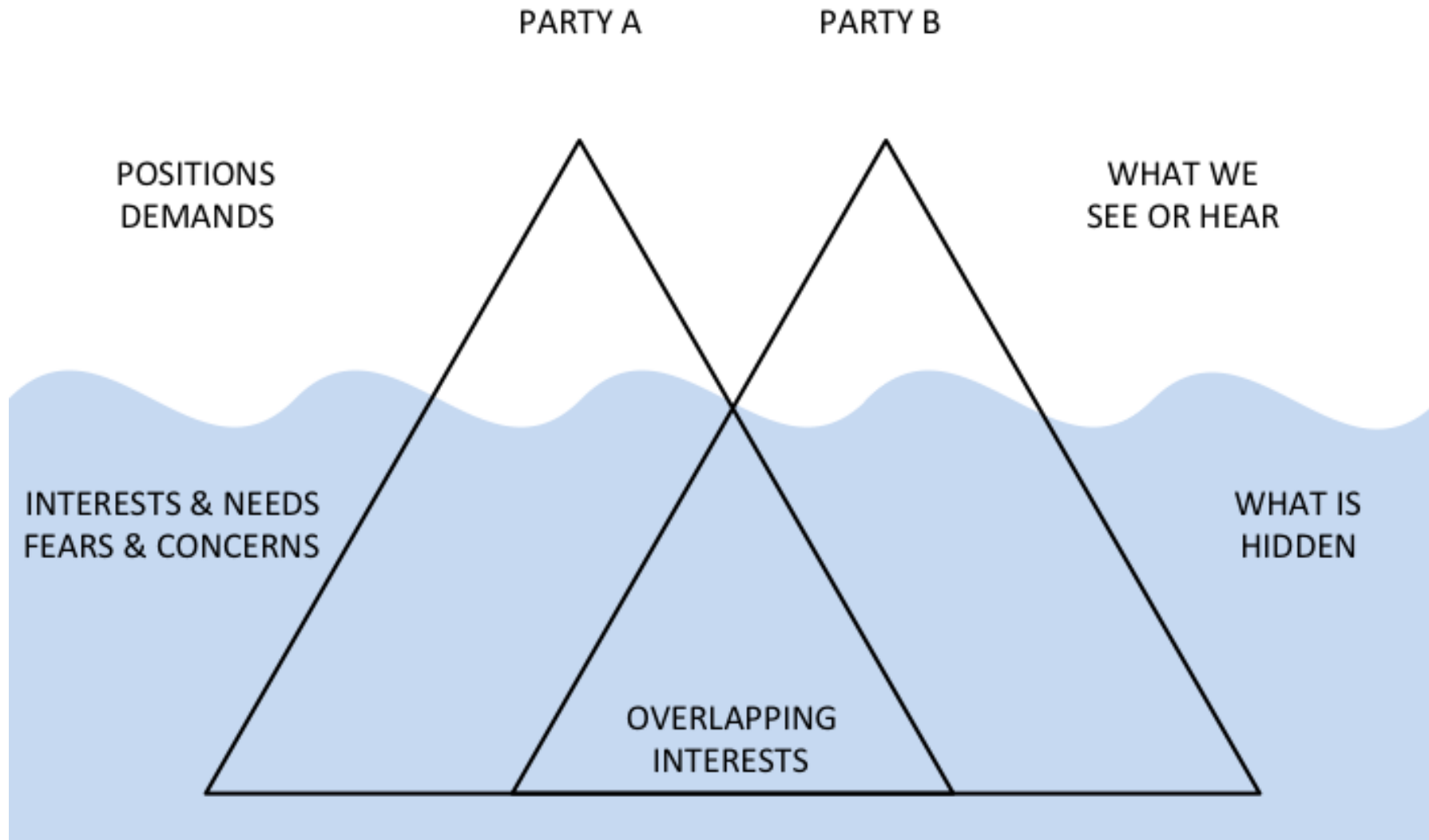
The exploration phase is an extremely important step in mediation. This is where you shine as an experienced communicator.

After both parties have spoken, the mediator invites the parties to respond to what has been said, asks any questions to clarify points made, or probe further into the issues. The purpose of the exploration phase is for all parties to improve their understanding of the issues and begin to formulate options for further discussion. The mediator will use the exploration phase to investigate the issues and elicit the parties' interests and needs while improving their perceptions of the issues in dispute.

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The Iceberg Formula





Positions, Interests and Needs

A position is one party's expectations in the negotiation. They place demands on the other party. This is where the push and pull behaviour exists. Bringing out all or nothing approaches.

An interest is why they want to achieve their expectations. Delving into interest gets the parties thinking as to what is important to them achieve mutually beneficial outcomes.

A need is what they really must have at the conclusion of the negotiation that often overlaps with the needs of the other party in the negotiation. Looking further into the needs of the parties is moving towards zones of possible agreements.

In a negotiation you must hear the position, acknowledge the position, and encourage the other parties to explore their positions and to uncover their interest and needs by engaging in active listening and open questioning skills.

The parties' interests and needs can incorporate tangible and/or intangible interests, for example the control or distribution of resources; intangible interests, for example being treated with

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dignity or receiving recognition for positive contribution to projects.

Purpose – to obtain more clarity and information on interests, needs, positions, develop an understanding of the dispute and goals

- Generally conducted in Caucus/Side Meetings – short sessions – maintains involvement of parties equally.
- Confidential unless you are asked to share the information.
- You are going more into their interests and needs and moving away from positional talk.
- Ask the party you are with, if they are willing to bring issues revealed in a caucus to a joint session.
- If the relationship is going to be ongoing, try to keep the parties in joint sessions more often.
- Address the concerns of the parties.
- Ask them - What motivates them to behave the way that they do and what motivates them to put forward the decisions they are making.

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Analysing the Dispute

Purpose: to assist the parties to develop and consider a range of options for possible agreement.

- What are their mandates and authority?
- Parties need to shift from being positional for effective mediation to happen.
- Understand their interests and needs.
- What value do they place on the outcome and the relationship?
- What is their best and worst alternative to a negotiated agreement.

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SESSION 10

GENERATING OPTIONS

Key Learning Points:

- 1) Managing the private session
- 2) Facilitating between the parties in a negotiation
- 3) Identify fears, concerns and “hot buttons” as well as strategies to overcome them
- 4) Identify areas to research for each party
- 5) Define BATNA, WATNA, and ZOPA



Generating Options

Assist parties in thinking about the dispute in other ways to help them move forward. Help the parties to consider their options realistically:

- Focus on the problem and not the person
- Focus on needs and interests rather than position
- Utilise objective criteria
- Brainstorm creative options
- Look for mutual or shared interests

Added to the above the following can be added:

- It is important to set out clearly and objectively the parties' needs and where parties want to end
- Break the problem down into more manageable parts and have sub-goals
- Move the thinking away from "no solution" to "many options"
- Use the SMART Model to work through more realistic options
Parties in ongoing relationships, example, employees and employers, co-parents, benefit from speaking directly to each other develop an amicable communication pattern. Often better solutions are likely with all the parties present.

Notes



Private Sessions (*caucus*)

When parties are reluctant to share information in joint sessions or there are power imbalances, move into caucus sessions. It allows the party and the mediator to probe options openly and to reality test without jeopardising impartiality or confidentiality.

How to conduct yourself in a private session:

- Listen and Build Rapport
- Assure of confidentiality
- Get information about the issues in the dispute
- Understand the main problems in the dispute
- Create an atmosphere of trust
- Do not mention weakness in opening statement
- Build Agenda
- Ask what they see as the strength and weaknesses of the case
- Understand the risk, cost and time issues in case of non-settlement
- Look for settlement
- Reality testing BATNA and WATNA with open-ended question.
- Look at the implications of the proposed settlement over time

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Collaborative or Principled Negotiation

In collaborative negotiations there is a high concern for both the relationship and the outcome. In order to achieve both these aims, you need to focus on the following four principles:

- ▶ People: Separate the people from the problem.
- ▶ Interests: Focus on interests, not positions.
- ▶ Options: Generate a variety of possibilities before deciding what to do.
- ▶ Criteria: Insist that the result be based on an objective standard.

This method suggests that you look for mutual gains whenever possible, and that where the parties' interests conflict, you should insist that the result be based on some fair standards independent of the will of the other side.

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The Negotiator's Dilemma

Negotiations typically involve **"creating" and "claiming" value**. First, the negotiators (the parties) work co-operatively to create value (that is, "enlarge the pie,") but then they must use competitive processes to claim value (that is, "divide up the pie").

However, a tension exists between creating and claiming value. This is because the competitive strategies used to claim value tend to undermine co-operation, while a co-operative approach makes one vulnerable to competitive negotiating tactics. The tension that exists between co-operation and competition in negotiation is known as **"The Negotiator's Dilemma:"**

- ▶ *If one co-operates and the other competes, the co-operator will get a terrible outcome and the competitor will get a great outcome.*
- ▶ *If both compete, they will both have mediocre outcomes.*
- ▶ *In the face of uncertainty about what strategy the other side will adopt, each side's best choice is to compete.*
- ▶ *However, if they both compete, both sides end up worse off*

Notes



Preparation Steps

1. Identify the parties' fears, concerns and your "Hot Buttons."
2. Gather research:
 - a) Information about their situation.
 - b) Give the parties tasks to consult with experts or to get further instruction/information from their heads of departments/supervisors
3. Guide the parties with open-ended questions and reality test to determine their BATNA and WATNA in private sessions.
4. Identify the ZOPA to take into the joint session

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Reality-testing

The parties are now generating options or putting terms on the table for agreement.

As the mediator you now need to facilitate a method and direct their thought processes to understand the consequences of the decisions and options they are putting forward.

Use your mediator toolkit strategies to work out BATNA, WATNA and ZOPA

You are now taking them into a zone where the negotiation process has become more detailed and the issues are narrowed down. The parties are collecting information from each other and from objective criteria. They are working towards making informed decisions.

Be careful of becoming a messenger of offers before proper reality testing has been done.

Use “homework” sessions to motivate a party to work on their offers and to think of how the other party will receive this offer.

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Best Alternative to a Negotiated Agreement (BATNA)

BATNA is a term coined by Roger Fisher and William Ury in their 1981 bestseller, *Getting to Yes: Negotiating Without Giving In*. It stands for "BEST ALTERNATIVE TO A NEGOTIATED AGREEMENT." Said another way, it is the best you can do if the other person refuses to negotiate with you--if they tell you to "go jump in a lake!" or "Get lost!". So it is not necessarily the ideal outcome--unless the ideal outcome is something the party can get without the cooperation of the other person.

As the mediator you need to explain to the parties, usually in a private session that BATNAs are critical to negotiation because they cannot make a wise decision about whether to accept a negotiated agreement unless they know what their alternatives are. You may task each party to gather more information before putting final options on the table or walking out of the resolution process.

For example, you may say "If you are offered a used car for R75,000, but there's an even better one at another dealer for R65,000--the R65,000 car is your BATNA. Another term for the

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same thing is your "walk away point." If the seller doesn't drop her price below or equal to R65,000, you will WALK AWAY and buy the other car".

As the mediator, how do you facilitate the negotiation process to assist the parties in determining their BATNA?

You can help disputants accurately assess their BATNA's through reality testing and costing.

