



28-Hour General Civil Mediation Training

Ellen Lahtinen, MPA & Amanda J. Reinke, PhD

9:00-6:00 PM

Online



Technical Matters

- Call/text Ellen Lahtinen if technical problems arise: 770-855-7224 (write this down)
- Leave video on except during breaks to verify attendance for GODR.
- Mute your mic unless you are speaking.
- Can we share your cell number with role play partners if technical problems arise?
- Use “raise hand” function to ask questions.

Introductions

- Name
- Vocation / Occupation
- Current skillset relevant to mediation
- Why you're here

Goals

1. Understand the difference between various ADR processes.
2. Understand how to “Fit the Forum to the Fuss”.
3. Understand which processes are used by courts in Georgia, which aren’t and why.
4. Understand skills and concepts basic to negotiation and mediation.
5. Understand the steps in the mediation process.



Goals, cont.

6. Master basic mediation skills.
7. Understand ethics rules and be able to apply them to individual scenarios.
8. Understand how the practice of mediation works in Georgia's court-connected setting (e.g., how to get on rosters, build a practice, etc.) and OUTSIDE the courts.
9. Practice and become more comfortable as a mediator.
10. Learn techniques for breaking impasse.



Mediation vs. mediation

Formal Mediation

- Done by trained mediators in court or other formal setting.
- Follows specific rules regarding process and ethics.
- Agreements are written and enforceable via courts.

Informal mediation

- Done by parents, managers, neighbors, public officials, religious leaders outside court-connected setting.
- Neutral uses mediation skills, but not carry title of “mediator.”
- Agreements often unwritten, informal.



Mediation

- A future-oriented process of facilitated dialogue and negotiation based on **self-determination, mutual respect, and shared responsibility.**
- Mediation use neutral third-parties who are not decision-makers, but there is diversity in the ways the process takes place.





Alternative Dispute Resolution

A continuum of
practices

Alternative Dispute Resolution (ADR) Continuum

Decisions/actions controlled by parties

Decisions/actions controlled by others



Negotiation

Mediation

Case evaluation

Ombuds

Arbitration

Adjudication



ADR Continuum Options

- **Mediation:** process of using a third-party neutral involved in assisting two or more parties reach a mutually agreed upon resolution through facilitative conversation. The neutral does not make any decisions for the parties. It is the party's self-determination to reach a resolution.
- **Case evaluation:** parties/attorneys present case summaries to a neutral that provides a non-binding opinion of the case and prediction of case outcome if adjudication occurs.
- **Ombuds:** organization neutral assisting with informal conflict resolution with confidentiality assurance
- **Summary jury trial/minitrial:** mock trial with an advisory jury and evidence presentation (after final pretrial conference)



ADR Continuum Options,

- **Facilitation:** neutral third-party (facilitator) involved to help a group find/clarity common objectives and how to work together more effectively.
- **Negotiated Rulemaking:** process of bringing agencies and stakeholders together to draft federal rules by consensus.
- **Arbitration:** neutral third-party or parties (arbitrators) listens to the parties and renders a decision.
- **Adjudication:** binding legal proceeding involving judge's review.



ADR Process Matching Exercise

Mediation = just 1 tool among many

Intake screening should: “Fit the forum to the Fuss” as Goldberg and Sander would say.

Break into pairs to discuss this exercise together via small group online breakout (or phone if technical issues occur)

Styles/Models of Mediation

Transformative: seeking to improve the parties' relationship through empowerment and recognition (many community mediation centers).

Facilitative: leading a productive discussion that explores settlement options (used in GA courts).

Evaluative/Directive: weighing the strengths and weaknesses of each party's case, then giving an estimate about how they would do in court.

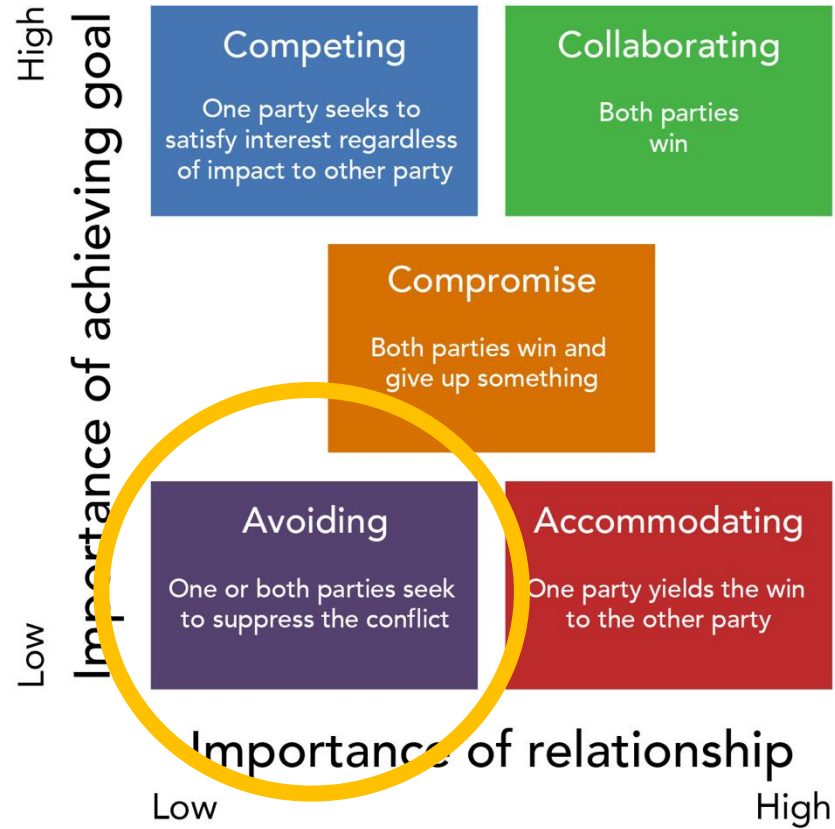


Conflict Theories

1. Thomas-Kilmann
Conflict Mode
Assessment
2. Fairness Theories
3. Procedural Justice
4. Attribution Bias
5. Negotiation
Theories



Thomas-Kilmann Conflict Modes



T-K: Avoiding

- In mediation:
 - May be disengaged.
 - Might avoid eye contact.
 - Will not speak up/actively participate during joint sessions.
 - May not engage directly but makes snide comments and/or have difficulty expressing strong emotions.



T-K: Avoiding



Pros

- Conserves energy for “winnable” fights.
- Recognition that not all problems require engagement.
- “Stepping back” allows others to “step in” to conflict

Cons

- Small problems can grow over time.
- Missed opportunities for positive change through conflict.
- Volcano syndrome.
- Voice doesn’t get heard.



T-K: Avoiding, cont.

