

Chapter One

The Mediation Process

Mediation is a process in which a third person helps the participants in a dispute to resolve it. The agreement resolves the problem with a mutually acceptable solution and is structured in a way that helps maintain the continuing relationships of the people involved.

In order to resolve the dispute, the participants must negotiate a solution. Problem solving is part of negotiations. Because the problem solving involves more than one person, the chosen solution must satisfy *all the participants in the dispute*. The participants must negotiate which solution or combination of solutions is acceptable to all of them. That is why mediation is ideally suited to family disputes.

The process of mediation is the management of other people's negotiations, and the mediator is the manager of the negotiations who organizes the discussion of the issues to be resolved. The more coherent and organized the process, the easier it is for the participants to arrive at solutions that are mutual and appropriate for them. There are generic aspects of mediation, and specialized parts of the process that apply to different contexts. This book concentrates on family mediation. Therefore, it first examines the generic mediation process and then applies the unique aspects to family and divorce mediation.

The Generic Process

The generic process of mediation includes nine stages:

1. Recognizing the problem
2. Choosing the arena
3. Selecting the mediator
4. Gathering the data (fact finding)
5. Defining the problem
6. Developing options
7. Redefining positions
8. Bargaining
9. Drafting the Agreement

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Recognizing the Problem

Negotiations can take place when the parties to a dispute recognize that they have a dispute, agree on the need to resolve it, and actively engage in a process designed to settle the dispute.¹

Sometimes not everyone agrees that there is a dispute. Informal attempts to negotiate an agreement are frustrated if one person does not agree that he is in a dispute. When this happens the other person has only one obvious choice: to make the disagreement a legal dispute. By engaging counsel and filing a suit, one person forces the other to engage in the resolution of the dispute, since the other person is defined by the judicial system as a respondent who must then engage in a process determined by the legal system.

Choosing the Arena

Once the disputants agree they must solve the problem, they need to decide on the appropriate method. They choose an arena in which to settle the problem; in this case, mediation. People are increasingly selecting mediation as the arena in which to settle disputes. In family matters, courts are using mediation as an alternative arena to the court room to help families resolve problems. The choice of mediation as the arena in which to settle the dispute is usually made on one of four grounds:

- **Mediation is nonadversarial.** The nature of the legal system requires the participants to be adversaries. Many people in dispute are not adversaries, and even if they are, they are not always inclined to be adversarial. Rather, they want to problem solve because they understand the importance of maintaining their ongoing relationship. People with this approach to life choose mediation.
- **Mediation is private.** Interpersonal disputes are best solved privately and most people prefer to settle their family matters within the confines of the family. Choosing a mediator limits outside intervention to one professional.²

¹ P. H. Gulliver, *Disputes and Negotiations: A Cross Cultural Perspective* (New York: Academic Press, 1979).

² Some mediators prefer to work in teams.

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- **Mediation is cheaper.** Since only one professional is involved, the cost of resolving the dispute is much less in mediation than in the legal system.³
- **Mediation is faster.** Since all discussions are held face-to-face, resolving the dispute takes less time in mediation than in the adversarial legal system.

Selecting the Mediator

Selection of the specific mediator is based on the clients' knowledge of the process, the reputation of the mediator, and the extent to which other professionals refer cases to the mediator. This book will help the reader develop the skills and reputation to become a chosen mediator. You will also find simple steps in chapter 7 that you can take to develop your mediation practice.

Gathering the Data (Fact Finding)

The mediator begins by gathering the data about the nature of the dispute, the participants' views of the dispute and any other relevant information. He ensures that all information is revealed to all of the participants. The data are shared, verified, and exchanged.

The fact finding stage helps the participants to clarify the bargaining issues and to learn about each other's positions on the issues. Prior to these discussions, each has thought little about what the other wants, concentrating on making their own argument, rather than understanding the needs of the other. Hearing the other's version of the situation and the data the other brings to the mediation helps participants measure their own position more realistically.