In reality testing, the you help clarify and ground each disputing party's alternatives to agreement. You may do this by asking hard questions about the asserted BATNA: "How could you do that? What would the outcome be? What would the other side do? How do you know?"

Costing is a more general approach to the same process. You use a systematic effort to determine the costs and benefits of all options. In so doing, parties will come to understand all their alternatives. If this is done together and the parties agree on the assessment, this provides a strong basis upon which to come up with a negotiated solution that is better than both sides' alternatives. But if the sides cannot come to such an agreement,

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then negotiations will break down, and both parties will pursue their BATNA instead of a negotiated outcome.

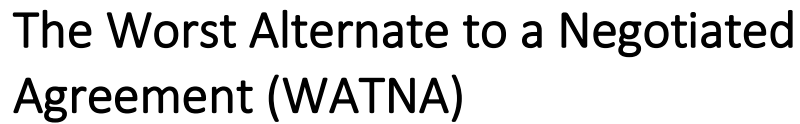
In mediation we will look at the BATNA from a collaborative perspective and refer to a BATMA (Best Alternative to a Mediated Agreement)

What do you do in the private session when developing the BATMA:

- Develop a list of actions the parties might think of taking if no agreement is reached;
- Improve some of the more promising ideas and convert them into practical options; and
- Select, tentatively, the one or two options that seems more likely to move towards agreement.

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The WATNA is what will be the worst that can happen if the negotiation fails and the dispute remains unresolved.

As the mediator you need to bring this to the parties' attention preferably in a private session. Or in a joint session you may leave it as a question to consider. For example, there may be threats of going to the media or taking the dispute to court.

Or in some instances they have been “advised” that they have better options if they battle it out. Your role as the mediator is to assist them to understand the consequences of walking away. Identifying the WATNA is crucial where there is no movement in the mediation process and communication has broken down.

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What Zone of Possible Agreement (ZOPA) might exist?

The Zone of Possible Agreement

(ZOPA) is an area of overlap where the desired outcomes of both parties reside, and where both parties can live with the outcome. Once the parties reach a ZOPA, the finer details need to be worked out within the scope of what both parties have already found is potentially working for them.

By using your communication skills and moving beneath the “Iceberg” you can bring parties closer to the ZOPA. Look for common interests and highlight that to the parties.

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Questions to pose to the parties as tasks to do during the generation of options stage.

Parties can be reluctant to share information or wanting to make the first offer, keep probing.

- What is your main objective?
- Do a Reality-Test and Assess your Risk
- Identify your Best Alternative to a Negotiated Agreement (BATNA).

Notes

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SESSION 11

FACILITATING THE MEDIATION

Key Learning Points:

- 1) Exchange of information
- 2) Identify contingency plans for unfavourable situations
- 3) Bargaining techniques
- 4) Strategies for inventing options for mutual gain





The Bargaining Stage

Understanding and Responding to Conflict

Conflict may be part of your mediations. Every mediation has to endure some conflict. At the very least, there will be conflict between the interests of the parties. The odds are excellent that negotiating will not be an entirely pleasant experience.

As a mediator, you will be saying things the parties will not like.

Remind them that you may play “devil’s advocate” to fully develop their offers.

You have to expect some negative reactions. During conflict, it is vital that you get the parties to separate the person from the issues in dispute.

It is also where you need to be aware of your “hot buttons” and other issues that could make you angry if parties show lack of responsibility towards the outcome.

Notes

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The Four Obstacles

All too often negotiators end up like the proverbial sisters who quarrelled over an orange. After they finally agreed to divide the orange in half, the first sister took her half, ate the fruit, and threw away the peel, while the other threw away the fruit and used the peel from her half in baking a cake. All too often negotiators leave money on the table; they fail to reach agreement when they might have, or the agreement they do reach could have been better for each side. Too many negotiations end up with half an orange for each side instead of the whole fruit for one and the whole peel for the other. Why?

As valuable as it is to have many options, people involved in a negotiation rarely sense a need for them. In a dispute, people usually believe that they know the right answer and that their view should prevail. They are equally likely to believe that their offer is reasonable and should be adopted. All available answers appear to lie along a straight line between their position and the other party's. Often the only creative thinking shown is to suggest splitting the difference.

Notes

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In most negotiations there are four major obstacles that inhibit the inventing of an abundance of options:

- ▶ Premature judgment
- ▶ Searching for the single answer
- ▶ The assumption of a fixed pie
- ▶ Thinking that “solving their problem is their problem.”

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Premature Judgment

Inventing options does not come naturally. Not inventing is the normal state of affairs, even when you are outside a stressful negotiation.

Practical negotiation appears to call for practical thinking, not wild ideas.

However, as a mediator, you will through necessity get the parties to explore and analyse, thereby inventing more options. It will not be easy. Especially if they think their position is better than exploring their options. By definition, inventing new ideas, requires the parties to think about things that are not already in their mind. You should therefore consider arranging a brainstorming session that each party can do in private. Such a session can effectively separate hard line haggling from deciding with a more informed approach.

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Brainstorming

In a brainstorming caucus session, people need not fear looking foolish since wild ideas are explicitly encouraged. And in the absence of the other side, each party need not worry about disclosing confidential information or having an idea taken as a serious commitment. There is no one right way to run a brainstorming session. Rather, it should tailor it to their needs and resources. In doing so, they may find it useful to consider the following guidelines.

Before Brainstorming

- Define their purpose. Think of what they would like to walk out of the meeting with. People are so accustomed to meeting for the purpose of reaching agreement that any other purpose needs to be clearly stated
- Analyse their BATNA and WATNA and keep it in the background
- Change the environment. Distinguish the joint session from the private session as much as possible if it's in the interests of the parties to meet with fresh ideas in the ZOPA.

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- The more different a brainstorming session seems from a joint meeting, the easier it is for parties to suspend going into deadlock.
- Design an informal atmosphere. What does it take for you and others to relax and speak informally?
- As the mediator, keep the discussions on track, to make sure everyone gets a chance to speak, to enforce any ground rules, and to stimulate discussion by asking open-ended questions.

During the Brainstorming joint session

- ▶ Seat the parties facing the problem side-by-side. Physically sitting side-by-side can reinforce the mental attitude of tackling a common problem together. People sitting side by side in a semicircle of chairs facing a flip chart, for example, tend to respond to the problem depicted on the chart.
- ▶ Clarify the ground rules, including the no-criticism rule. If the parties have changed their delegates since the opening stage, and do not all know each other, the joint session begins with introductions all around, followed by clarification of the ground rules. Outlaw negative criticism of any kind.

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- ▶ Once the purpose of the session is clear, let their imaginations go. Try to come up with a long list of ideas, approaching the question from every conceivable angle.
- ▶ Record the ideas in full view. Recording ideas on large sheets of paper gives the group a tangible sense of collective achievement, it reinforces the no-criticism rule, it reduces the tendency to repeat, and it helps stimulate other ideas.

Searching For the Single Answer

If the first impediment to creative thinking is premature criticism, the second is premature closure. By looking from the outset for the single best answer, the parties are likely to short-circuit a wiser decision-making process in which they select from a large number of possible answers.

Look through the eyes of different experts

Another way to generate multiple options is for the parties to examine their problem from the perspective of different professions and disciplines. As the mediator you may give information that requires clarity and in which you are an expert,

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however you must distinguish between giving information and giving advice.

As the mediator you may use guidelines and procedures that influence the outcome of the dispute in which the parties will not be able to deviate from. The flexibility of the process must not impact facts, research and proper procedure so as to render any agreement null and void because the final agreement goes against any law, policy or regulation, that exists.

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The Assumption of a Fixed Pie

The third major block to creative problem-solving lies in the assumption of a fixed pie: the less for you, the more for me. Rarely, if ever, is this assumption true. Both sides could be worse off.

Even apart from a shared interest in avoiding joint loss, there almost always exists the possibility of joint gain. This may take the form of developing a mutually advantageous relationship, or of satisfying the interests of each side with a creative solution.

In this situation, each side sees the situation as essentially either/or: either I get what is in dispute or you do. A negotiation often appears to be a fixed-sum game; R5000 more for you on the price of a car means R5000 less for me. Why bother to invent if all the options are obvious and I can satisfy you only at my own expense?

Find common interests between the parties that will benefit them both of agreement is reached. By going into interests and needs the pie is expanded because each party hears what the other party has to offer in return to satisfy their own interests and needs.

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As the mediator, get the parties to gain perspective and place themselves in the other party's position.

Identify Shared Interests

As a mediator, you will always want to look for solutions that will leave the other side satisfied as well.

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Three points about shared interests are you need to inform the parties that are worth remembering:

- ▶ First, shared interests lie latent in every negotiation. They may not be immediately obvious. Ask yourself: Do we have a shared interest in preserving our relationship? What opportunities lie ahead for cooperation and mutual benefit? What costs would we bear if negotiations broke off? Are there common principles, like a fair price, that we both can respect?
- ▶ Second, shared interests are opportunities. To be of use, you need to make something out of them. It helps to make a shared interest explicit and to formulate it as a shared goal. In other words, make it concrete and future-oriented.
- ▶ Third, stressing your shared interests can make the negotiation smoother and more amicable. Passengers in a lifeboat afloat in the middle of the ocean with limited rations will subordinate their differences over food in pursuit of their shared interest in getting to shore.

Notes

SESSION 12

BREAKING DEADLOCK (*IMPASSE*)

Key Learning Points:

- 1) Strategies to get the parties away from reaching deadlock
- 2) Strategies to deal with negative emotions



Getting Past No to Yes

Negotiation expert William Ury has six strategies for getting someone past saying “no” – and therefore getting them on the road to “yes.”



Go to the balcony

Imagine yourself as a spectator to the mediation. If you notice from the outside that the mediation is heated or that parties need to take a break during the joint session, as the person in control of the process you must call a break. This helps you control any emotions that you have (and we all have emotions, we’re human) and also that of the parties. It will also give the parties an opportunity to see alternatives that they hadn’t considered. It can also be a useful way to evaluate your next strategy in the mediation and where you all are in the process.

Step to their side

Here you move into the caucus negotiation sessions. You ask the parties to question where do they see their strengths and weaknesses? How can you modify your negotiating approach to offer each other what the other party wants, and still get what you want? Discuss the expansion of the pie. How can they make the offer more lucrative for the other party to accept? In other words, “what are their needs that are not yours?”



Invite them to step to your side.

Invite each party to see the problem the way the other sees it and to step into their shoes. Or, phrase the problem as you think a third party might see it. Another powerful tactic is to do the unexpected. One way to do this is to ask for their advice on the matter. This gets both parties thinking outside the box.

Build a golden bridge.

Remember, at the very least you want to leave relationships undamaged – ideally, you want to improve them. Act accordingly. Remember that you are building a winnable solution together.

This comes back to building common ground, which we discussed earlier. Set the tone by giving them something (no matter how small) they can say “yes” to.

Make it difficult to say “no.”

Get the parties to communicate where you are coming from in terms of their proposed solutions – give each other facts and figures and educate each other with information. Remember to equalise their points being put forward. One party should not be the only one giving information.

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This is also the time they may want to share their BATNA, if they are strong.

Use high-yield questions

Communication is the key to successful mediation. Keep your questions emotionally neutral and non-judgmental. Bring down the parties defenses with open and leading questions.