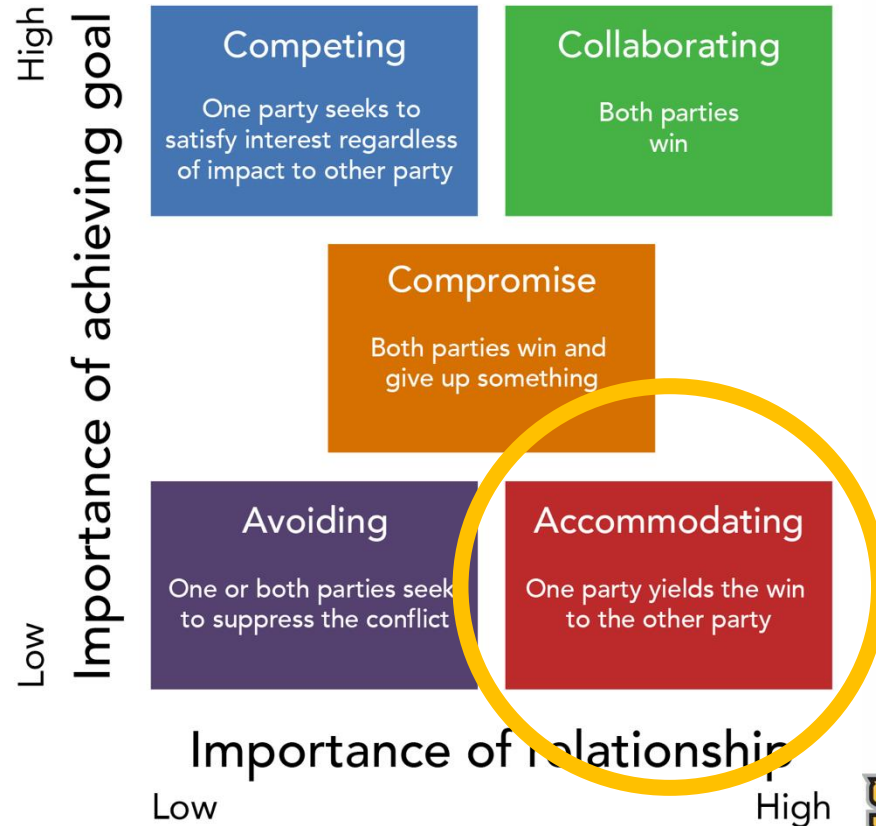
- When is avoidance beneficial?
 - An issue is unimportant to you.
 - “Picking your battles” for winnable/worthwhile conflicts.
 - “Temporary avoidance” to let folks cool down.



T-K: Avoiding, continued

- Techniques to engage the avoider in mediation:
 - Caucus (private confidential meeting) to speak with them one-on-one.
 - Ask them to write down their needs or an initial proposal that they could share.
- Lessons for non-avoiders in mediation:
 - Breaks for “temporary avoidance” to let people cool down.
 - Prioritizing interests/needs to explore concessions and things that matter most (non-negotiables).





T-K: Accommodating



In mediation:

- May be “giving in” to other parties demands quickly and constantly.
- May not speak up about their own needs/interests.

T-K: Accommodating, cont.



Pros

- “Team player”
- Focus on preserving relationships.
- “Stepping back” so others can “step in” to conflict.
- Easily recognizes others’ needs and interests.

Cons

- May feel like a push over who always “gives in” to others.
- Interests, needs, and ideas go unshared.
- Missed opportunities for positive change through conflict.



T-K: Accommodating, continued



Techniques to engage the accommodator in mediation:

- Caucus (private confidential meeting) to speak with them one-on-one.
- Ask them to write down their needs or an initial proposal that they could share.

Lessons for non-accommodators in mediation:

- Concessions are critical to negotiations and building positive feelings in conflict.
- Prioritizing interests/needs to explore concessions and things that matter most (non-negotiables).

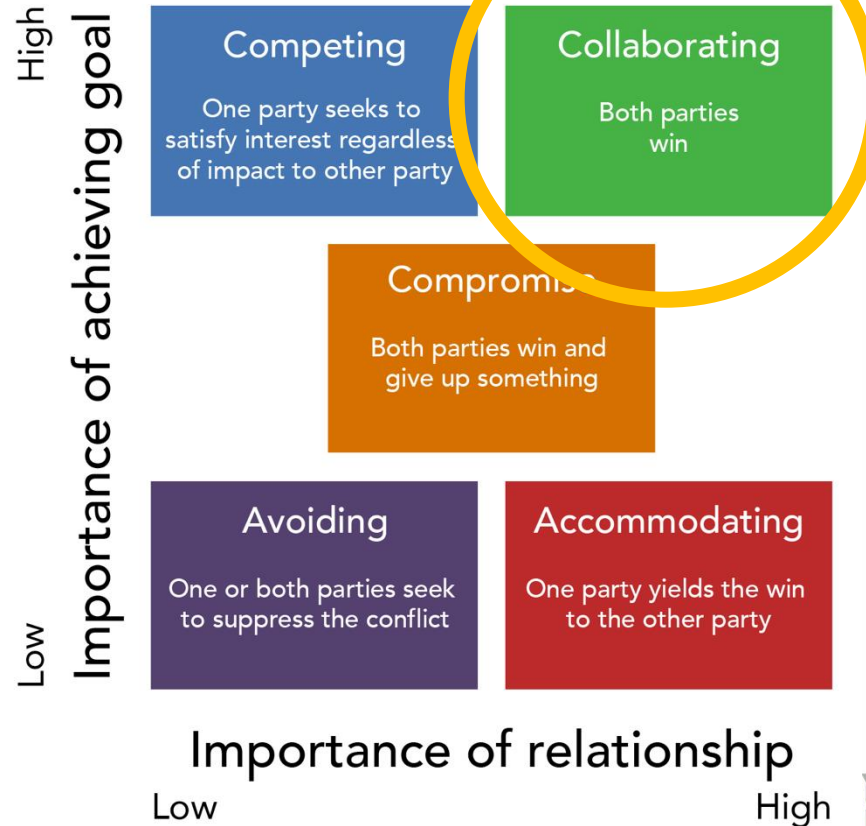


T-K: Accommodating, continu



When is accommodation beneficial?

- Building goodwill or team attitudes are important.
- Often willing to make several concessions, increasing the confidence and positive feelings in mediation.



T-K: Collaborating



In mediation:

- Will want to thoroughly discuss all points and information.
- Will not want to make a definitive proposal, but instead collaborate with other parties to come up with solutions.
- May take a lot of time to explore new information.

T-K: Collaborating, continued

Pros

- Honors relationships with others by active engagement with them.
- Maximizes information sharing.
- Agreements are collaborative, and therefore all stakeholders have buy-in.

Cons

- Very time consuming.
- Not all decisions/outcomes demand collaboration.
- Not all issues are negotiable.



T-K: Collaborating, cont.



When is collaboration beneficial?

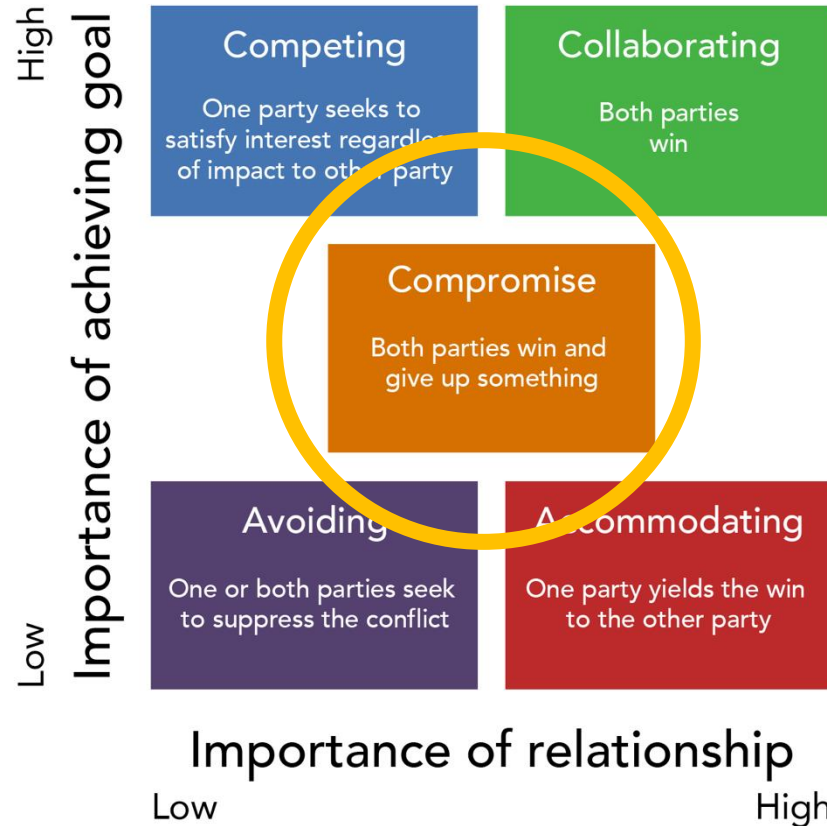
- When buy-in from all parties to an agreement is key to its success long-term.
- When everyone cares about the issues at hand to the extent, they're willing to spend the time on collaboration.
- Enough time exists and relationships are valued.