In most cases, prior to entering mediation, the people in dispute have exchanged threats and counter threats about what they will and will not do in the negotiations. These threats reinforce the fears the family members carry for their individual futures and limit the number of options each feels is available. Threats work only in the absence of concrete data, thus fact finding minimizes their impact.

The mediator insists on full disclosure of all issues and facts to all participants. Sharing information is part of power balancing since

³ Joan Kelly, "Is Mediation Less Expensive? Comparison of Mediated and Adversarial Divorce Costs" *Mediation Quarterly* 8. no. 1 (Fall 1990): 15-26.

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knowledge is power, and when the mediator uses the process to ensure disclosure of all the information he

- empowers the less knowledgeable participants,
- assures that all participants use the same data to define the problem, and
- improves the ability of each participant to choose the options most beneficial to them.

Disclosure has a special meaning in divorce negotiations. In order to determine the appropriate level of support and the fair distribution of the family assets, all participants must have full and complete knowledge of all the income and assets. Attempts by either spouse to withhold information are prevented by the mediator's process control in insisting on complete disclosure. This is discussed more fully in the budget and asset division chapters.

Defining the Problem

Using the shared data, the mediator helps the people in dispute define the problem. The problem must be defined in a way that does not benefit any one person over the others and, therefore, is a mutual problem definition.

In any dispute, control of the problem definition is crucial. In the legal arena, defining the legal issue is often more important than trying the case. In arbitration, defining the precise issue to be arbitrated is as important as arguing the case once the issue is defined. All participants attempt to define the problem in a way that (a) minimizes their responsibility for the problem and (b) moves the onus for change to the other participants. However, the mediator cannot allow the discussion to focus on solving a unilaterally defined problem since that benefits the participant who determines the problem definition. Rather, the mediator helps the participants negotiate a mutual definition of the problem that does not benefit one client at the expense of the others.

Developing Options

When all the people involved agree on the definition of the problem, the mediator helps them generate options for solving the problem. These options tend to be mutual, since the problem is now mutual, and unilateral solutions are more easily seen as one-sided. Old

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options, based on a one-sided definition are discarded, and new, mutual options are considered.

Many times participants are in dispute simply because they do not perceive options for solution. They tend to view all situations in the same way, and their limited options prevent them from solving the problem without the assistance of a third party. In these cases, the mediator helps the participants expand the range of options by brainstorming. In brainstorming, a few simple rules help the parties to generate new ideas:

- Any idea they think of should be shared
- Every idea, no matter how unusual, is added to the list
- No idea can be dismissed by the other party
- Nobody may criticize any idea or explain why it won't work

In the first stage of the brainstorming process, the goal is to list every conceivable idea, without assessing each idea as it listed. Once the clients list every idea they can think of, they go back and examine each one individually. The mediator helps them categorize the ideas into *highly possible, possible, unlikely, and impossible*.

After eliminating the latter two groups the participants focus on the remaining ideas, exploring the consequences of each idea, the costs associated with it, and the benefits its implementation will bring.

When brainstorming does not provide a wide range of options, the mediator suggests options from similar cases; if acceptable to the clients, these options are added to the list.

When the list of options appears complete, the mediator moves to the next stage: redefining positions.

Redefining Positions

All participants enter the mediation process with a position. It is part of their problem definition. Positions are usually taken in an emotional climate and do not always match the disputant's self-interest. Most people bargain from positions rather than interest, and bargaining about positions often results in a stalemate. The mediator helps the people bargain from their self-interest.⁴ He initially ignores

⁴ Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Boston: Houghton Mifflin, 1981), state a cogent case for bargaining from interests, not positions.

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the positions introduced at the beginning of the session and helps the participants use the rational process of problem solving to identify their true self-interests, which then form the basis of their subsequent bargaining. They do this by selecting the options most useful to them.

When the positions have been translated into interests, the participants are ready to select the options that seem to provide the most benefits at the least cost to each of them. One option may be more useful to one person, and a different option proves more useful to another. When they select options, they take informed positions based on self-interest leading into the bargaining phase of the negotiations.