Dealing with the *Impasse*(deadlock)



First, take a break so that everyone has time to regroup and re-energize. Then, try these strategies.

Identify hidden interests.

Is there a piece of the puzzle that you are missing as a mediator? Ask open-ended questions as to why a resolution cannot be reached or why a particular solution will not be acceptable.

Deal with unrealistic expectations.

Although both parties probably will not be on the same page at the beginning of the mediation, they need to be in the same book to reach a successful resolution.



Use brainstorming techniques

Creative thinking can help both sides think outside the box to achieve the best solution. Some techniques include:

- ▶ Look at the problem from a different perspective.
- ▶ Paraphrase the other side's position.
- ▶ Review the information presented so far.
- ▶ List it on a flip chart or whiteboard.

Focus on areas of agreement

Try to establish common ground – what do you agree on so far? You can also agree to disagree on the particular stalling point for now and move onto another issue.

Notes

[illegible]



Getting to Yes

Of course, William Ury also has some strategies for what to do once you break the deadlock and get past “no.”

Avoid positional bargaining

We talked about positional bargaining: this is where each side takes a position, argues for it, and makes concessions to reach compromise. This traditional style of negotiating rarely results in win-win solutions.

Separate the person from the problem

Remember to maintain control and remove destructive emotional detachment.

Focus on interests

Keep a positive focus during the bargaining phase. Do not get distracted by emotions, games, and tricks. This is where it helps for the parties to have key information (including their BATNA, ZOPA, main objective, and supporting points) on a reference sheet.

Notes

[illegible]



Work towards a mutual gain solution

We also talked about mutual gains. Look for a solution that benefits both parties. Make this intention clear – it will build goodwill, trust, and common ground.

Insist on using objective criteria

The parties must attempt to have objective criteria to help evaluate solutions.

Notes

[illegible]



Responding to Dishonesty

If you are alert to these possibilities, you have the opportunity to respond by:

- ▶ Challenging them
- ▶ Asking them some questions that can clarify or expose the deception
- ▶ Staying silent and seeing what happens
- ▶ Making a request that parties are reminded of the ground rules and that mediating in good faith is encouraged

Notes

This image shows a full page of primary-ruled paper. It features multiple sets of horizontal dashed lines spaced evenly down the page, providing a guide for handwriting practice. The lines are black and set against a white background. There are no margins, text, or other markings on the page.



Tips for Dealing with Negative Emotions from a party.

- ▶ Listen and allow the party to vent and get their feelings out.
- ▶ Do not interrupt. This is not only rude, but also a real turn-off. (If someone is venting, a good rule of thumb is not to interrupt until the other party starts repeating him/herself.)
- ▶ Try not to use red flag words like “but,” “always,” and, “never.”
- ▶ Point out any suggestions that were made where they agree more which outweighs the differences.
- ▶ Build their self-esteem. Give them sincere praise on what they do well.
- ▶ Make sure your words and your body language are consistent. Do not say, “Take your time,” and then show signs of impatience.

Notes

[illegible]

SESSION 13

CLOSE THE MEDIATION - RESOLUTION

Key Learning Points:

- 1) Moving from generating options to reaching agreement
- 2) Closing the mediation
- 3) Follow-ups





Finalising agreement and closing

What do you do as the mediator in closing:

- Summarise what has been agreed
- Check and understand what has been agreed – no ambiguity
- Check that all the issues have been covered
- Write the agreement down if needed (“action plan” can be useful terminology)
- Consider who else needs to be told about what has been agreed
- Consider what support parties may need
- Agree follow up process
- Reaffirm confidentiality
- Check how they are feeling
- Thank the parties for their efforts.

Notes

[illegible]



The Mediation Process Resolved

Having generated a range of mutually acceptable outcomes, the parties must evaluate and road- test these options. In other words, to be effective, the agreement must be put into action. It needs to be reduced to writing and all other forms and documents needs to be completed.

Formalising their agreements provides an important symbolic end to the conflict and increases the parties' commitment to the agreement. If there are any formal procedures to put the agreement to a higher authority, you may use your organisations guidelines and regulations to do so.

Depending on your instructions as a mediator to record the mediation proceedings, you may at the end of each session compile a mediation summary and at the end of the mediation process the full settlement agreement will be drawn up based on the mediation summaries.

The parties can consult with their respective legal representatives if they have any on how to move this agreement further to formalise it, for example court orders, contracts, amendments.

Notes

[illegible]



Formal Agreements

These are some tips to make sure the closing process is fair to all.

- If possible, have a neutral lawyer prepare the document to be signed.
- Read the document over thoroughly, clause by clause. Ask if anything that is unclear to the parties.
- Ensure that the parties have the signed, original copies of all documents.
- Follow due process on keeping these agreements on file.

Notes

[illegible]



Building a Sustainable Agreement

In this age of complex life and work arrangements, an agreement can be said to reflect the reality of the business. An agreement cannot be a rigid reflection of ineffective negotiations; rather, it must reflect the reality of business and economic cycles, industries, and real issues that people face. It must also reflect the multiple aspects of the stake-holders who both provide input, and are affected by the results. An agreement also cannot focus on one aspect of the business when the business impacts other industries, cultures, or linguistic groups.

In developing a sustainable agreement, the parties must ensure that, first of all, the organisations that they negotiate on behalf of are interested in having an agreement. Parties must also ensure that negotiating organisations will enforce and take part in the terms of that agreement. If the agreement cannot stand on its own, and the parties who sign it refuse to use it, then the paper it is printed on is useless.

Notes

[illegible]



Obtaining Everyone's Perspective

A sustainable agreement really does incorporate feedback from all stakeholders. Although we will never always agree with other people, and although we can write an agreement much more quickly than we can negotiate the terms of one, an agreement is just that, an agreement.

Gathering perspective is something that can take place throughout the negotiation process. It begins in the research phase, where the negotiator considers the needs of the members of an organisation in conjunction with the strategic vision and mission of the negotiation. This does not mean that everyone will get what they want in an agreement; rather, it means that all points of view are considered. There is no point in entering a dispute resolution process and reaching an agreement that ignores a section of stakeholders, proposed guidelines and procedures or breaks the law. Gathering perspective can be a considerable under-taking, depending on the size and scope of the operation. This is one area where outside resources can be utilised (an outside firm conducting employee satisfaction surveys, for example).

Notes

[illegible]

agreement in principle took considerable effort to achieve, this can be a good time for a celebration of the collaboration that has taken place up to this point.

Getting Consensus

Before an agreement is signed, it is important to have consensus for agreement among the parties. Consensus can be difficult during tough negotiations; generally, the more stakeholders taking part in the process, the more difficult it is to reach consensus. Know that not all people will ever agree on all items, and that you are trying to negotiate the best terms you can. Persuasion, that ability to have people recognise the value in what we are saying, is an exceptionally valuable communication skill for a negotiator.

As the mediator, you will also have to secure the commitment to actually carry out the agreement.

The Follow Up

If there is a need or an opportunity to do so, you may follow up with the parties as to whether the agreement has been realistically implemented.

Notes

This image shows a full page of handwriting practice paper. It features multiple sets of three horizontal dashed lines, which are commonly used to guide letter height and placement for children learning to write. The lines are evenly spaced and extend across the width of the page. There is no text or other markings on the paper.



You may also follow-up on the relationship and how the communication style between the parties has changed.

In Conclusion

"Win-Win" dispute resolution is achieved by confrontation of the issues and the use of problem-solving to reconcile differences. This positive approach involves recognition by all conflicting parties that something is wrong and needs attention. When success is achieved in problem-solving, the conflict has truly been resolved. Win-win conditions eliminate reasons for continuing or resurrecting the conflict, since nothing has been avoided or suppressed. All relevant issues are raised and openly discussed.

The ultimate test for a win-win solution is whether or not the conflicting parties are willing to say to each other:

- ▶ "We want a solution which achieves your goals and my goals and is acceptable to both of us."
- ▶ "It is our collective responsibility to be open and honest about facts, opinions, and feelings."

Notes

Recommended Reading List

1. Carnegie, D. *How to Win Friends and Influence People*. Vermilion, 2006
2. Cialdini, R. *Influence: The Psychology of Persuasion*. Collins, 2006.
3. Covey, S. *The 7 Habits of Highly Effective People*. Simon & Schuster 2004.
4. Fisher, R, and Ury, W. *Getting to Yes*. Houghton Mifflin, 1992.
5. Fisher, R and Shapiro, D. *Beyond Reason - Using Emotions as You Negotiate*, Viking - Penguin Group, 2005
6. Gladwell, M. *Blink*. Back Bay Books, 2007.
7. Grant, A. *Originals: How Non-Conformists Change the World*, Penguin Group, 2016
8. Harvard Business School. *Harvard Business Essentials Guide to Negotiation*. Harvard Business School Publishing, 2003.
9. Malhotra, D and Bazerman M. *Negotiation Genius*, Bantam Books, 2007
10. McCormack, M. *On Negotiating*. Dove Books, 1997.
11. McRae, B. *Negotiating and Influencing Skills*. Sage Publications, 1997.
12. Mnookin, R. *Bargaining with the Devil: When to Negotiate, When to Fight*. Simon & Schuster, 2011
13. Shell, G. R. *Bargaining for Advantage: Negotiation Strategies for Reasonable People (2nd Edition)*. Penguin, 2006.
14. Ury, W. *Getting Past No*. Bantam, 1993.

Sources online:

<http://www.kilmanndiagnostics.com/overview-thomas-kilmann-conflict-mode-instrument-tki>

https://www.adelaide.edu.au/writingcentre/learning_guides/learningGuide_activeListening.pdf

RESOURCE MATERIAL



AFSA

The Arbitration Foundation of Southern Africa
NPC

LETTER RULES BOARD FOR COURTS OF LAW



The Arbitration Foundation of Southern Africa
NPC

Arbitration Foundation of Southern Africa 1st Floor, Grindrod Tower,
8a Protea Place, Sandton South Africa | +27 11 320-0600 | selina@arbitration.co.za | <https://arbitration.co.za/>

[BACK TO DOCUMENT CONTENT](#)



**RULES BOARD FOR COURTS OF LAW
REPUBLIC OF SOUTH AFRICA**

2nd Floor, Centre Walk East Tower, 266 Pretorius Street, PRETORIA

16 April 2024

Our ref: MCele (MCR 72 URC 41A)

Your ref:

Per: e-mail

Dear Sir/Madam,

PROPOSED AMENDMENTS TO MAGISTRATES' COURTS RULE 72 (NOTICE AGREEING TO OR OPPOSING MEDIATION): HARMONISATION OF THE MAGISTRATES' COURTS MEDIATION RULES WITH UNIFORM RULE 41A

The Rules Board for Courts of Law (Rules Board) has considered aligning the provisions of Magistrates' Courts Rule 72 with the provisions of Uniform Rule 41A(2), which regulate notice agreeing to or opposing mediation in the Magistrates' Courts and the High Court, respectively.

During 2023, and arising out of operation of Uniform Rule 41A in practice and out of certain judgments, the Rules Board considered that certain amendments to the rule were either necessary or at least desirable for achieving the objects of mediation and the rule.

For the reason mentioned above, the Rules Board considered that in urgent applications there is no provision for what should occur if a party is unable to comply with the provisions of subrule (2) of Uniform Rule 41A, in particular the notice required, especially in applications launched in terms of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998).