T-K: Collaborating, continue



- Techniques to engage the collaborator in mediation:
 - Direct questions to focus their energy.
 - Asking them “out of these issues, what do you think is negotiable?”
 - Make space for others to contribute.
- Lessons for non-collaborators in mediation:
 - Working together creates a better mediation experience.
 - Be curious about other peoples’ perspectives, feelings, and experiences – more information can help reach resolution.
 - Open, honest discussions that are tactful increase understanding.





T-K: Compromising

- In mediation:
 - Will move quickly to concessions and proposals.
 - May propose non-sensical solutions (i.e., splitting 50/50).
 - Will leave value unclaimed and not engage in creative problem-solving as easily.



T-K: Compromising, cont.



Pros

- Quick process
- Fair – everyone wins and everyone loses something

Cons

- Less creative in problem-solving and agreement proposals
- May lead to outcomes that are not easy to implement or are not fully satisfactory.

T-K: Compromising, continued

- When is compromising beneficial?
 - Time is short and agreement needs to be reached.
 - A fair process is as important as the outcome of the process itself.
 - When there is a preference for “splitting the difference.”

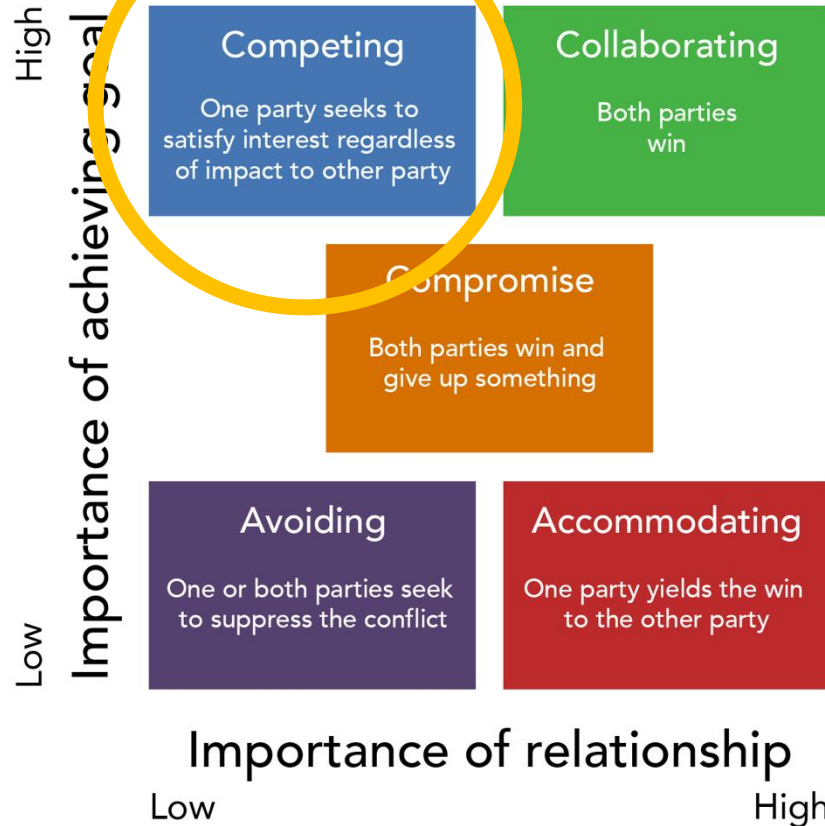


T-K: Compromising, cont'd.



- Techniques to engage the compromiser:
 - Invite brainstorming ideas for proposals/agreements.
 - Ask reality-testing questions about their proposals.
- Lessons for non-compromisers in mediation:
 - Splitting the difference can be more efficient and effective than other approaches in some conflicts.
 - Not every issue/interest is equally important – be willing to make concessions.
 - A fair process is important!





T-K: Competing



- In mediation:
 - Has demands prepared.
 - States a strong position.
 - Will struggle to abandon their positions and explore interests deeply and thoroughly.
 - May be intense in their emotions and/or presentation of their case.
 - May struggle to take the other parties' perspectives and issues seriously.
 - Will expect others to be direct in their communication and advocate for their position.

T-K: Competing, cont.



Pros

- Clear positions and understanding of what they want.
- Health competition can inspire others to participate actively.
- Will take initiative in conversations and proposals.

Cons

- Can speak over others.
- May be seen as a poor listener or as pushy.
- Can make proposals that don't incorporate everyone's needs/interests.
- Will be brutally honest, regardless of how it affects others' feelings.



T-K: Competing, continue



- When is the competitive approach beneficial?
 - It encourages others to actively participate, be clear about their needs, and advocate for their interests/needs.
 - When time is short, and you need to state interests and positions quickly.

T-K: Competing, continued



- Techniques to engage the competitor:
 - In caucus, ask them to summarize the other parties' needs/interests.
 - Reality-test proposals and encourage the competitor to consider “how this proposal meets *everyone's* stated needs.
- Lessons for non-competitors in mediation:
 - Be prepared to share your interests and needs in mediation.
 - Focus on the negotiables.
 - Be willing to advocate for yourself.



For Mediators

- Be aware of your own default conflict mode, and how these change or are triggered.
- Be aware of cultural differences in conflict modes and their expression.
- Be willing to try different techniques that meet the needs of your parties (i.e., temporary avoidance, etc.).





Fairness

What is fair?

What does “fairness” mean?

Alexus, Brooke, and Chris work together as ABC Consulting. They’ve recently wrapped up a small contract – the firm was paid \$2,400 for 24 billable hours of work (at \$100/hour).



Activity: Fairness

Alexus knows a lot about this consulting gig—brought this project to the firm and did 6 hours of work on this project. Alexis is retired, wealthy, and doesn't need to work, but does this as a hobby that she enjoys.

Brooke did 12 hours on this project. Knows something of this area of work, but Alexis was the lead, with the most expertise. Brooke is mid-career and looking to build the business.

Chris didn't know much about the type of work involved in this project and worked 6 hours on this project. Chris is a single-parent with two kids and loans to pay off; life is busy and messy, but he is doing his best and working hard!

(Do exercise in groups before moving to next slide)

10 minutes to “divide the pie”

	Equality	Equity (time)	Equity (expertise)	Equity (leads)	Need
Alexus	\$800	\$600	\$1,200	\$1,000	\$0
Brooke	\$800	\$1,200	\$600	\$800	\$800
Chris	\$800	\$600	\$600	\$600	\$1,600

A black and white photograph of two chess knights (horses) facing each other on a chessboard. The knight on the left is black, and the knight on the right is white. The background is blurred, showing other chess pieces. The text "Procedural Justice" is overlaid in white, centered between the two knights.