Bargaining

The mediator helps them negotiate over the choice of solutions so that the agreement is acceptable to all involved. In this stage positions are modified, options are traded, and the give-and-take of bargaining occurs. Participants can bargain only when they have

- all of the facts,
- an appropriately mutual definition of the problem,
- a range of options to solve the problem, and
- one or more options as their primary goal.

The ways people actually bargain is discussed in chapter 6.

Drafting the Agreement

The mediator drafts a memorandum of understanding (MOU) detailing the agreements and gives a copy to each participant. Drafting the MOU is a simple matter when the mediator keeps track of the issues, the data, and each agreement the participants reach.

At the conclusion of the bargaining he drafts the understandings in plain language that is clearly understood by each participant. Sometimes the agreement needs to be used in the legal arena. In that case the participants' attorneys have responsibility for translating the MOU into legal language. The MOU includes

- the background data,
- the definition of the problem,
- the options chosen, and the reason for the choice, and
- the goal of the agreement.

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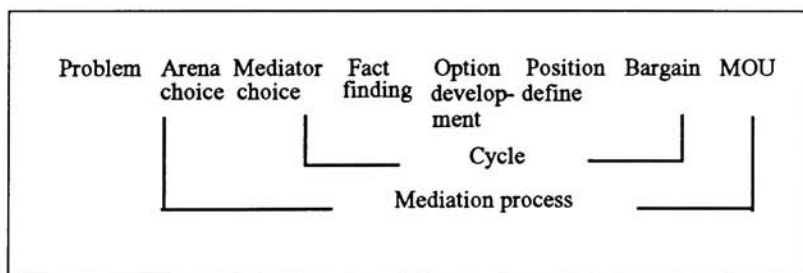
Cycles of the Mediation Process

Every mediation consists of the generic process plus unique parts, depending on the context. Those parts unique to the context are also made up of the same cycle of the mediation process. The cycle consists of the middle five stages of the generic process described on page 1. These five stages are:

- Gathering the data (fact finding), during which the mediator verifies, displays, and shares the data
- Defining the problem (from the data)
- Developing options to solve the problem
- Redefining positions from self- to mutual interests
- Bargaining over the options to reach a mutual agreement

The cycle is repeated over and over again within the larger mediation process to deal with each issue. For example, in the divorce process it is used in the budgeting/support, asset division, and parenting sections. This is shown in fig. 1.1.

Figure 1.1 Cycles in the Mediation Process



Being a Mediator and Not a Judge

The mediator manages and is responsible for maintaining the process. Frequently, clients act to draw the mediator away from managing the negotiations into other roles.

When the mediator enters the dispute, he is confronted by clients who have thought a great deal about how to convince him they are right and the others are wrong. The disputants have an image of the mediator as a judge who must be convinced. The mediator, on the other hand, must convince them he is not a judge and cannot be "won

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over” to one side or the other. The mediator helps the clients to accept him as one who

- is committed to the agreement, not to any one person,
- is balanced between the disputants,
- controls the process while yielding control of the content to the clients,
- does not accept any one person’s unilateral definition of the problem,
- helps them develop options to solve their problem, and
- holds no secrets from them and allows no participants to withhold information from the others.

Helping Clients Define a Solvable Problem

When people have an intractable dispute that appears unresolvable, the mediator enters to assist them to settle the dispute by negotiating a mutually acceptable agreement. However, a significant part of the problem is the inability of parties to agree on the *content* of the dispute. Indeed, the participants often have quite different versions of the nature and history of the dispute.

When the mediator first meets with the disputants each person has a story to tell. The stories consist of three parts.

The first is their specific version of the events and the past. The basic data of the versions may be similar, or even the same, but the interpretation each places on the facts colors that view of the situation. Each version is designed to show the mediator how good they are; how each is the innocent victim of the situation.

The second part is their complaint about the other, which is designed to show the mediator how bad the other is. The third part is their definition of the problem. The hallmark is that each person defines the problem in such a way that the problem can be solved only by a change in the behavior or position of the *other*. For example, A’s problem can be solved only by a change in B, and B’s problem can be solved only by a change in A.