In addressing the above issue, the Rules Board considered that Uniform Rule 41A should be amended by inserting a proviso to subrule (2) to indicate that "in urgent applications the court or a judge may dispense with compliance with paragraphs (a) and (b).".

As part of its rule review function, the Rules Board has considered harmonizing the equivalent provisions in the Magistrates' Courts Mediation Rules.

Magistrates' Courts Rule 72:

- (a) The amendments proposed to MCR 72 are to subrule (2).
- (b) MCR 72 is proposed to be amended by inserting a proviso to subrule (2) of MCR 72 which would allow the court or a magistrate in urgent applications to dispense with compliance with subrules (1) and (2).

Board members appointed in terms of Section 3 of the Rules Board for Courts of Law Act 107 of 1985

Justice N Dambuza (Chairperson) | Justice N Mabindla-Bogwana (Vice Chairperson) | Adv S Jikela SC | Ms J Wessels | Adv K Kollapen | Mr M Maliwa | Ms N S Khanyile | Mr R R Titus | Mr V P Maluleke | Professor T Broodryk | Adv P Setati | Mr O M Krieling | Mr J Balkishun

In addition, the Rules Board considered repealing MCR 79 which provides for costs. The Rules Board considered that the provisions of MCR 79 offend the voluntary nature and confidentiality of the mediation process.

Draft amended MC Mediation Rules are attached for consideration. **[ANNEXURE A]**

Uniform Rule 41A:

Regarding amendments to URC 41A, the Rules Board considered that:

- (a) The provisions of subrule (9)(b) which is the equivalent of MCR 79, should be similarly repealed; and
- (b) The existing subrule (9)(a) will become subrule (9).

Draft amended Uniform Rule 41A is attached for consideration. **[ANNEXURE B]**

As part of its rule-making and consultation process, the Rules Board invites your comments on the draft amendments proposed to the Magistrates' Courts Mediation Rules and Uniform Rule 41A marked Annexure A and B, respectively.

Your comments and inputs should be submitted to the Secretariat of the Rules Board by no later than **30 June 2024** and may be sent via hand delivery, post or email to:

Physical: 2nd Floor, Centre Walk East Tower, 266 Thabo Sehume (Andries) Street, Pretoria

Postal: P.O. Box 13106, The Tramshed, 0126

Email: MuCele@justice.gov.za

The Rules Board looks forward to receiving your inputs (if any) and thanks you for same.

Yours sincerely,



F NJOBE

Secretary: Rules Board for Courts of Law

Email: FNjobe@justice.gov.za

www.justice.gov.za

Board members appointed in terms of Section 3 of the Rules Board for Courts of Law Act 107 of 1985

Justice N Dambuza (Chairperson) | Justice N Mabindla-Bogwana (Vice Chairperson) | Adv S Jikela SC | Ms J Wessels | Adv K Kollapen | Mr M Maliwa | Ms N S Khanyile | Mr R R Titus | Mr V P Maluleke | Professor T Broodryk | Adv P Setati | Mr O M Krieling | Mr J Balkishun

RULES BOARD FOR COURTS OF LAW ACT, 1985 (ACT NO. 107 OF 1985)



The Arbitration Foundation of Southern Africa
NPC

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[BACK TO DOCUMENT CONTENT](#)

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

NO. R. 3371

5 May 2023

RULES BOARD FOR COURTS OF LAW ACT, 1985 (ACT NO. 107 OF 1985)

AMENDMENT OF RULES REGULATING THE CONDUCT OF THE PROCEEDINGS OF THE
MAGISTRATES' COURTS OF SOUTH AFRICA

The Rules Board for Courts of Law has, under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), and with the approval of the Minister of Justice and Correctional Services, made the rules in the Schedule.

SCHEDULE

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from the existing enactments.

_____ Words underlined with a solid line indicate insertions into the existing enactments.

Definition

1. In this Schedule the "Rules" means the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa, published under Government Notice No. R. 740 of 23 August 2010 as amended by Government Notice Nos. R. 1222 of 24 December 2010, R. 611 of 29 July 2011, R. 1085 of 30 December 2011, R. 685 of 31 August 2012, R. 115 of 15 February 2013, R. 263 of 12 April 2013, R. 760 of 11 October 2013, R. 183 of 18 March 2014, R. 215 of 28 March 2014, R. 507 of 27 June 2014, 571 of 18 July 2014, R. 5 of 9 January 2015, R. 32 of 23 January 2015, R. 33 of 23 January 2015, R. 318 of 17 April 2015, R. 545 of 30 June 2015, R. 2 of 19 February 2016, R. 1055 of 29 September 2017, R. 1272 of 17 November 2017, R. 632 of 22 June 2018, R. 1318 of 30 November 2018, R. 842 of

31 May 2019, R. 1343 of 18 October 2019, R. 107 of 7 February 2020, R. 858 of 7 August 2020, R. 1156 of 30 October 2020, R. 1602 of 17 December 2021 and R. 2434 of 2 September 2022.

Amendment of Chapter 2 of Rules

2. Chapter 2 of the Rules is hereby amended—

- (a) by the substitution for rules 70, 71, 72, 73, 74, 75, 76, 77, 78 and 79, respectively, of the following rules:

“70. Purpose of rules

The purpose of the rules in this Chapter is—

- (a) to provide for the parties to litigation the opportunity to submit the dispute to mediation, either of their own accord or upon enquiry by the court;
(b) to regulate the referral to mediation where parties agree to submit the dispute to mediation;
and
(c) to regulate the further conduct of litigation where the dispute is referred to mediation.

71. Definitions

For the purposes of this Chapter—

‘action’ means litigation commenced by the issue of summons;

‘application’ means litigation commenced by notice of motion;

‘dispute’ means the subject matter of litigation between parties, or an aspect thereof;

‘litigation’ means court proceedings commenced by action or application proceedings;

‘mediation’ means a voluntary process entered into by agreement between the parties to a dispute, in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute.

72. Notice agreeing to or opposing mediation

(1) In every new action or application, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.

(2) A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or

answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.

(3) The notices referred to in subrules (1) and (2) shall be substantially in accordance with Form 60A and Form 60B of Annexure 1 and shall clearly and concisely indicate the reasons for such party's belief that the dispute is or is not capable of being mediated.

(4) Subject to the provisions of rule 79, the notices referred to in this rule shall be of a without prejudice nature and shall not be filed with the clerk or registrar of the court.

73. Referral to mediation

(1) Notwithstanding the provisions of rule 72, the parties may, at any stage before judgment, agree to refer the dispute between them to mediation: Provided that where the trial or opposed application has commenced, the parties shall first obtain the leave of the court.

(2) A judicial officer or the court may at any stage before judgment enquire into and allow the parties to consider mediation, whereupon the parties may, if they agree, refer the dispute to mediation.

(3) Where the parties agree to refer the dispute to mediation, either upon delivery of the notices referred to in rule 72, or in terms of this rule, the parties shall—

- (a) deliver a joint signed minute recording their election to refer the dispute to mediation; and
- (b) enter into an agreement to mediate, prior to the commencement of mediation proceedings.

74. Time limits

(1) The time limits prescribed by the rules in Chapter 1 for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party to the litigation, from the date of signature of the minute referred to in rule 73(3)(a), to the time of conclusion of mediation: Provided that any party to the litigation who considers that the suspension of the prescribed time limits is being abused, may apply to the court for the upliftment of the suspension of the prescribed time limits.

(2) The process of mediation shall be concluded within 30 days from the date of signature of the minute referred to in rule 73(3)(a): Provided that a judicial officer or the court may, on good cause shown by the parties, extend such time period for completion of the mediation process.

75. Multiple parties and issues

(1) Where there are multiple parties to the litigation, some of whom are agreeable to mediation and some of whom are not, parties who are agreeable to mediation may proceed to mediation notwithstanding any other party's refusal to mediate.

(2) The time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step, as prescribed by the Rules in Chapter 1, shall be suspended for every party, from the date of signature of the minute referred to in rule 74(1) to the time of conclusion of mediation by the parties who have elected to mediate: Provided that any party to the litigation who considers that such suspension of time limits is being abused, may apply to the court for the upliftment of such suspension.

(3) In any matter where there are multiple issues, the parties may agree that some issues be referred to mediation and that the issues remaining in dispute may proceed to litigation.

(4) If any issue remains in dispute after mediation, the parties may proceed to litigation on such issue in dispute.

76. Confidentiality and admissibility

Except as provided by law or discoverable in terms of the rules in Chapter 1 or as agreed between the parties, all communications and disclosures, whether oral or written, made at mediation proceedings, shall be confidential and inadmissible in evidence.

77. Conclusion of mediation

(1) Upon conclusion of mediation, the parties who engaged in mediation shall, by notice inform the clerk or registrar of the court and all other parties that mediation has been completed.

(2) Notwithstanding the failure of parties who have engaged in mediation to deliver the notice referred to in subrule (1), the suspension of the time limits referred to in rule 74(1) shall lapse, unless a judicial officer or a court, upon application, extends any time limit and notice thereof has been given to all parties to the litigation within five days of the grant of such extension.

(3) Subject to rule 74(2), mediation shall be deemed to be completed within 30 days from the date of signature of the joint minute referred to in rule 73(3)(a), from which date the suspension of the time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step referred to in rule 74(1) shall lapse: Provided that where mediation is completed before the aforesaid period of 30 days, the parties who engaged in mediation shall deliver a notice, contemplated in subrule (1), indicating that mediation has been completed.

(4) The parties who engaged in mediation and the mediator who conducted the mediation shall, within five days of the conclusion of mediation, issue a joint minute indicating—

(a) whether full or partial settlement was reached or whether mediation was not successful; and

(b) the issues upon which agreement was reached and which do not require hearing by the court.

(5) It shall be the joint responsibility of the parties who engaged in mediation to file with the clerk or registrar of the court, the minute referred to in subrule (4).

(6) No offer or tender made without prejudice in terms of this rule shall be disclosed to the court at any time before judgment has been given.

(7) Where the parties have reached settlement at mediation proceedings, the provisions of rule 27 in Chapter 1 shall apply *mutatis mutandis*.

78. Fees of mediator

Unless the parties agree otherwise, liability for the fees of mediator shall be borne equally by the parties participating in mediation.

79. Costs

When an order for costs of the action or application is considered, the court may have regard to the notices referred to in rules 72(1) and 72(2) or to any offer or tender referred to in rule 77(6) and any party shall be entitled to bring such notices or offer or tender to the attention of the court."
and

(b) by the repeal of rules 80, 81, 82, 83, 84, 85, 87 and 88.

Amendment of Annexure 1 to Rules

3. Annexure 1 to the Rules is hereby amended by the insertion after Form No. 59 of the forms contained in the Annexure hereto.

Repeal of Annexure 3 to Rules

4. Annexure 3 to the Rules is hereby repealed.

Commencement

5. These rules come into operation on **9 June 2023**.

ANNEXURE**"No. 60A – NOTICE OF AGREEMENT OR OPPOSITION TO MEDIATION IN TERMS OF RULE 72(3)"***** For use in the District Court**

IN THE MAGISTRATES'S COURT FOR THE DISTRICT OF.....

HELD AT..... Case No.of 20.....