Procedural Justice

Procedural Justice, cont.

- Includes voice, fair process, and being treated with respect.
- McEwen and Maiman (1984), compliance with judgments vs. mediated agreements:
 - Adjudication, 59.2%
 - Mediation, 90.4%
 - Adjudication after failed mediation, 69.2%



Procedural Justice, cont'd.

And authorities (in a workplace, for example)...

“If authorities treat people with trust, fairness, respect and neutrality, people will not only be more willing to cooperate...but they will also be more likely to comply with authority decisions and rules” **and** “perceptions of procedural justice influence the emotions experienced by people...these emotional reactions (i.e. anger and happiness) mediate the effect of justice on subsequent compliance behavior”

(Murphy & Tyler, 2008)



Procedural Justice, continue

When people perceive *the process* is just, then

- they are more likely to be satisfied,
- cooperate, and
- adhere to agreements *even if they don't get all the substantive things they wanted.*





Negotiation Dynamics

Negotiation

- Negotiation is communication for the purposes of persuasion.
- Mediation is a facilitated negotiation.
- Negotiation skills and concepts are the foundation for the practice of mediation.



Ury, W., R. Fisher, & B. Patton (2011) *Getting to yes: Negotiating an agreement without giving in*. New York: Penguin Random House.

Positions and Interests

Positions: demands; what the party wants (or thinks they want!)

- Positions focus on the “what” (“I want that!”).
- Ex: “I want the house”

Interests: need; underlying reason for a demand

- Interests focus on the “why”
- Ex: the house could be *safety* or *security* (financial or physical) or *memories* or *school district*

Ury, W., R. Fisher, & B. Patton (2011) *Getting to yes: Negotiating an agreement without giving in*. New York: Penguin Random House.



Positions versus Interests

Position Statement

- I want the house!

- I loaned them \$2,000; I want my money.

Interest Statement

- My grandfather built the house; the legacy is important to me.

- I gave my friend money, but now I need the money to pay my bills.



Negotiation Styles

Positional

- Focus on position (the *what*)
- Conflict of interests is emphasized
- Fixed pie, zero-sum game
- Adversarial style

Interest-Based

- Focus on interests (the *why*)
- Focus on common interests
- Development of options to expand the pie
- Collaborative opportunities

Breaking through Positions

- Focus on the future, not the past.
- Ask questions instead of making statements.
- Reframe positions as interests.
- Identify and legitimate emotions.
- Separate the people from the problem.
- Focus on interests, not positions.
- Invite options for mutual gain/creative problem-solving.



Ury, W., R. Fisher, & B. Patton (2011) *Getting to yes: Negotiating an agreement without giving in*. New York: Penguin Random House.

Psychological Barriers

“Some of the most frustrating conflicts are those that people fight within their own heads, as they struggle with the dilemmas and temptations they encounter and create”
(Mischel, DeSmet, and Kross, 2014, p. 310)

“Intrapsychic” conflicts include cognitive bias and attribution bias, addiction, stimulus control (triggering events)

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Attribution Bias:
Ascribing
Motivations to
Actions

When we have a good relationship with someone:



We attribute their (negative) behavior to circumstances beyond their control.



When we have a bad relationship with someone:



We attribute their behavior to their disposition or character flaws.

Endowment Effect:
Over-inflating value

When we have/own something:

We place a higher value on it than we might otherwise,
or when we first acquired it.

We are loathe to get rid of it, give it away, and balk
at "letting go" of it.

So what do we do?

Sunk Cost Fallacy:
“My case is worth
AT LEAST as much
as I put in and I’m
not walking away
until I get that!”

We have spent a lot of time, money, mental or
emotional energy, or other resources on an issue

We believe that our case is worth AT LEAST that much

So how could someone possibly suggest that we
settle for less?!

So what do we do?

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Dijkstra, K. and Y. Hong (2019) “The feeling of throwing good money after bad: The role of affective reaction in the sunkcost fallacy.” *Plos One*
<https://doi.org/10.1371/journal.pone.0209900>.

Nolland, C. (2021) “Overcoming the sunk cost fallacy and its untoward impact on settlement dynamics,” *Mediate*. <https://www.mediate.com/articles/nolland-sunk-cost-fallacy.cfm>⁵⁹

Activity: Family Cabin Negotiation

2 parties:

Jaime Miller and Cameron Morrison

No third-party intervenor (mediator). Explore negotiation dynamics from your assigned party's perspective.





Mediation.

Mediation, cont.

- A future-oriented process of facilitated dialogue and negotiation based on **self-determination, mutual respect, and shared responsibility.**
- Mediation use neutral third-parties who are not decision-makers, but there is diversity in the ways the process takes place.



When is mediation appropriate?

That which is **negotiable**, is mediatable.

Which of the following are negotiable?

- Schedules
- Values
- Payment, reimbursement
- Noise
- Rights
- Procedures
- Beliefs



Mediation Process

1. Contracting, mediator's opening
2. Uninterrupted time
3. Agenda setting
4. Negotiation, generating potential solutions
5. Agreement building/writing

Past

Present

Future



Preparation for Mediation

Watch “Preparing for mediation” together, followed by discussion of parties’ preparedness (what you can expect from the parties) and how to prepare as a mediator.



Intake Process for Private Mediators

- **SCREEN:** is the case appropriate for mediation?
- **INFORM:** provide information about mediation.
- **MATCH:** determine the appropriate mediator(s).
- **PLAN:** discuss process and logistics.



Prepare for Mediation

Parties' preparedness for mediation:

- 54% perceived to be prepared (civil mediation)
- 57% perceived to be prepared (private mediation)
- 43% perceived to be prepared (small claims)
- 50% perceived to be prepared (community mediation)

Parties can be better prepared:

- During intake process
- Prior to mediation (online resources, seeking/conferring with legal counsel)

Prepare for mediation: In-person session

- Things to bring to in-person: paper, writing tools for parties; notetaking plan for yourself; tissues; printer for agreements; snacks and/or water for parties
- Where to mediate: courthouse; private space (office); other contexts appropriate for your type of mediation
- Set up the room: space the chairs; be closest to the door
- Security measures: courthouse versus other places
- Pre-process contact: intake procedures



Preparing for Online Mediation

- Guidelines for mediation: signed in advance
 - Adobe sign, DocuSign or Dropbox Sign (Most common)
 - Other Options: SignNow, BoldSign, PandaDoc, Jotform, Zoho Sign
- Confidentiality: recording-audio/video, texts, emails, calls, online meetings
- Non-party participants-who is in the room?

See *The University of Toledo Law Review*, 2006, vol. 38 issue 1, "Symposium on Enhancing Worldwide Understanding through Online Dispute Resolution."
Raines, S. (2006) "Mediating in your pajamas: The benefits and challenges for ODR practitioners," *Conflict Resolution Quarterly* 23(3): 359-369.



Preparation for Online Mediation (continued)

Use of caucus vs. joint sessions

Technology options:

- Zoom <https://www.zoom.com>
- Teams <https://Microsoft.com>en-us>Microsoft-teams>log-in>
- Modron Spaces
 - <https://www.modron.com> OR <https://www.linkedin.com/company/modron>
- Venture X
 - <https://venturex.com/use-case/mediators-arbitrators/>
- Good old phone calls (have a back up plan if technology fails)

Step 1: Contracting and the Opening Statement

Video Demonstration of using 5 mediation steps!