These three elements represent each party’s definition of the problem. Their inability to agree on the content of the dispute means that the mediator’s role in the early stages is to obtain agreement on the problem to be resolved. Thus, the mediator helps the clients to

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define a mutual and neutral problem definition that, when solved, benefits all participants.

Neither A nor B will change unilaterally, and neither will change to conform with the other's definition of the problem, since both have their own definition. Therefore the mediator's task is to help the participants discard their individual problem definitions and adopt a mutual and common definition of the problem. Only then can problem solving begin.

The mediator begins to take control of the problem definition by first creating doubt in both parties minds about the validity and fairness of their original stories. This is done *without* challenging either side's image of self. In order to achieve this elemental goal, the mediator engages in a set of generic strategies. By "generic" I mean those strategies that are common to all mediation contexts: *normalizing* and *mutualizing*, which create doubt in the original version, and maintaining a *future focus* and *summarizing*, which solidify the new problem definition.

Normalizing

In order to arrive at the point where the dispute needs a third person to assist in its resolution, the participants must believe that their problem is unique enough to justify bringing in an outsider. Normal problems, after all, are solved normally. But clients often frame their problem as abnormal or as having unusual aspects. The mediator must convince them that theirs is a normal, resolvable problem.⁵

Most people engaged in a dispute requiring a mediator have convinced themselves that their situation is unique, and its very uniqueness justifies their position. Given the unique characteristic of the situation, the person also holds an equally unique (or unilateral) solution. The mediator undermines the uniqueness of each problem definition by normalizing the situation. Because, if the situation is normal, it is also resolvable within normal bounds. Let's look at a divorce case to illustrate these points.

⁵ Obviously, in cases where the participants do have an abnormal problem, the mediator does not try to convince them otherwise. To do so is disrespectful to the clients and undermines the mediator's credibility.

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A Case Example

The wife, Debra's, opening statement concluded with "I have let him see the children on several occasions, but the children aren't happy seeing their father. They said they don't want to see him. They are unhappy about the separation. When they've come back home, they're very upset. They're crying and it takes me hours to settle them down and I just don't know how they're going to cope with this."

If the mediator accepts this problem definition as *the* definition, the solution is to maintain either the status quo with the father seeing the children under conditions set by the mother or for Michael to move back home with Debra. Neither of these solutions would be acceptable to the husband.

Michael has his own definition of the problem. "I've seen these kids now five times over the past month. They are happy to come with me, we have a good time. We have done a lot of things together, they enjoy being with me. Now when they come and see me they're apprehensive about their visits. I know that, but I don't think Debra is helping them. I'm having great difficulty coming back and watching her dissemble. When I bring the kids back home she starts crying."

If Michael's definition of the problem is accepted, the children would spend most of the time with him, and Debra would accept the separation and not cry when Michael returns the children. These solutions to the problem as Michael defines it are equally unacceptable to Debra.

Each parent claimed that the children cried when transferring to the other and each blamed the other for this. In commenting to Michael and Debra, the mediator said, "It's not unusual for them, by the way, to have this tension and lots of crying when they go back and when they come forward and some apprehension. Obviously they're still trying to sort out how to behave in relationship to each of you, when you're living apart as distinct from when you were living together. So it is perfectly possible for them to have a good time when with you, Michael, but also express real concerns and reservations when they're with you, Debra. That's not an unusual situation."

In this commentary the mediator accepts the description of the children's behavior according to each parent and presents it as normal and to be expected, thus robbing each parent of the uniqueness of their

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version of the facts. This carefully balanced commentary addresses both parents' concerns without siding with either one. The more the mediator can normalize the clients' problem the more resolvable it becomes in their eyes and the more chance the mediator has of moving them towards a common definition of the problem that, of course, is not only normal but also mutual.

Mutualizing

Participants in a dispute usually frame the problem in a way that blames the other and denies personal responsibility for the problem. It is a rare person who admits to being a part of the problem. The initial articulation of the problem includes an attack on the other, blaming them for the problem. The mediator's task, as part of creating doubt in order to move towards a mutual problem definition, is to help the participants let go of their individual definitions. When each person makes a strong case that is unilateral, the mediator attempts to reframe the issue as a mutual one.