In the matter between:

.....Plaintiff/Applicant

.....Defendant/Respondent

Please take notice that the Plaintiff/Applicant/Defendant/Respondent agrees to/opposes to the referral of this matter to mediationPlaintiff/Applicant/Defendant/Respondent does so for the following reasons:

Dated at on this day of 20
Plaintiff/Applicant/AttorneyDefendant/Respondent/AttorneyAddress:"Without prejudice and not to be filed in court"

No. 60B – NOTICE OF AGREEMENT OR OPPOSITION TO MEDIATION IN TERMS OF RULE 72(3)*** For use in the Regional Court**

IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF

HELD AT.....Case No.of 20.....

In the matter between

.....Plaintiff/Applicant

.....Defendant/Respondent

Please take notice that the Plaintiff/Applicant/Defendant/Respondent agrees to/opposes to the referral of this matter to mediationPlaintiff/Applicant/Defendant/Respondent does so for the following reasons:

Dated at _____ on this _____ day of _____ 20 _____

Plaintiff/Applicant/AttorneyDefendant/Respondent/AttorneyAddress:"Without prejudice and not to be filed in court" .



**ISAZISO SIKAHULUMENI
UMNYANGO WEZOBULUNGISWA NOKUTHUTHUKISWA KOMTHETHOSISEKELO**

No. R.....

.....2023

**IBHODI LEMITHETHO LOMTHETHO WEZINKANTOLO ZOMTHETHO, WE-1985
(UMTHETHO 107 WE-1985)**

**UKUCHIBITSHIYELWA KWEMITHETHO ELAWULA UKUQHUTSHWA KOKUQULWA
KWAMACALA KWEZINKANTOLO ZIKAMANTSHI ZASENINGIZIMU AFRIKA**

Ibhodi Lemithetho Yezinkantolo Zomthetho, ngaphansi kwesigaba sesi-6 soMthetho Webhodi Lemithetho Yezinkantolo Zomthetho, we-1985 (uMthetho 107 we-1985), futhi ngemvume kaNgqongqoshe Wezobulungiswa kanye Nokuhlunyeleliswa Kwezimilo, lenze imithetho kwiSheduli.

ISHEDULI

AMANOTHI ACHAZAYO AJWAYELEKILE:

[] Amagama akubakaki abayisikwele abagqamile amele okukhishiwe emthethweni osebenzayo.

_____ Amagama adwetshelwe ngomugqa amele okufakiwe emthethweni osebenzayo.

Incazelo

1. Kule Sheduli "Imithetho" ichaza Imithetho elawula Ukuqhutshwa kokuqulwa kwamacala kwezinkantolo zikaMantshi zaseNingizimu Afrika, eshicilelwe ngaphansi Kwesaziso sikaHulumeni No.R.740 sangomhlaka-23 kuNcwaba 2010, njengoba ichitshiyelwe Isaziso sikaHulumeni No.R.1222 sangomhlaka-24 kuZibandlela 2010, R. 61 1 sangomhlaka- 29 kuNtulikazi 2011, R. 1085 sangomhlaka- 30 kuZibandlela 2011, R. 685 sangomhlaka-31

kuNcwaba 2012, R. 115 sangomhlaka-15 kuNhlolanja 2013, R. 263 sangomhlaka-12 kuNdasa 2013, R. 760 sangomhlaka-11 kuMfumfu 2013, R. 183 sangomhlaka-18 kuNdasa 2014, R. 215 sangomhlaka-28 kuNdasa 2014, R. 507 sangomhlaka- 27 kuNhlangulana 2014, 571 sangomhlaka- 18 kuNtulikazi 2014, R. 5 sangomhlaka- 9 kuMasingana 2015, R. 32 sangomhlaka 23 kuMasingana 2015, R. 33 sangomhlaka- 23 kuMasingana 2015, R. 318 Sangomhlaka-17 kuMbasa 2015, R. 545 sangomhlaka-30 kuNhlangulana 2015, R. 2 sangomhlaka 19 kuNhlolanja 2016, R. 1055 sangomhlaka- 29 September 2017, R. 1272 sangomhlaka- 17 kuLwezi 2017, R. 632 sangomhlaka- 22 kuNhlangulana 2018, R. 1318 sangomhlaka- 30 November 2018, R. 842 sangomhlaka-31 kuNhlabi 2019, R. 1343 sangomhlaka- 18 kuMfumfu 2019, R. 107 sangomhlaka-7 kuNhlolanja 2020, R. 858 sangomhlaka- 7 kuNcwaba 2020, R. 1156 sangomhlaka-30 kuMfumfu 2020, R. 1602 sangomhlaka-17 kuZibandlela 2021 kanye nesaziso R. 2434 sangomhlaka-2 kuMandulo 2022.

Ukuchitshiyelwa kweSahluko sesi-2 Semithetho.

2. Isahluko sesi-2 seMithetho sichitshiyelwe—

(a) ngokufaka esikhundleni semithetho 70, 71, 72, 73, 74, 75, 76, 77, 78 kanye no 79, ngokulandelana, kwalemithetho elandelayo:

"70. Inhloso yemithetho

■ Inhloso yemithetho kulesi Sahluko —

■ (a) ukuhlinzekela abathintekayo ekuqulweni kwecala ithuba lokuhambisa ingxabano ukuba ilanyulwe, lokhu kungenzeka ngokuthanda kwabo noma ngokucelwa inkantolo:

■ (b) ukulawula ukudluliswa kwamacala ukuba ayolanyulwa, lapho abathintekayo bevumelana nalokho kanye

■ (c) nokuphinda kuqhutshekwe nokulawula ukuqulwa kwecala lapho ingxabano idluliselwa ukuyolanyulwa.

71. Izincazelo

Ngezinhlalo zalesi Sahluko—

'isinyathelo' kusho ukuqulwa kwecala okuqalwa ngokukhipha amasamanisi:

'isicelo' kusho ukuqulwa kwecala okuqalwa ngesaziso sesiphakamiso:

'ingxabano' kushiwo indaba yokumangalelana phakathi kwezinhlangothi, noma ingxenye yalokho:

'icala lombango' kusho ukuqulwa kwecala enkantolo okuqalwe ngenxa yesinyathelo noma ngenxa yesicelo:

'ukulamula' kusho inqubo yokuzithandela okungenwa kuyo ngokuvemelana phakathi kwabathintekayo engxabanweni, lapho umuntu ongachemi futhi ozimele, umxazululi, esiza abathintekayo ekuxazululeni ingxabano phakathi kwabo, noma ukubona izindaba okungavunyelwana ngazo, noma abheke la bengathobelana khona, noma alethe izindlela ezahlukeni zokuxazulula ingxabano, noma ukucacisa okubalulekile, ngokuqondisa izingxoxo phakathi kwezinhlangothi kanye nokubasiza ezingxoxweni zabo ukuxazulula ingxabano.

[1] Kuso sonke isinyathelo esisha noma isicelo, ummangali noma umfakisicelo kufanele, kanye namasamanisi noma amasamanisi ahlanganisiwe noma isaziso sesiphakamiso, anikeze ummangalelwa ngamunye noma umphenduli isaziso esibonisa ukuthi lowommangali noma umfakisicelo uyavumelana noma uyaphikisana nokudluliselwa kwengxabano kumlamuli.

(2) Ummangalelwa noma umphenduli kufanele, lapho eletha isaziso senhloso yokuzivikela noma isaziso senhloso yokuphikisa, noma nganoma isiphi isikhathi ngemva kwalokho, kodwa kungakapheli ukulethwa kwesicelo noma incwadi efungelwe yokuphendula, anikeze ummangali ngamunye noma umfakisicelo noma abameli bommangali noma bomfakisicelo, isaziso esibonisa ukuthi lowo mmangalelwa noma umphenduli uyavumelana noma uyaphikisana nokudluliselwa kwengxabano kumlamuli.

(3) Izaziso okukhulunywe ngazo ezigatshaneni zomthetho woku-(1) nowesi-(2) ziyohambisana kakhulu neFomu 60A kanye neFomu 60B lesiThasiselo 1 futhi zizokhombisa ngokucacile nangokufingqiwe izizathu zenkolelo yalolo hlangothi lokuthi ingxabano izokwazi noma ngeke ikwazi ukuxazululeka.

(4) Ngokuya ngemihlinzeko yomthetho wama-79, izaziso okukhulunywe ngazo kulo mthetho ziyoba ngezohlobo olungachemi futhi angeke zifakwe kumabhalane noma kunobhala wenkantolo.

73. Ukudluliselwa ukuyoxazululwa

(1) Ngaphandle kwemihlinzeko yomthetho wama-72, abathintekayo, nganoma yisiphi isikhathi ngaphambi kokuqulwa kwecala, bangavuma ukudlulisela ingxabano yabo kumlamuli: Kuncike ekutheni lapho ukuqulwa kwecala noma isicelo esisiphikiswayo sesiqalile, abathintekayo bayoqala bathole invume enkantolo.

(2) Isikhulu sezomthetho noma inkantolo kunoma yisiphi isigaba ngaphambi kwesinqumo singaphenya futhi sivumele izinhlangothi ukuthi zikucabange ukulamula, lapho okungathi uma izinhlangothi zivumelana, ziyidlulisele ingxabano yazo kumlamuli.

(3) Lapho izinhlangothi zivuma ukudlulisela ingxabano kumlamuli, noma ngemva kokulethwa kwezaziso okukhulunywe ngazo kumthetho wama-72, noma ngokwalo mthetho, izinhlangothi kufanele—

(a) balethe iminithi abalisayine ndawonye eliveza isinqumo sabo sokudlulisela ingxabano kumlamuli: kanye

(b) bangene esivumelwaneni sokulamula, ngaphambi kokuqala kwezinqubo zokulamula.

74. Imikhawulo yesikhathi

(1) Imikhawulo yesikhathi ebekwe yimithetho eSahlukweni soku-1 yokulethwa kwezicelo nezaziso kanye nokufakwa kwezincwadi ezifungelwe noma ukuthatha isinyathelo kwanoma yisiphi isinyathelo kuzo zonke izinhlangothi ekuqulweni kwecala, kusukela ngosuku lokusayinwa kweminithi okukhulunywe ngalo emthethweni wama-73(3)(a), kuze kuphothulwe ukulamula: Kuncike ekutheni noma yiliphi uhlangothi ecaleni elibona ukuthi ukumiswa kwemikhawulo yesikhathi enqunyiwe kusetshenziswe kabi, lingafaka isicelo enkantolo sokuthi kuphakanyiswe ukumiswa imikhawulo yesikhathi enqunyiwe.

(2) Inqubo yokulamula iyophothulwa zingakapheli izinsuku ezingama-30 kusukela osukwini okwasayinwa ngalo iminithi okukhulunywe ngalo kumthetho wama-73(3)(a): Kuncike ekutheni isikhulu sezomthetho noma inkantolo, ngesizathu esiphusile esikhonjiswe yizinhlangothi, ingaselula isikhathi sokuphothulwa kwenqubo yokulamula.

75. Izinhlangothi eziningi nezinkinga

(1) Lapho kukhona izinhlangothi eziningi ecaleni, ezinye zazo zivumelana nokulamula udaba kanti ezinye ziphikisana nalokho, izinhlangothi ezivumayo ukulamula zingaqhubekela phambili nokulamula naphezu kokwenqaba kwanoma yiluphi olunye uhlangothi.