Contracting, Opening Statement

1. Parties sign the mediation guidelines/agreement to mediate. If working in the courts, they give you this document. If doing private mediation, you will have to draft your own.
2. The mediator then delivers their opening statement, following the 10 required points that *must* be covered according to GODR. (Opening Statement Checklist document)



Opening Statement Components

1. The **role** of the mediator.
2. The **procedure** (mediation process).
3. The **confidentiality** terms and limits.
4. The mediator will not give legal/financial **advice**.
5. Participation can be required, but **settlement cannot be mandated**.
6. Mediation can be **terminated** by any time by mediator or parties.
7. Parties expected to negotiate in **good faith**.
8. Parties are **free to consult legal counsel**.
9. A mediated **agreement**, once signed, can have significant effect upon the rights of parties and the status of the case.
10. Parties affirm that they have the **capacity** to make good decisions for themselves, including terminating mediation.



Remember...

Tailor your opening statement to

- Your personality
- Your audience
- The context (time, mediation content/context)

Add ground rules, as appropriate.



Ground Rules

- Help you set the tone and expectation.
- Can help minimize distractions (i.e., technology use during mediation; name-calling, etc.).
- Too many leads to time over-spent reminding parties to adhere.
- Covers practical matters, such as issues with technology (online mediation), parking or restrooms (in-person mediation).



Activity: Opening Statement

Develop and write down your own opening statement.

Use GODR's Opening Statement Checklist to ensure you include all 10 required points.



End of Day One

“Peace is found not in the absence of challenge but in our own capacity to be with hardship without judgment, prejudice, and resistance.”
bell hooks

Step 2: Uninterrupted Time

Parties' Uninterrupted Time

Parties share their stories in their own words.

This is **not** an opportunity for them to interrupt each other. How to start:

- Start with the plaintiff/complainant.
- Ask “what has brought us here today?”
- Once they’re done, summarize what you’ve heard.
- Invite “anything I missed or that you’d like to add at this time?”
- Then ask the other party the same thing.



Listening Skills



Listening is arguably the most critical skill in mediation



Typical conversations are marked by 2 characteristics:

A low rate of comprehension and retention

Taking turns as 'the speaker'

Activity: Listening Self-Evaluation

What are your listening strengths?

Where could you improve?



Mediators use Reflective listening



To **convey** respect, interest, empathy



To **model** respectful listening/attention



To **learn** the parties' perspectives



To **elicit** underlying causes of conflict, interests, and possible solutions.

The purpose of reflective listening is...

- To **understand** what the speaker is saying
- To **help the speaker clarify** her/his/their thoughts and feelings
- To **let the speaker know** that you have heard and understood
- To build **rapport and relationship**
- In processes like mediation, to **help** others present and understand.

Pappas, B. (2019) "Mindful mediation," *Southwestern Law Review* 48: 351-366.



Two Simple Lessons of RL

1. Keep the focus on the speaker.
2. You can't do two things at once if one of those things is listening.



Recipe for RL

Attending skills

- Posture, eye contact, physical contact, movements, environment

Following/encouraging skills:

- Door-openers, acknowledgement responses, interested silence, open-ended questions

Responding skills:

- Paraphrasing content, reflecting emotion, reflecting meaning, summarizing



A quality reflection meets 3 criteria

1. Short, so the speaker's train of thought is uninterrupted.
2. Has no listener input (no "I").
3. Is a close approximation of what the speaker means, not what you think the speaker *should* mean, what they forgot to say, or what the speaker should focus on.



Reactive responses (non-reflective)

Evaluate/judge

- Agreeing, disagreeing, criticizing, blaming, diagnosing, praising

Solve

- Ordering, threatening, moralizing, advising, questioning, problem-solving

Avoid

- Logical arguing, reassuring, diverting, or “understanding”



Some formulas (there are many!)

- “It sounds like you feel _____ about _____.”
- “If I’m hearing you right, you are _____ about _____.”
- “So you feel _____ about _____.”

- Consider what formula works for you or devise your own that reflects your personality and style of communication, but avoids the reactive responses.
- Work on the reflection exercise in small groups.



Reframing

Reframing is an art. It is delicate and crude.

- **Delicate** because it requires judicious use of similar (but less specific, toxic) words, and **crude** in that some mediators find it manipulative

The goal of framing in mediation is to arrive at neutral language.

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Activity: Reframing

Reframe the statements into neutral language that reflects meaning, but shifts the focus to interests/shared problems/need/the future/shared issues.





Useless Questions

- “Don’t you think...”
- “Wouldn’t it be better if...?”
- These are leading or rhetorical.
- Mediators **avoid** leading questions.
- Leading questions suggest the mediator approves of a particular answer.

Types of Questions

Open

General

Opinion-seeking

Fact-finding

Narrow, forced choice

Closed

Leading

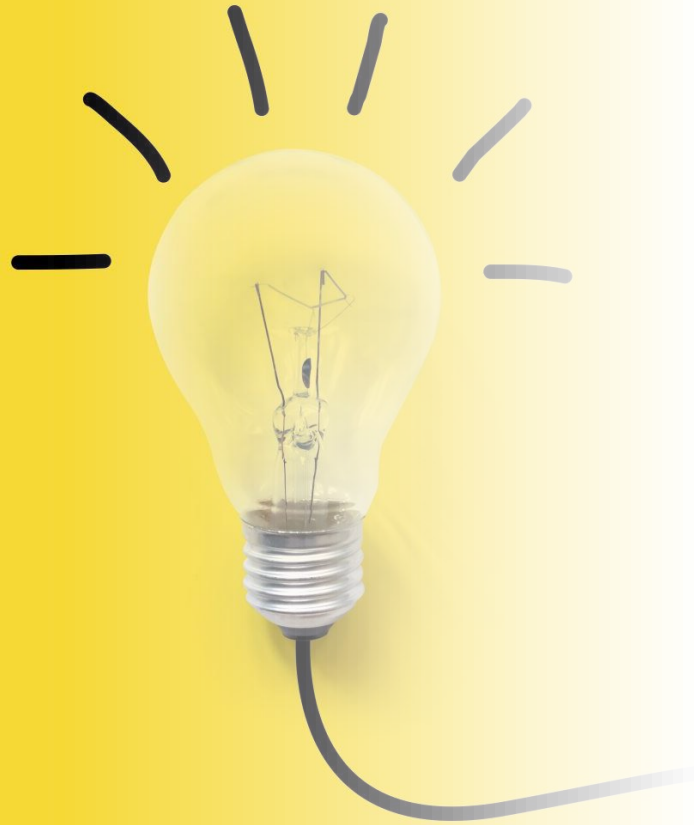


Common Mediator Questions*

- You mentioned _____. Could you give me an idea of what you mean?
- Tell us how that would meet everyone's stated needs.
- Could you help me understand _____."
- What might be a good way of doing/achieving that?
- How could your interest in [insert interest here] be satisfied?
- What specifically would meet that need?
- What would help you both achieve your goals?
- In caucus (1-on-1 with each party separately):
 - What do you think the other party wants to achieve? What do you think would make a realistic solution? What can you do to help them achieve what they want and to achieve what you want? What can you realistically offer/deliver? What can they realistically offer/deliver? If you don't reach a resolution today, what might happen next?

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Activity: Asking Good Questions

Step 3: Agenda- Setting Phase

Setting the Agenda

A short, but important stage.

Agenda-setting

- Provides a summary of what work has been done, what stories have been shared.
- Demonstrates that the mediators have heard and understood the parties' concerns.
- Sets an agenda through a **visual listing** of topics, presented in positive and impartial language.
- Provides a transition from **past focus** to **present** and **future** focus.