The daughter may say about her father, "He never listens to me. I might as well not exist." The father responds, "She never listens to me. I'm her father, yet she ignores everything I say." The mediator says, "I assume you both want to be heard." That statement turns the negatives "he doesn't"/ "she doesn't" into a positive "you both want to be heard." The statement also makes not listening a *mutual* problem, and points the way to a *mutual* answer: each being heard.

In a child custody case, the father may complain, "But the children need their father." The mother quickly responds, "But they need their mother more so." The mediator interjects, "I assume they need both of you." This statement does not contradict what either of them said. It merely states their problem as being mutual. The options to solve mutual problem definitions tend to be mutual solutions.

When each person takes a position, they rarely think about the other's view, and thus strategies such as normalizing and mutualizing, which help them look at the situation from different viewpoints, also help to create doubt as to the certainty of the original positions. This opens the way for developing alternative, mutual positions that meet their self-interests.

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Once the doubt has been created and the disputants are willing to look at alternatives, the mediator helps solidify the changes by maintaining a future focus in the discussions.

Future Focus

When people first appear in the mediator's office all they want to do is to talk about the past. Their complaints are about past actions and behaviors. The dispute is about the past. The origin of the problem lies in the past, and the fact that they have come to mediation indicates that the past was unsuccessful and without hope. However, determining who was right and wrong about the past is the function of a judge, not the mediator. Any discussion about the past inevitably casts the mediator into a judge role.

The wrongs of the past are unchangeable. Talking about the past does not resolve it; the dialogue simply reinforces the disputants' individual views of their joint past. Searching for solutions requires a future focus because the solution lies in the future. Thus the mediation process is future focused. The mediator is not interested in discussing or evaluating complaints about the past but redirects the disputants to talking about their aspirations for the future.

Mediation is concerned not with who was right and wrong in the past but how the disputants want to reorganize for the future. Returning to our divorce case example, when the husband says to the mediator, "Can't you tell her that what I'm doing is normal, it happens all the time. Can't you explain to her where I am coming from?" The mediator responds to the husband, "I was not so much interested in where you are coming from as in where you want to go in the future with this issue."⁶

Most of the time, clients complain about what they don't want: a continuation of the other's past behavior. It is somehow easier for us to articulate what we don't like or want than it is to articulate what we do want. Thus, the mediator asks questions about what people want in the future rather than what they did not like about the past.

The mediator moves the clients from complaining about the past to stating what they want in the future. The solution lies in the future and hope is also there. As long as the clients talk and complain

⁶ J. M. Haynes and G. L. Haynes, *Mediating Divorce: A Casebook of Successful Family Negotiations* (San Francisco: Jossey Bass 1989), 68.

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about what happened last week, they cannot talk about what they would like to happen differently next week. The mediator asks very few past-focused questions. He prefers to stay in the present and the future tense. Change, hope, and solutions lie in the future.

There is a serendipitous benefit to talking about the future: *clients rarely complain about the future*. As soon as they talk in the past tense, their communication is full of recriminations, complaints, and hopelessness. When talking about the future there are no complaints or recriminations. We can complain about yesterday's weather, but we can't complain about tomorrow's. When the mediator keeps the focus on what people want in the future the clients are not in a complaining mode. The clients benefit, since while talking about their hopes for the future they are also talking about possible solutions to their problems.

A good example of this type of a past-to-future focus occurred in a session where the couple argued about whether the husband could care for their diabetic daughter.⁷

Tom (husband): I can do those things. I can do those things.

Pat (wife): No you can't. You've never done them. You don't know how to do them.

Tom: Well, I can learn. I'm not stupid.

Mediator: Pat, would you like for Tom to be able to do them in the future?

Pat's answer must be yes, she would like Tom to be able to care for the daughter. The question moves her from the past and Tom's *inability* to provide care to the future and the benefits of his *ability* to provide the care.