(2) Imikhawulo yesikhathi enqunyelwe ukulethwa kwezikhalazo kanye nezaziso kanye nokufakwa kwezincwadi ezifungelwe noma ukuthathwa kwanoma yisiphi isinyathelo, njengoba kunqunywe yiMithetho eSahlukweni soku-1, iyomiswa kuwo wonke amaqembu, kusukela ngosuku lokusayinwa kweminithi okukhulunywe ngakho kumthetho wama-74(1) ngesikhathi sokuphothulwa kokulamula yizinhlangano

ezikhethe ukulamula udaba lwazo: Kuncike ekutheni noma yiliphi uhlangothi ecaleni elibona ukuthi lokho kumiswa kwemikhawulo yesikhathi kusetshenziswe kabi, lingafaka isicelo enkantolo sokuthi kuphakanyiswe ukumiswa imikhawulo yesikhathi enqunyiwe okunjalo.

(3) Kunoma iluphi udaba lapho kunezindaba eziningi, izinhlangothi zingavumelana ukuthi ezinye izindaba ziyiswe kumlamuli nokuthi izindaba ezisele zingaxazululiwe zingaqhubekela enkantolo.

(4) Uma noma yiluphi udaba luhlala luyingxabano ngemva kokulamula, abathintekayo bangaqhubeka nokumangalelana ngalolo daba abaxabana ngalo.

76. Ubumfihlo nokwemukelwa

Ngaphandle kokuthi kuhlinzekwe ngumthetho noma okutholakala ngokwemithetho eseSahlukweni soku-1 noma njengoba kuvunyelwene phakathi kwezinhlangothi, konke ukuxhumana nokudalula, noma ngomlomo noma ngokubhaliwe, okwenziwa ezinqubweni zokulamula, kuyoba kuyimfihlo futhi kungamukeleki ebufakazini.

77. Ukuphothula ukulamula

(1) Ngemva kokuphothula ukulamula, izinhlangothi ezibambe iqhaza ekulamuleni kufanele, ngesaziso, zazise umabhalane noma unobhala wenkantolo kanye nazo zonke ezinye izinhlangothi ukuthi ukulamula sekuphothuliwe.

(2) Naphezu kokwehluleka kwezinhlangothi ezibambe iqhaza ekulamuleni ukuhambisa isaziso okukhulunywe ngaso esigatshaneni somthetho soku-(1), ukumiswa kwemikhawulo yesikhathi okukhulunywe ngayo kumthetho wama-74(1) kuyophelelwa yisikhathi, ngaphandle uma isikhulu sezomthetho noma inkantolo, ngemva kwesicelo, selula noma yisiphi isikhathi esinqunyiwe futhi isaziso salokho sinikezwe bonke abathintekayo ecaleni zingakapheli izinsuku ezinhlanu kusukela ngaleso sikhathi seluliwe.

(3) Ngokuncika kwisigatshana somthetho wama-74(2), ukulamula kuyothathwa ngokuthi kuqediwe zingakapheli izinsuku ezingama-30 kusukela osukwini lokusayinwa kweminithi elihlanganyelwe okukhulunywe ngalo kumthetho wama-73(3) (a), okusukela ngalo usuku ukumiswa kwemikhawulo yesikhathi enqunyelwe ukulethwa kwezicelo nezaziso kanye nokufakwa kwezincwadi ezifungelwe noma ukuthathwa kwanoma yisiphi isinyathelo okukhulunywe ngaso kumthetho wama-74(1) kuzophelelwa yisikhathi: Kuncike ekutheni lapho ukulamula sekuphothuliwe ngaphambi kwesikhathi esishiwo ngenhla esiyizinsuku ezingama-30, izinhlangothi ezibambe iqhaza ekulamuleni zizoletsa isaziso, esihlongozwe kwisigatshana somthetho woku-(1), esibonisa ukuthi ukulamula sekuphothuliwe.

(4) Izinhlangothi ezibambe iqhaza ekulamulweni kanye nomlamuli olamulile kufanele, zingakapheli izinsuku ezinhlanu kuphothulwe ukulamula, bakhiphe iminithi elihlanyanyelwe elivezayo—

(a) Ukuthi ingabe kufinyelelwe esivumelwaneni esigcwele noma ingxenye noma ukulamula akuphumelelanga' futhi

(b) izindaba okwavunyelwana ngazo futhi ezingadingi ukudingidwa enkantolo.

(5) Kuyoba umsebenzi wezinhlangothi zonke ebeziyinxenye yokuxazululwa ukunika umabhalane noma unobhala wenkantolo iminithi okukhulunywe ngalo esigatshaneni somthetho sesi-(4).

(6) Akukho mnikelo noma ithenda elenziwe ngaphandle kokuchema ngokwalo mthetho elizodalulwa enkantolo ngesikhathi esimisiwe ngaphambi kokuba kukhishwe isinqumo.

(7) Lapho izinhlangothi sezifinyelele esivumelwaneni ezinqubeni zokulamula, imihlinzeko yomthetho wama-27 eSahlukweni soku-1 izosebenza ngokufanele ngokuhambisana nezinguquko.

78. Izindleko zomlamuli

Ngaphandle uma izinhlangothi zivumelana ngenye indlela, isikweletu semali yomlamuli sizothwalwa ngokulinganayo izinhlangothi zonke ezibambe iqhaza ekulamuleni.

79. Izindleko

Lapho umyalelo wezindleko zesinyathelo noma isicelo ucutshungulwa, inkantolo inganikeza izaziso okukhulunywe ngazo emithethweni wama-72(1) kanye nowama-72(2) noma kunoma yisiphi isithembiso noma ithenda okukhulunywe ngalo kumthetho wama-77(6), futhi noma yiluphi uhlangothi liyoba nelungelo lokuveza lezo zaziso noma i-offer noma ithenda enkantolo."; futhi

(b) ngokuchithwa kwemithetho 80, 81, 82, 83, 84, 85, 87 and 88.

Ukuchitshiyelwa kweSithasiselo 1 seMithetho

3. Ngakho-ke isithasiselo 1 seMithetho siyachitshiyelwa ngokushutheka ngemuva kweFomu 59 lamafomu aqukethwe eSithasiselweni lapha.

Ukuchithwa kweSithasiselo 3 seMithetho

4. Isithasiselo 3 seMithetho ngalokhu sichithiwe.

Ukuqala

5. LeMithetho iqala ukusebenza ngo **9 uNhlangulana 2023**.

ISITHASISELO**"INOMBOLO 60A - ISAZISO SESIVUMELWANO NOMA UKUPHIKISANA NOKULAMULA NGOKOMTHETHO WAMA-72(3)***** Kuzosetshenziswa eNkantolo Yesifunda****ENKANTOLO YEZIMANTSHI ESIFUNDENI SASE-****IBANJELWE E-****Inombolo yecala. yango-20****Odabeni oluphakathi kwa:****.....Ummangali/Umfakisicelo****.....Ummangalelwa/Umphenduli****Sicela uqaphele ukuthi ummangali/umfakisicelo/ummangalelwa/umphenduli uyavumelana/uyaphikisana nokudluliselwa kwalolu daba ukuyolanyulwa****Ummangali/Umfakisicelo/Ummangalelwa/Umphenduli wenza njalo ngenxa yalezi zizathu ezilandelayo:**

 Ifakwe usuku e _____ mhlaka _____ enyangeni ka _____, 20 _____

Ummangali/Umfakisicelo/Ummeli
Ummangalelwa/Umphenduli/Ummeli
Ikheli:

"Ngaphandle kokuchema futhi akufanele ifakwe enkantolo"

INOMBOLO 60B - ISAZISO SESIVUMELWANO NOMA UKUPHIKISANA NOKULAMULA NGOKOMTHETHO WAMA-72(3)

*** Kuzosetshenziswa eNkantolo Yesifunda**

ENKANTOLO YESIFUNDA OPHIKWENI LWESIFUNDA SE-

IBANJELWE E. _____ ...Inombolo yecala. _____ . yango-20

Odabeni phakathi kwa:

.....Ummangali/Umfakisicelo

.....Ummangalelwa/Umophenduli

Sicela uqaphele ukuthi ummangali/umfakisicelo/ummangalelwa/umphenduli uyavumelana/uyaphikisana nokudluliselwa kwalolu daba ukuyolanyulwa

Ummangali/Umfakisicelo/Ummangalelwa/Umphenduli wenza njalo ngenxa yalezi zizathu ezilandelayo:

Ifakwe usuku e _____ mhlaka _____ enyangeni ka _____, 20 _____

Ummangali/Umfakisicelo/Ummeli

Ummangalelwa/Umphenduli/Ummeli

Ikheli:

"Ngaphandle kokuchema futhi akufanele ifakwe enkantolo"

RULE 41A

UNIFORM RULES OF COURT



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[BACK TO DOCUMENT CONTENT](#)

- (4) Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least five days' notice to all interested parties.

[Rule 41(4) substituted by GoN R2164 in G. 10958 with effect from 2 October 1987, GoN R2642 in G. 11045 with effect from 31 December 1987.]

41A. Mediation as a dispute resolution mechanism

- (1) In this rule—

“**dispute**” means the subject matter of litigation between parties, or an aspect thereof.

“**mediation**” means a voluntary process entered into by agreement between the parties to a dispute, in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute.

- (2)

- (a) In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.
- (b) A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.
- (c) The notices referred to in paragraphs (a) and (b) shall be substantially in accordance with Form 27 of the First Schedule and shall clearly and concisely indicate the reasons for such party's belief that the dispute is or is not capable of being mediated.
- (d) Subject to the provisions of subrule 9(b) the notices referred to in this subrule shall be without prejudice and shall not be filed with the registrar.

[Rule 41A(2)(d) substituted by GoN R2133 in G. 46475 with effect from 8 July 2022.]

(3)

- (a) Notwithstanding the provisions of subrule (2), the parties may at any stage before judgment, agree to refer the dispute between them to mediation: Provided that where the trial or opposed application has commenced the parties shall obtain the leave of the court.
- (b) A Judge, or a Case Management Judge referred to in rule 37A or the court may at any stage before judgment direct the parties to consider referral of a dispute to mediation, whereupon the parties may agree to refer the dispute to mediation.

(4) Where a dispute is referred to mediation—

- (a) the parties shall deliver a joint signed minute recording their election to refer the dispute to mediation;
- (b) the parties shall prior to the commencement of mediation proceedings enter into an agreement to mediate;
- (c) the time limits prescribed by the Rules for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party to the dispute from the date of signature of the minute referred to in paragraph (a) to the time of conclusion of mediation: Provided that any party to the proceedings who considers that the suspension of the prescribed time limits is being abused, may apply to the court for the upliftment of the suspension of the prescribed time limits; and
- (d) the process of mediation shall be concluded within 30 days from the date of signature of the minute referred to in paragraph (a): Provided that a Judge or the court may on good cause shown by the parties extend such time period for completion of the mediation session.

(5)

- (a) In proceedings where there are multiple parties some of whom are agreeable to mediation and some of whom are not, parties who are agreeable to mediation may proceed to mediation notwithstanding any other party's refusal to mediate.