Setting the Agenda



Setting the Agenda: Framing the problem

When describing the task ahead, the goal is to **frame a problem the parties can solve together.**


Use “both/and” language instead of “either/or”.



Setting the Agenda, cont.

- Summarize what has been accomplished so far
- List the issues visually
- Agree on an agenda





Setting the Agenda: Tips

- **Visually** list the issues (on paper, white board, shared screen with word doc if virtual, projector)
- Keep the list **short** and **manageable**
- State the issues generally and in **neutral** terms
- Focus on **mediatable** issues only
- Ask the parties if the list is **accurate, complete, and acceptable.**



Activity

- 3 roles: 2 parties, 1 mediator
- Go through these stages:
 - Mediator's opening statement
 - Uninterrupted Time
 - Agenda setting

Step 4: Negotiation

Note on Limitations

- Company representatives (lawyers, managers, etc.) will typically have **limitations** on what they can agree to or settle for in mediation.
- If you suspect this might be the case, then ask that party **in caucus** about whether there are some limitations to their authority to reach agreement or produce a settlement.



Problem-solving

- After identifying and listing the issues during Agenda Setting, move on to problem-solving.

- There are several ways to approach organizing the issues:

- Easy to hard
- Least to most important
- Most to least urgent
- Most to least important

Good for getting traction quickly

Good when time is limited and pressing issues need some discussion





Brainstorming Solutions

Ground rules for brainstorming:

- Generate a list of interests for each party
- Separate the idea generation stage from the idea evaluation stage
- Use objective criteria to evaluate the ideas that come from brainstorming
- Compare ideas to interests. What works? What doesn't?
- Should the mediator share ideas?

Overcoming Impasse

- Don't give up too early.
- Caucus 1 one more.
- Have you gotten to interests or are they stuck in positions?
- Ask them about the best path forward for their case.
- Play “worst case/best case scenario” to help them think through options.
- Backcasting
 - A strategic planning method that involves envisioning a desirable future and then working backwards to identify the steps needed to achieve it.



Benjamin, R. (2018) "The joy of impasse: The neuroscience of 'insight' and creative problem solving." *Mediate*. <https://www.mediate.com/articles/benjamin44.cfm>

Peterson, D. (2017) "Embracing impasse," *Mediate* <https://www.mediate.com/articles/PetersonD1.cfm>.

Overcoming Impasse (continued)

- Set aside the present topic and shift to another (“it seems like we’re getting a little stuck on this topic. Why don’t we press ‘pause’ on this for now and come back to it? Let’s talk about [xx]”)
- Take a break.
- Ask them to consider what they will do if there’s no agreement.



Caucus

A one-on-one confidential and private meeting between the mediator and a party.

Can be used to:

- overcome mutual fears of exploitation.
- overcome fears of disclosing “too much” information.
- be used to build rapport and trust between mediator and each party separately.
- provide a “temporary avoidance” to help cool down tensions.
- learn more information about a party’s interests/needs.



Caucusing: The How

In-person:

- Place parties in separate rooms, or walk the “waiting” party to a waiting area while you caucus with the other party. Never let them walk alone.
- Remind party of confidentiality at beginning of meeting.
- At end of caucus, ask the party “is there anything you’ve said that you *don’t* want me to share with the other party?”

Virtual:

- Use breakout rooms to separate parties.
- Remind party of confidentiality at beginning of meeting.
- At end of caucus, ask the party “is there anything you’ve said that you *don’t* want me to share with the other party?”

Hoffman, D. (2011) “Mediation and the art of shuttle diplomacy,” *Negotiation Journal*, doi: 10.1111/j.1571-9979.2011.00309.x
Poitras, J. (2013) “The strategic use of caucus to facilitate parties’ trust in mediators,” *International Journal of Conflict Management* 24(1).



Caucusing: Cautions

- Hams parties' trust in each other or the process.
- Misses opportunities for relationship building.
- Slows down the process, stifles dialogue.
- Removes responsibility from the parties to work directly on resolution.
- Risks neutrality.



Caucusing: Tips



Assure the party of confidentiality!
(Ethics!)



Be understanding but impartial.



Be clear about what you can and cannot
share.



If possible, persuade them to speak
directly to each other, especially in
delivering an apology or making an offer.

To caucus or not to caucus?

- Perpetuates indirect communication, a common cause of many disputes.
- “Shuttle diplomacy” fails to lay the groundwork for improving direct communication and, thus, increases likelihood of future conflict
- Can more efficiently get to interests.
- Can reveal underlying information they wouldn't have shared in joint session.



Hoffman, D. (2011) “Mediation and the art of shuttle diplomacy,” *Negotiation Journal*, doi: 10.1111/j.1571-9979.2011.00309.x

Challenges in Mediation

- Survey of mediators spanning many contexts (Poitras & Raines, 2014)
- 200+ survey participants with experience in many areas:
 - 49% family and divorce
 - 3% discrimination/workplace mediation
 - 25% interpersonal mediation
 - 15% landlord/tenant
- Ranked 10 challenges most difficult to least difficult



Poitras, J. & S. Raines (2014) *Expert mediators: Overcoming mediation challenges in workplace, family, and community conflicts*. Rowman & Littlefield.

Raines, S., S. Pokhrel, & J. Poitras (2013) "Mediation as a profession: Challenges that professional mediators face" *Conflict Resolution Quarterly* 31(1): 79-97.

Challenges in Mediation, cont.

Survey participant demographics:

- 45% had mediated more than 500 cases
- 30% mediated between 200-500 cases
- 12% mediated between 100-200 cases

79% of respondents had more than 10 years of practice experience



Poitras, J. & S. Raines (2014) *Expert mediators: Overcoming mediation challenges in workplace, family, and community conflicts*. Rowman & Littlefield.

Raines, S., S. Pokhrel, & J. Poitras (2013) "Mediation as a profession: Challenges that professional mediators face." *Conflict Resolution Quarterly* 31(1): 79-97.

Challenges in Mediation: Hardest to easiest

- Entrenched positions
- Moving from past to future focus
- Parties' emotions
- Neutrality
- Cultural differences
- Difficult attorneys
- Mistrust
- Resistance to mediation



Step 5: Agreement Writing Phase

When possible, we help the parties clarify and write their agreement. Not all conflicts conclude with an agreement.

Agreement Development, Writing

- If/when the participants reach agreement:
 - Write it down!!!
- Reaching an agreement isn't about the skill of the mediator, but the will of the parties. If one or both parties aren't willing to reach an agreement, no mediator regardless of skill, could get them there. If you try to force an agreement, it will not be upheld.



A solid agreement

- Resolves the present dispute, deals with all the issues raised by the parties, and reflects the wishes of the parties by using their own language where possible.
- Helps prevent needless future disputes by providing sufficient details.



Discuss “if / thens”

- If they don't pay on time, what then?
- If they don't follow the action items, what happens then?
- Reality test their expectations and help them think through what could happen if the agreement isn't fulfilled. These don't necessarily have to be written in the agreement, but in some cases certainly should.



Make SMART Agreements



SPECIFIC



MEASURABLE



ACTIONABLE



REALISTIC



TIME-BOUND

Activity: Agreement Writing

Work in small groups to refine the agreement.

Pay attention to details and the “if / thens”





How are agreements enforced?

- Some agreements become the order of the court and can be enforced like any other court order.
- Other agreements do not become court orders and are enforced as **contracts**.

Is an agreement a contract?

Only if it meets the requirements for contract under law.

What is the advantage to the parties of an agreement that is a valid contract?

- The agreement will be **enforceable** as a contract.