In normalizing, mutualizing, and moving people into a future focus, the mediator does not deny what the clients have said. Rather, he summarizes the key mediation points the clients make, directing them towards problem solving.

Summarizing

The mediator moves the mediation session forward through the summarizing. The summary drives the session. Clients are not sure of

⁷ Ibid., 197-98

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what to expect from the mediator and how to behave as mediation clients. The process of summarizing clarifies their expectations and helps them adopt an appropriate mediation client role.

The mediator does not summarize everything the clients say. He chooses to summarize what he believes is important. If the client says, "It was raining yesterday," the mediator does not summarize, "It was wet yesterday." However, if she says, "It was raining yesterday, and Jimmy went off again without his raincoat even though I asked him to wear it," the mediator summarizes. "So you are concerned when Jimmy goes out in the rain without his raincoat."

The mediator is constantly faced with choices as to what to summarize and what to ignore. Whatever the mediator focuses on becomes important in the eyes of the participants. The mediator uses the summary to

- ignore information that is *not* useful to the conduct of the session,
- focus on those items of information that are useful,
- ignore all attempts to cast him in a legal or therapy role.

In general, we can say that non-useful information includes

- social talk,
- emotional and emotive statements,
- legal and therapy questions.

What is useful in a mediation session is

- information and data about the dispute,
- the clients' goal statements,
- indications of their bargaining behaviors and strategies.

By focusing on the useful and ignoring the nonuseful information, the mediator stays in role and keeps the couple in role as mediation clients. An attorney asks legal questions and summarizes back to the client the *legal* aspects of their response. He ignores the non-legal matter. Similarly, a therapist asks therapy questions and summarizes back the therapeutically relevant aspects of the clients responses. Obviously, the mediator cannot screen out every nonmediation communication of the clients. Frequently, they insist on

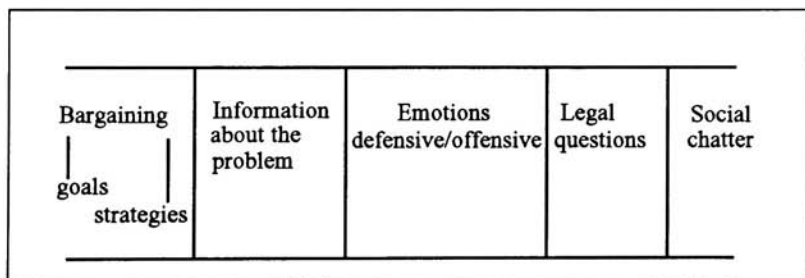
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a response to these other matters. When that happens, the professional responds to the needs of the client.

While the mediator cannot avoid all legal questions or emotive behavior, he can limit the nonuseful dialogue. The primary method is by focusing on what he believes is relevant to the clients. He tests and clarifies the difference between relevant and unuseful information. He clarifies for the clients what is important, directing them away from emotive behavior towards their self-interests that are contained in the information about the problem and solutions to it.

He can limit the nonuseful dialogue by redirecting the clients, cutting off long monologues, and explaining to the clients his function as manager of the negotiations. By limiting the emotive behavior he can concentrate on ways to be most helpful to the clients in solving the problems that brought them to mediation. Most clients monitor the mediator's response, noting what is important and unimportant to the mediator and adjusting their behavior to match the mediator's behavior. Being aware of this helps the client model appropriate and useful mediation behaviors.

Figure 1.2 Sorting Information in Mediation



The client dialogue is divided into two sectors. The left-hand sector is useful client information, and the right-hand sector is unuseful client information. When the mediator collects the data, he looks for useful data: information about the problem, the clients' bargaining goals, and strategies. He summarizes this information for the client. The data are collected and noted and form the basis of the next line of questioning. Client information that falls into the right sector is ignored unless the client is persistent. Faced with client persistence, the mediator attempts to deal with the behavior by acknowledging it and engaging in other strategies to limit it.

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Although we have drawn a clear line between the useful and nonuseful dialogues, the distinction is less clear when in the session with the clients. It is helpful to think about client emotional behavior in two ways: offensive and defensive behaviors.