- (b) The time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party from the date of signature of the minute referred to in subrule (4)(a) to the time of conclusion of mediation by the parties who have elected to mediate: Provided that any party to the proceedings who considers that such suspension of time limits is being abused, may apply to the court for the upliftment of such suspension.
 - (c) In any matter where there are multiple issues, the parties may agree that some issues be referred to mediation and that the issues remaining in dispute may proceed to litigation.
 - (d) If any issue remains in dispute after mediation, the parties may proceed to litigation on such issue in dispute.
- (6) Except as provided by law, or discoverable in terms of the Rules or agreed between the parties, all communications and disclosures, whether oral or written, made at mediation proceedings shall be confidential and inadmissible in evidence.
- (7)
 - (a) Upon conclusion of mediation the parties who engaged in mediation shall inform the registrar and all other parties by notice that mediation has been completed.
 - (b) Notwithstanding the failure of parties who have engaged in mediation to deliver the notice referred to in paragraph (a), the suspension of the time limits referred to in subrule (4)(c) shall lapse unless a Judge or a court has extended the time limit and notice thereof has been given to all parties to the proceedings within five days of such order.
- (8)
 - (a) Mediation shall be deemed to be completed within 30 days from the date of signature of the joint minute referred to in subrule (4)(a), from which date the suspension of the time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step referred to in subrule (4)(c) shall lapse: Provided that where mediation is completed before the aforesaid period of 30 days, the parties who engaged in mediation shall deliver a notice contemplated in subrule (7) indicating that mediation has been completed.
 - (b) The parties who engaged in mediation and the mediator who conducted the mediation shall within five days of the conclusion of mediation, issue a joint minute indicating—

- (i) whether full or partial settlement was reached or whether mediation was not successful; and
 - (ii) the issues upon which agreement was reached and which do not require hearing by the court.
 - (c) It shall be the joint responsibility of the parties who engaged in mediation to file with the registrar, the minute referred to in paragraph (b).
 - (d) No offer or tender made without prejudice in terms of this subrule shall be disclosed to the court at any time before judgment has been given.
 - (e) Where the parties have reached settlement at mediation proceedings the provisions of rule 41 shall apply *mutatis mutandis*.
- (9)
- (a) Unless the parties agree otherwise, liability for the fees of a mediator shall be borne equally by the parties participating in mediation.
 - (b) When an order for costs of the action or application is considered, the court may have regard to the notices referred to in subrule (2) or any offer or tender referred to in subrule (8)(d) and any party shall be entitled to bring such notices or offer or tender to the attention of the court.

[Rule 41A inserted by GoN R107 in G. 43000 with effect from 9 March 2020.]

42. Variation and rescission of orders

- (1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary—
 - (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- [Rule 42(1)(a) substituted by GoN R235 in G. 1375 with effect from 18 February 1966.]
- (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
 - (c) an order or judgment granted as the result of a mistake common to the parties.

A PRIMER ON NEGOTIATION FOR MEDIATORS, COUNSEL, AND CLIENTS

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[BACK TO DOCUMENT CONTENT](#)

CHAPTER 2

A Primer on Negotiation for Mediators, Counsel, and Clients

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Scope Note

This chapter provides a basic review of negotiation techniques for mediators, as well as for counsel and their clients. Beginning with a description of positional bargaining tactics, it goes on to describe interest-based bargaining (as described in the book *Getting to Yes*) and then discusses how the two bargaining styles can be combined to overcome barriers to settlement. The chapter then recounts lessons in successful bargaining from the field of mediation.

§ 2.1 INTRODUCTION

Because mediation is facilitated negotiation, it is important for mediators and those who use mediation to understand the basic principles and techniques of negotiation in the culture in which mediation is practiced. (As discussed in Chapter 8, those principles and practices may vary from one culture to the next.)

Negotiation has been given a bad name in our mainstream culture by much of our popular media. Recall the opening scene of the film *Air Force One*, in which the president of the United States, played by Harrison Ford, castigates himself and other foreign policy leaders for their willingness to negotiate with terrorists and vows never to negotiate again. Or, recall the hero of the science fiction film *The Fifth Element*, played by Bruce Willis, who offers to negotiate with one of the villainous Mangalors who have captured the control deck of a spaceship and then, when face-to-face with the chief Mangalor, quickly shoots him squarely between the eyes, while Willis's impressed colleague asks, "where did he learn to negotiate like that?"

In these films, and in much of our culture, negotiation is treated as an activity suitable only for unprincipled wimps (*Air Force One*) or indecisive fools (*The Fifth Element*). The moral we pass on is that real men and women don't negotiate.

Yet the reality is that we negotiate all the time. If we have young children, we are engaged in negotiation from the minute they wake up—over such weighty subjects as what they are going to eat for breakfast or wear to school. If we drive to work, we are “negotiating” the traffic to get there. If we are married or in a domestic partnership, negotiation is how we decide what movies to rent and when the refrigerator needs cleaning. Virtually every aspect of our lives involves negotiation—even negotiations with ourselves (over what we will eat, or not eat, how we will spend our time, etc.). See generally Erica Fox, *Winning from Within: A Breakthrough Method for Living, Leading, and Lasting Change* (2013).

In mediation, the parties, their lawyers, and the mediator are all negotiating to achieve certain objectives. The satisfactory resolution of the mediation depends on the ability of each participant to negotiate productively. Thus, effective negotiation can make the difference between a successful mediation and an unsuccessful one.

What is effective negotiation? Lawyers and social scientists who have studied negotiation behavior offer several answers to this question, and their answers have evolved rapidly in the last twenty-five years. The sections below briefly describe that evolution, and suggest some future directions.

§ 2.1.1 Positional Bargaining—Negotiation Tactics

The early 1980s represent a watershed in the literature of negotiation. In 1981, Roger Fisher and William Ury published *Getting to Yes: Negotiating Agreement Without Giving In*, arguably the most influential book ever written about negotiation. See also Roger Fisher, William Ury, and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (rev. ed. 1991); Howard Raiffa, *The Art and Science of Negotiation* (1982). *Getting to Yes*, which has been translated into eighteen languages and has guided the training offered to world leaders through the Program on Negotiation at Harvard Law School, offers a vision of negotiation as a *principled* activity in which the participants can each be made better off.

However, prior to the publication of *Getting to Yes*, negotiation was typically viewed as an activity in which two or more parties each vied for advantage at the other's expense. The best negotiators were those who succeeded in obtaining the largest slice of the pie, with little attention paid to whether the pie could be expanded in some way.

(a) Hardball Tactics

Typical of the literature of the era before *Getting to Yes* is the advice given to legal services lawyers by Michael Meltsner and P.G. Schrag in their book *Public Interest Advocacy: Materials for Clinical Legal Education*. See also G. Bellow and B. Moulton, *The Lawyering Process: Negotiation* (1981) (focusing on the skills needed for successful negotiation). Their suggestions for negotiators combine such common-sense advice as thorough preparation with a set of techniques designed to manipulate, deceive, or intimidate the opponent. The unspoken assumption in these suggestions is that the opponent is willing to take advantage of the negotiator—fairly or unfairly—and therefore success requires using competitive negotiation techniques, and using them more effectively than the opponent. The following is a short list of the techniques Meltsner and Schrag recommend:

- Arrange to negotiate on your own turf.
- Balance or slightly outnumber the other side.
- Time the negotiations to advantage.
- Lock yourself in.
- Designate one of your demands a “precondition.”
- When it is in your interest, make the other side tender the first offer.
- Make your first demand very high.
- Place your major demands at the beginning of the agenda.
- Insist that the other side make the first compromise.
- Use two negotiators who play different roles.
- Be tough—especially against a patsy.
- Appear irrational where it seems helpful.
- Raise some of your demands as the negotiations progress.
- Claim that you do not have authority to compromise.

Many of these techniques are as repugnant as they are common. Like the behavior all too many of us experience when we buy a car in an auto showroom, negotiation tactics of this kind involve treating the other party in a negotiation as a depersonalized enemy. They reflect an individualistic worldview in which negotiation is a vicious, competitive struggle for advantage.

One of the hallmarks of this style of negotiation is the manipulation of the other party's point of view. For example, lecturers on the subject of negotiation like to tell the story of a mistake made by organizers of the presidential campaign of Theodore Roosevelt, who printed millions of copies of a campaign flyer with a photograph of Roosevelt lifted from the popular press. Unfortunately, no one had asked the photographer for permission to use the photo. The campaigners anticipated having to pay the photographer a fortune because reprinting the flyers would be costly. Instead of negotiating the price, however, they sent him a telegram informing him that his photograph had been selected from among several others, but that he would have to pay a modest fee in order for his photograph to be used. He forwarded the money, and the flyers were distributed.

Obviously, there are major disadvantages to negotiating in this way in a mediation—particularly if the parties expect to have an ongoing relationship of some kind afterwards (such as divorcing parents of young children). Behavior that is the norm in the auto showroom, where buyer and seller may never meet again, is unsuitable for such mediations. Clearly, a more collaborative mode of negotiation is needed in that setting.

(b) *Cooperative Versus Competitive Bargainers*

In the late 1970s and early 1980s, Professor Gerald R. Williams began a series of experiments to determine whether cooperative styles of negotiation could be as successful as competitive styles. See Gerald R. Williams, *Legal Negotiation and Settlement* (1983). He videotaped mock negotiations involving experienced lawyers from across the United States and polled the lawyers about the characteristics and effectiveness of the attorneys with whom they routinely negotiate. His findings showed that 65 percent of the lawyers were viewed as cooperative, while only 24 percent were considered competitive. Williams also found that the perceived effectiveness of negotiators did not correlate with their competitive or cooperative orientation. In other words, there were effective cooperative negotiators, just as there were ineffective competitive negotiators, and vice versa.

One of the goals of this research was to identify the characteristics of effective negotiators, regardless of whether they were cooperative or competitive in style. Williams found the following characteristics (among others) were common to both types of effective negotiators:

- rationality,
- experience,
- perceptiveness,

- creativity,
- analytical-mindedness,
- self-control,
- intelligence, and
- honesty.

The import of Williams's research was to counteract the view that the most successful negotiators are those that use competitive techniques, such as those recommended by Meltsner and Schrag. The meaning of these studies, for the practice of mediation, was that the parties and their lawyers could adopt more cooperative styles of negotiation without necessarily giving up any advantage to the other side.

§ 2.2 INTEREST-BASED BARGAINING— PRINCIPLED NEGOTIATION

As noted above, with the publication of *Getting to Yes*, Fisher and Ury introduced a fundamentally different approach to negotiation. Instead of examining the personal characteristics of negotiators, or even the specific techniques they used (i.e., competitive versus cooperative), Fisher and Ury argued that the most successful negotiators are the ones who focus on underlying interests rather than positions.

§ 2.2.1 *Getting to Yes*

One of the important insights of *Getting to Yes* is that successful negotiation often requires separating the people from the problem. In other words, reactions to proposals (particularly critical reactions) should be couched in such a way that the criticism is not taken personally by the other party. Fisher and Ury also recommend using principled benchmarks for resolving contested issues—e.g., using an independent appraisal to determine the fair market value of a business or house. By seeking out objective criteria for the resolution of disputes, the parties can be spared, to some degree, the intense struggle over whose view shall prevail. A third vital insight offered by Fisher and Ury is that effective preparation for negotiation requires careful consideration of each party's BATNA—their best alternative to a negotiated agreement. Unless and until each party knows their respective BATNAs, they will lack a principled basis for determining whether they should accept any given proposal or set of proposals. Finally, Fisher and Ury

emphasize the importance of using negotiation to communicate about underlying interests so that mutually advantageous exchanges can occur. Using this technique, negotiating parties can expand the pie, and thus create "win-win" results in which each of the parties is made better off than either could be in positional, non-interest-based bargaining.