Under GA Law (O.C.G.A. 13-1-1)

- All parties are competent to contract;
- There are mutual promises;
- No party is required to do anything illegal;
- The agreement is definite, clear, and concise so that all parties understand its terms; and
- Each party assents to all the terms of the agreements.

- What if your parties are under 18? Drunk? Have Alzheimer's?



What is the mediator's role in agreements?

- Should the mediator write the agreement?
- Should the mediator suggest language?
- Should the mediator suggest terms the parties left out? Should the mediator add terms?
- What if the parties don't have lawyers (*pro se*)?
- What if the parties can't write their own agreement?





Ethics

Georgia Rules and Regulations

- GODR is the coordinating agency for court-connected mediation in Georgia
- www.godr.org
- Appendix A: Uniform Rules for Dispute Resolution Programs
- Appendix B: Requirements for Qualification and Training of Neutrals
- Appendix C: Ethical Standards for Neutrals; Ethics Procedures



Frequent Sources of Ethics Complaints

When a party wants to vacate the mediation agreement and need a legal basis for doing so. They claim:

1. Mediators overstep authority by pressuring parties to settle or accept particular elements within a settlement agreement. Labeled as a violation of impartiality or unauthorized practice of law.
2. “I wasn’t “right in my mind” when I signed that agreement and the mediator should have known it!” Mediators who do overly long sessions where parties are tired/hungry make poor decisions. Parties under influence (drugs/alcohol) or lack mental capacity will later seek agreement nullification.



Frequent Sources of Ethics Complaints, cont.

When a party wants to vacate the mediation agreement and need a legal basis for doing so. They claim:

3. Complaints regarding inappropriate professional behavior.

- Mediator didn't fully disclose fees.
- Mediator inappropriately advertised services (claiming settlement rate, "certified" rather than registered).
- Didn't disclose relationship with 1+ parties or their attorneys prior to mediation.
- Failed to disclose a criminal record when applying for mediator status.
- Continued in a DV case even though they aren't registered as a DV mediator.



O.C.G.A. 15-19-51

It shall be unlawful for any person other than duly licensed attorney:

- To practice or appear as an attorney at law for any person other than himself in any court of this state or before any judicial body...
- To render or furnish legal services or advice;...
- To render legal services of any kind in actions or proceedings of any nature.



O.C.G.A. 15-19-50

The practice of law in the state of Georgia is defined as:

- The preparation of legal instruments of all kinds whereby a legal right is secured...



What can a mediator do to avoid the unauthorized practice of law?

- Use the parties' own words whenever possible;
- Avoid any legal jargon – write in plain English!
- Never add terms to the parties' own agreements
- Be very careful about suggesting additional terms, but help the parties clarify through questions.



Ethics Code for Mediators

Five areas of rules:

- Self-determination
- Confidentiality
- Impartiality
- Fairness
- Rules of fair practice

Ethics procedures:

- Registration process
- Complaint process
- Confidentiality
- Immunity of those involved



Activity: Appendix C

What part(s) of Appendix C applies to each of the scenarios?



Breaching Confidentiality

- Always notify the ADR program director if you intend to breach confidentiality.
- Threats of imminent harm to self or others: report to the Sheriff or police department.
- Child abuse or neglect: report to DFCS (may report via phone, but then report via letter for a “paper trail”).
- Mandated reporters must report child abuse allegations: doctors, counselors, teachers and school administrators, law enforcement, social workers, dentists, podiatrists, some clergy.



Court Challenges

What if a member of the court asks, “what happened in mediation?”

- “Sorry, but I can’t share that information.”

What if you receive a subpoena to testify?

- Contact your ADR program director for assistance.
- Contact GODR for guidance.



End of Day Two

Man must evolve for all
human conflict a method
which rejects revenge,
aggression and
retaliation. The foundation
of such a method is love.

Martin Luther King, Jr.

Activity: Ethics Opinion 7

A closer look at virtual mediation, social media, and mediator ethics and responsibilities.



Activity: Ethics Opinion 4

A closer look at when mediation "ends," and confidentiality.





Ethical work is quality work.

Ethics is often treated as an afterthought, but that which is ethical work represents quality work.

Each person will be the mediator in 1 role play with an experienced mediator as a coach.

You will be evaluated on the ten points of your opening statement and the mediation process.



Role players:

Play your role as if you were in the situation. Please allow the mediator to conduct the process!





END OF DAY # 3

“Whenever you're in conflict with someone, there is one factor that can make the difference between damaging your relationship and deepening it.

That factor is attitude.”

William James



Culture, Diversity, and Mediation



What role might
diversity and
culture play in
mediation?



Diversity and Mediation

Culture is a set of beliefs, values, behaviors, practices, and material goods which are learned and shared by group members and transmitted to the next generation

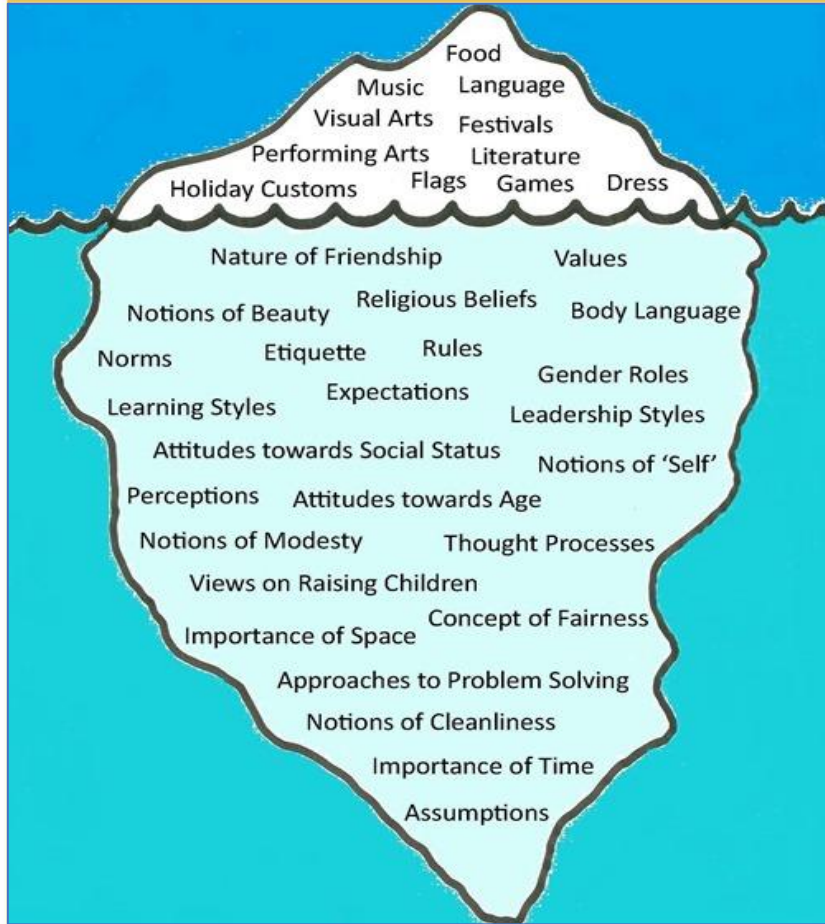
- Learned via **socialization**
- Shared via identity



Culture and Mediation

- Culture tells us what to notice and what is just background noise.
- Our cultural beliefs are often invisible to us until we step out of our own culture and into another.
- We often assume a belief/value/behavior/norm is universal, when it is instead culturally-based. Examples?





Often reveals **cultural norms**: standards or rules about what is considered acceptable behavior

Often reveals **cultural values**: people's beliefs about the goals or way of life that is desirable for themselves and their society

How might this affect mediation?