Offensive behaviors are unuseful and are best ignored by the mediator unless they prevent progress in the mediation process. Offensive behavior includes attacks by the clients on each other, fights about the marriage, and arguments. Defensive emotional statements are often useful because they alert the mediator to underlying issues or they indicate emotional issues that, if dealt with, enable the mediator to continue the mediation process.

For example, in one case the couple were fighting about an issue they had as spouses, and the mediator could not bring them back to the mediation issues. Finally, in the middle of an offensive statement about his wife, the husband said, "I'm hurting and she just doesn't know how much I hurt." The mediator, who had been ignoring all of the offensive fighting, acknowledged the hurt by summarizing: "I believe you are both hurting and I sense that neither of you understands just how much the other hurts. That's O.K. in a sense, because it's part of the process of divorce." Upon hearing these comments, the couple relaxed and let go of the offensive fighting and followed the mediator as he led them towards a discussion of the mediation issues.

When the mediator verifies, displays, and shares the data, he works with the data in the useful sector. In a divorce, for example, he concentrates on budget information in the support session. He displays the concrete needs and does not verify, display, or share with the clients their emotional behavior or legal requirements. The same is true as he helps the clients develop a mutual problem definition. The definition is about practical matters falling into the useful sector. When the mutual problem has been defined, the options to solve that problem are useful, as is the outcome to the clients.

When clients ventilate their emotions or ask legal questions, the mediator ignores that part of the communication and summarizes the useful parts. The clients respond to the summary and, if they find it acceptable, do not challenge the omissions. If they do challenge the omissions, the mediator responds by accepting their insistence that the omitted item be dealt with by adding it back into the summary.

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Using the case example introduced on page 10, the wife told the mediator that the children lived with her and that they visited their father and added a complaint that the children were not happy seeing their father. The mediator summarized her opening statement with, "So they are currently living in the family home, and they are spending time with their dad."

In addition to focusing the clients' attention on relevant information and suggesting its relative importance to their goals, summarizing also

- tests the clients statements and positions
- helps to determine what is useful and non-useful in mediation
- clarifies data and adds to the common knowledge of all the participants.

We test a hypothesis as to whether the goals are strategic or not. We can determine the priority of various goals by varying our responses to the clients' stated goals.

The client may say that she needs 1, 2, and 3. The mediator can test the relative importance of 1, 2, 3 by reordering them in the summary such as "So you feel 2, 1, 3 are important to you." If the client does not challenge the reordered list, the mediator proceeds using the new list.

If the mediator believes the client is engaging in a strategy of enlarging the number of goals, thinking that this would give him extra room to compromise, the mediator responds to a 1, 2, 3, statement with the summary, "So you think that 1 and 2 are important to you." The client's acceptance of that statement tends to confirm the mediator's belief that number three was added as a strategy. If the client rejects the mediator's summary and reminds him of item three, the mediator apologizes and restores number three to a revised summary.

Professional Bias

Our views and understanding of events are shaped by our experience. We learn from our accumulated experiences in life and also in a formal way through education and reading. Our life events shape our attitudes and values. They provide a prism through which

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we separate the parts of each new event we encounter so that we can categorize and understand the event in a way that makes sense to us.

This way of looking at experiences is called “biases” or “prejudices.” Everyone has them, and everyone is controlled by them, since the biases filter all new information we receive and all new events we experience. We operate continually under a preset catalogue of biases/prejudices.

In addition to looking at events through life-learned ways, we also learn through formal education, which provides a different way of looking at and receiving events. This usually begins during our undergraduate years and increases in importance in graduate and particularly in graduate professional schools.

Thus, if a client takes the same problem to an attorney, a therapist and a mediator, the professional in each situation will define the problem differently.

As attorneys we are taught to look at all new professional events and experiences through a legal prism. As mental health professionals, we are taught to look at all new professional events through a mental health prism.⁸ As mediators, we look at each new professional experience through a mediation prism. The mediation prism separates out the legal and mental health issues and focuses on the mediation issues.