Example

Mediator Stefan Mason tells the story of a discrimination case in which a longtime airline employee alleged that she had been unlawfully excluded from a ticket-selling position because of a disability. After extensive bargaining in the mediation, the employee was holding firm at a demand of \$2 million. Stefan asked her why she was seeking that amount, and she replied that she needed that amount so that she and her husband could travel extensively during their retirement years. Stefan then asked the defendant if it would consider providing the plaintiff with frequent flier miles, and the answer was "yes." The case settled for several million frequent flier miles and just enough cash to cover the plaintiff's costs and attorney fees. See Stefan M. Mason, "Telling Mediation Tales Can Encourage Settlement," in *Mediation: Approaches and Insights* 59–61 (Russell Bleemer, ed. 2005).

§ 2.2.2 The Critique of *Getting to Yes*

Critics of *Getting to Yes* have assailed its optimistic assumption that negotiators will be candid about their true interests. See, e.g., J. White, "The Pros and Cons of *Getting to Yes*," 34 *J. Legal Educ.* 114 (1984). Critics also pointed out that, with their emphasis on expanding the pie, Fisher and Ury had paid insufficient attention to the techniques bargainers use to maximize their share of the pie. Some critics questioned whether using Fisher and Ury's value-creating techniques might leave a negotiator vulnerable to the value-claiming techniques of the competitive bargainer. Moreover, while the Fisher-Ury approach may hold promise in settings where the parties have an ongoing relationship, its value seemed less obvious in settings (such as the settlement of a personal injury lawsuit) where the parties have no relationship, there are few if any opportunities for joint gains, and the goal for each party is simply individual welfare maximization.

§ 2.3 INTEGRATING POSITIONAL AND INTEREST-BASED BARGAINING

The arrival of *Getting to Yes* and its critique of positional negotiation turned the attention of mediators, lawyers, and negotiation scholars from the refinements of technique to the question of which fundamental orientation to negotiation is best. The Fisher-Ury analysis suggested a tension between integrative and distributive approaches to bargaining.

Interest-Based / Integrative

- Creating value
- Cooperative
- Win-win solutions
- Joint gains
- Expand the pie

Positional / Distributive

- Claiming value
- Competitive
- Win-lose outcomes
- Zero sum
- Claim the biggest piece

The next challenge then, for those seeking to find the most promising methods of negotiation, was to reconcile, or at least develop strategies for managing the tension between these two fundamentally different orientations to negotiation.

§ 2.3.1 Game Theory

An experiment with computer programs, described in Robert Axelrod's 1984 book, *The Evolution of Cooperation*, sought to determine the best method of solving a typical negotiation problem known as the Prisoner's Dilemma. In the Prisoner's Dilemma, the negotiators communicate with each other only through their behavior. See R. Fisher, *Getting Together: Building Relationships as We Negotiate* 198 (1988) (description of the Prisoner's Dilemma). The parties are rewarded or punished for their behavior according to the following matrix, which is used to score each round of either cooperative or competitive moves:

		A's Behavior	
		A Cooperates	A Competes
B's Behavior	B Cooperates	A and B win	A wins big; B loses big
	B Competes	B wins big; A loses big	A and B lose

In this matrix, it is possible for one party to take advantage of the other party's cooperative moves, but not for long. Once it becomes apparent that one party is

going to make competitive moves, the other party will do so as well. The winning computer program employed a simple tit-for-tat strategy: the program always began with a cooperative move, but then mimicked the other program's move on the previous round.

In the context of a real-life negotiation, this strategy suggests the value of disaggregating any negotiation into a series of moves so that the bargainer can determine whether the other party is willing to make a cooperative value-creating move, or a competitive value-claiming move.

Example

In the mediation of a divorce, the mediator suggested making a list of the issues that needed to be resolved, and then ranked them from easiest to hardest to resolve. The mediator further suggested beginning with the easiest and least important issues. The parties were thus able to determine how cooperative or competitive the other party was going to be in this particular case. With the mediator's help, the parties quickly resolved some of the less important issues and became less wary of each other as they approached the more difficult issues, because each saw that the other was willing to be cooperative, and therefore felt an increased level of comfort in reciprocating that cooperation.

The bottom line is that every negotiation has not only the potential for integrative and distributive moves, but also a need for such moves. At least in theory, the most successful negotiations would involve efforts by the parties to expand the pie to the greatest extent possible, and then divide it without mutually destructive conflict, perhaps using a principled basis for distributing joint gains. Accomplishing such an objective, however, requires overcoming a number of barriers.

§ 2.3.2 Overcoming Barriers to Settlement

One of the barriers to achieving optimal results in bargaining concerns communication. The Prisoner's Dilemma heuristic, which radically oversimplifies real-life bargaining, does not permit communication between the prisoners. In ordinary, day-to-day settings, negotiators *can* communicate with each other between rounds of bargaining and thus attempt to secure agreements on bargaining behavior. Even so, negotiators will often fail to make optimal deals because of flawed communication, or barriers to effective communication. See R. Mnookin, "Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict," 8 *Oh. St. J. on Disp. Resol.* 235 (1993) for a fuller discussion of this phenomenon.

One example is the phenomenon of reactive devaluation, a process by which our perceptions are influenced by the source of the information.

Example

In the mediation of a personal injury suit, the parties reached an impasse. The plaintiff reduced his demand to \$450,000 and the defendant increased her offer to \$350,000. The mediator believed that each party would be willing to settle the case for \$400,000, but that if either side proposed that number, the other side would reject it and make a smaller concession. By asking each side separately in caucus sessions whether they would be willing to settle for \$400,000, the mediator learned that the answer in both rooms was "yes"; the mediator therefore made the proposal, which both sides readily accepted.

Example

A husband and wife were getting a divorce, and their one remaining issue was the value of the wife's business. Both agreed that the husband was entitled to 50 percent of the value. The wife proposed to pay the husband \$250,000 for his 50 percent share. The husband, who initially thought that the business was worth approximately \$400,000, was now convinced that the business must be worth twice that because of his wife's offer. (In other words, he devalued the credibility of her offer because her interests were in conflict with his.) However, if a neutral and independent business valuation expert had presented \$500,000 as the value of the business, both parties would likely have accepted it.

Negotiation theorists have identified other barriers to successful negotiation, such as cognitive dissonance, loss aversion, missing parties (and other principal-agent issues), and strategic bargaining. According to Robert Mnookin, each of these barriers can, in theory, be overcome by improved communication and more rational methods of option assessment. See R. Mnookin, "Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict," 8 *Oh. St. J. on Disp. Resol.* 235 (1993). He points in particular to the use of mediation as one method of overcoming such barriers to successful negotiation.

Additionally, in his book *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Belknap Press 2000), Mnookin and his co-authors describe negotiation as requiring successful management of the tensions between empathy and assertiveness—both have a place in effective negotiation. Mnookin also provides a useful metaphor for the tension between creating and claiming value by describing certain types of negotiation as taking place simultaneously at "two tables": the table of "expected value" where the parties' BATNAs are discussed and the "interest-based" table where they seek to maximize their welfare. When

negotiators have difficulty getting to "yes" at the interest-based table, they typically go to the other table and assess their alternatives to settlement.

§ 2.4 SUCCESSFUL BARGAINING—LESSONS FROM THE FIELD OF MEDIATION

The process of mediation provides a useful lens through which to assess the effectiveness of negotiation. An intermediary can often provide a useful buffer for communications which might otherwise be devalued or go unheard. Mediators can help the parties manage or structure the negotiation, by focusing attention on the parties' interests, options (perhaps expanding the pie), and alternatives (perhaps reality testing by inquiring about the parties' assessments of their situation). When the parties in a mediation are at an impasse, mediators sometimes make proposals, with the understanding that the parties will respond confidentially to the mediator.

§ 2.4.1 Empowerment and Recognition

There are also other lessons that the practice of mediation teaches. In their 2004 book, *The Promise of Mediation*, Robert Baruch Bush and Joseph P. Folger articulate a new rationale for the practice of mediation. Previous discussions of the subject had taken as their premise that the settlement of disputes was the primary reason for employing mediation. According to Bush and Folger, however, the primary value of the process is its ability to

- empower participants to identify and articulate their needs and perspectives; and
- provide opportunities for mutual recognition.

Bush and Folger describe their model as based on a relational, as opposed to an individualistic, world view. From their perspective, personal transformation is a more valuable goal than solving problems. Within the world of mediation, this hypothesis is considered controversial. See, e.g., C. Menkel-Meadow, "The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices," 11 *Neg. J.* 217 (1995). However, it is instructive as a perspective on the meaning of "effective" negotiation.

For example, in the mediation of workplace disputes, this perspective suggests that even in those settings where management is unable (for one reason or another) to approve a particular request from an employee, the manner in which the employee is treated may satisfy certain needs for empowerment and recognition

that are at least as important as the substantive issue under discussion. For an important perspective on the psychosocial dimensions of negotiation, see Doug Stone, Bruce Patton, and Sheila Hcen, *Difficult Conversations: How to Discuss What Matters Most* (1999); and Roger Fisher and Daniel Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (2006).

The study of mediation and communication theory provides a set of tools for such empowerment and recognition, such as active listening and reframing. However, these tools cannot be employed in a mechanical way. Empathetic listening is as much a discipline of heart as of mind, just as thoughtful reframing requires intuition as much as intellect.

In a negotiation, these techniques may be valuable in and of themselves, because they demonstrate genuine concern, and that may be one of the other party's underlying objectives. However, they may also provide a broader window into the parties' respective interests—i.e., as part of a conversation in which each negotiator understands more fully the wide range of interests that the other party brings to the table.

§ 2.5 CONCLUSION

Learning how to negotiate successfully depends on how one defines success. Thirty years ago, successful negotiation was defined primarily as the effective deployment of techniques designed to accomplish the negotiator's objectives by persuasion or manipulation. Success was measured solely by the extent to which the negotiator's objectives were met.

With the advent of principled, interest-based negotiation came a *broader* focus on welfare maximization: the successful negotiator looks for opportunities to make both sides better off, instead of seeing negotiation as a competitive, zero-sum exercise. Because cooperative, interest-based negotiators risk being vulnerable to exploitation by negotiators seeking only to claim value (rather than participate in creating it), negotiation theorists developed the technique of tit-for-tat bargaining in which one engages in cooperative bargaining only if cooperation is reciprocated. Negotiators can also "expand the pie" by communicating their underlying interests and preferences. Mediation offers an opportunity to enhance such communications, especially in those settings where cognitive or other barriers to effective communication exist. Mediation also shows, by example, the ways in which the deeper underlying interests of negotiators—for empowerment and recognition—may be met in the process of negotiation. Meeting those needs, while at the same time pursuing the welfare maximization goals attainable through principled, interest-based negotiation, may be seen as a worthwhile definition of successful negotiation.

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[BACK TO DOCUMENT CONTENT](#)

Mediator's Journal - Day 3

What did I learn today that adds to my Mediator mindset?

What did I improve today to add to my Mediator skillset?

How am I feeling about my role as a mediator?

What has been my experience today emotionally?