When a professional is at work, his personal and professional prisms are in frequent conflict. That is, his personal biases and prejudices may be in conflict with his professional training. Hopefully, the professional training provides an awareness of the conflict, enabling the professional to concentrate on his professional reaction rather than the personal one. For example, a couple negotiating over the level of support may indicate a figure for housing that seems totally unreasonable to the mediator as a private person. However, the figure to the professional mediator is perfectly reasonable in the context of the client's lifestyle.

⁸ Mental health professionals have an additional problem: their different professional training tends to provide radically different prisms. Thus, given the same client, a psychoanalytical practitioner might see a narcissistic personality disorder and a family systems therapists might see a disorganized family. The different diagnosis leads to radically different treatment.

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The Hypothesis

How does the professional ensure that his professional prism is at work? He is aware of the hypothesis he develops about the clients' situation. The hypothesis is about those aspects of the information provided to him that are relevant to him *as a professional*.

Every professional constructs a hypothesis about what is happening in each session as a way of guiding him through the session. Without a hypothesis the professional would not know which question to ask once the basic information has been gathered. When the intake information has been presented to the professional and the clients define the problem that brought them to the office, the professional develops a hypothesis about the situation in order to determine the next line of questions.

At any given moment in an interview, the professional could ask dozens of different questions, and each would make sense to the client. However, in order to make sense to the professional, the chosen question must come from his professional hypothesis. Without a hypothesis, social chatter is as relevant as issue data.

The professional, therefore, selects one from a dozen or so relevant questions, and the hypothesis helps him decide which of a group of relevant questions is the *most useful* at that moment. It is not *whether* we work under a hypothesis, it is *which* hypothesis we are working under at a given moment. We can see that the hypothesis helps the professional to

- maintain a focus on his professional relationship with the client,
- choose the appropriate line of questioning,
- select the specific, most useful question within that line.

Different professions develop different hypotheses about the same situation. A lawyer develops a hypothesis about the legal theory; the family therapist, about the dynamic interaction of the participants; an accountant, about the accounting method, and so on. A mediator develops a hypothesis about

- the problem to be resolved through negotiations,
- the client's goals,
- their negotiating behavior.

The Fundamentals of Family Mediation

So, we now have an additional value of the hypothesis, it *helps the mediator to be a mediator*. This is particularly important in mediation because most mediators come to the profession from another profession. The lawyer/mediator has his personal bias/prejudice, his legal hypothesis, and his mediation hypothesis. The same trilogy is found with mediators from other professions.

Ideally the mediator disattends to any hypotheses about the clients' dynamic behavior or their legal posturing, since these do not help him to move the clients towards a mutual definition of the problem and the subsequent problem solving that follows from the acceptable definition.

The only relevance of a therapeutic hypothesis is whether the disorder impacts the client's ability to negotiate an agreement: if it does it requires a referral to a therapist. The only relevance of a legal hypothesis is whether the client has a legal problem requiring a referral to counsel. If the behavioral hypothesis is about a condition that might affect but not prevent an agreement, the mediator lays the nonmediation hypothesis aside.

To be useful, a hypothesis must be generally correct and must also be relevant. The mediator can develop a hypothesis about the client's psychological problem and hypothesize, for example, that one client has a narcissistic personality disorder. The hypothesis may be more or less correct but it would not be useful. Even a person with this disorder must negotiate an agreement in order to solve the problem.

Similarly, the mediator might hypothesize that a client is greedy. This might make the negotiations more difficult, but it does not prevent the other person from holding firm and insisting on a fair settlement, and it does not prevent the mediator from managing the negotiations leading to a fair settlement.

Let's see how different hypotheses affect the mediator's behavior and ability to help the couple solve their practical problems.

The Case of Mary and Peter

Mary and Peter lived in a home purchased by Peter before the marriage. Mary, who is in her mid-thirties, initiated the divorce two years ago. They fought about the children and money. She took the two children, Tony age nine and Greta, age five. She remarried and has a baby with her new husband, Arnie.