Examples of cultural behavior

- Speech (volume, interruptions)
- Timeliness
- Personal space
- Respectful behavior
- Appropriate role of the courts



Culture and Mediation Style

- Direct versus indirect communication
- Linear vs. non-linear storytelling
- Face-saving strategies
- Gendered interactions
- Age
- Importance of context
- Conceptions of time (monochronic vs. polychronic)





Cultural Assumptions in US Mediation

- Independence versus interdependence
- Courts have jurisdiction over individuals, property and behavior

Culture in Mediation: Cultural Dimensions

HIGH CONTEXT

Communicate indirectly,
attend to nuance and non-
verbal cues

LOW CONTEXT

Communicate directly,
explicit content of the
message primarily verbally

POLYCHRONIC

Simultaneous occurrence
of many different activities

MONOCHRONIC

Organize and schedule
things sequentially



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Bias in Mediation

- Implicit bias: **unconscious** belief, attitude, or association toward a social group where certain qualities/characteristics are attributed to all members of that group.
- Inequality in mediation: self-determination and disenfranchisement; violation of mediator neutrality; power and unequal outcomes (Wing 2009).



BIAS in MEDIATION, cont.

- Social class
- Race
- Gender
- Age
- Sexuality
- Knowledge
- Religious Belief
- Political Belief
- Physical Ability
- Country of Origin
- Rural / Urban



Halo Effect (Bias!)

- Initial positive impression/judgment that biases our perception of the person (Krockow 2021).



Diversity and Mediation, cont.

You must strengthen your ability to communicate with people who are different from you.

Likelihood of misunderstandings increases with increasing cultural distance. Why?

- Use of language
- Means of expression (gestures, eye contact, conveying respect, etc.)



General Suggestions for Practice

Ask what the parties would like to be called and for pronouns.

- If one party wants an honorific (Mr., Ms. Dr. Rev., etc), ask the other party if they would like an equivalent honorific used.
- Ensure you know how to pronounce their name correctly. Apologize if you make a mistake.

Notice the parties' communication style, eye contact, and body language practice in a non-judgmental way.



Conflicts with Cultural Influences

- A male party says he refuses to work with a female mediator.
- The dad in a divorce says the court has no authority to decide what should happen to his kids.
- Female defendant shows up to mediation in a halter crop top, flip flops, and short shorts.
- The whole family shows up to support the named party in an action, expecting to participate in mediation.



Diversity and Communication

- The way we tell stories varies based upon our cultural heritage and other factors.
- We tell stories to make sense of our lives.
- Stories and narratives **create** as well as describe reality
- Stories have characters, plots, and themes that reveal our interests, fears, and values
- Some tell linear stories, while others tell circular stories.



General Suggestions for Practice, cont.

Ask what the parties would like to be called and for pronouns.

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Diversity and Communication, cont.

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Model Administrative Protocol: Working with Interpreters (2020)

[https://www.gccaonline.org/resources/Documents/Model
I%20Administrative%20Protocol,%20Final%20Version
%20copy.pdf](https://www.gccaonline.org/resources/Documents/Model%20Administrative%20Protocol,%20Final%20Version%20copy.pdf)

MAP Common Concepts

Deaf or Hard of Hearing (DHH):
any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit him or her from understanding oral communication when spoken in a normal conversational tone.

Limited English Proficient (LEP):
any person who speaks English “less than very well,” cannot readily understand or communicate in spoken English, and who consequently cannot equally participate in/benefit from the proceedings without an interpreter to assist.

MAP Common Concepts, cont.

- **Qualified interpreter:** a person who is able to *orally* interpret effectively, accurately, and impartially.
 - **NOTE:** Per O.C.G.A. § 24-6-651 (6), a qualified sign language interpreter means “any person certified as an interpreter for hearing impaired persons by the Registry of Interpreters for the Deaf or a court qualified interpreter.”
 - **NOTE:** Per O.C.G.A. § 24-6-651 (2), a court qualified sign language interpreter means “any person licensed as an interpreter for the hearing impaired pursuant to Code Section 15-1-14.”
- **Qualified Translator:** A person who can translate written text effectively, accurately, and impartially. A qualified translator preserves the tone and level of language used in both languages, renders specialized vocabulary precisely so that the meaning of the written communication is clear and conceptually correct, and abides by industry-recognized ethical and professional standards of conduct for translators.



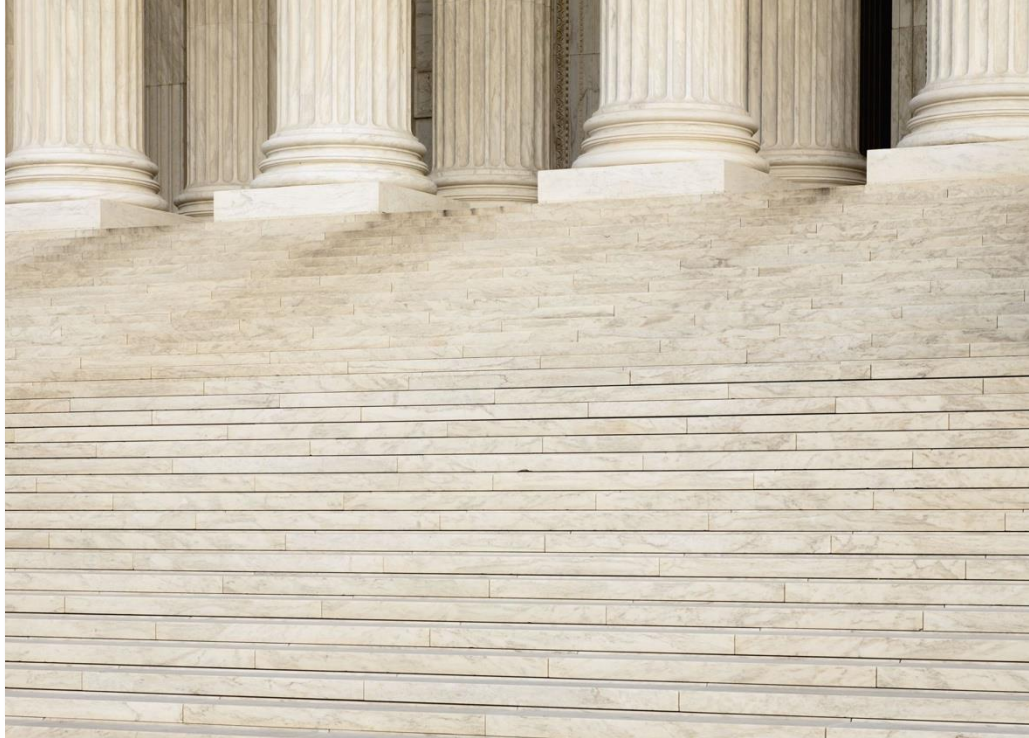
Georgia Law

- **2003: GA Commission on Interpreters formed by Supreme Court of GA**
 - Addressed statewide plans/procedures for providing qualified interpreters to Georgia's LEP and DHH court users in civil and criminal proceedings.
- **2005: Supreme Court of GA** rules a ***qualified*** interpreter necessary for LEP litigants to have meaningful access.
- **2010: *Ling v. State*** found that GA courts, as recipients of federal funding, must comply with Title VI of the Civil Rights Act.
- **Effective July 13, 2017:** Uniform Superior Court Rule 7.3, attorneys and *pro se* litigants notify courts of their need for language assistance and clarifies courts' obligations to secure and pay for interpreters.



Working with Interpreters

Federal Law: Title VI of the Civil Rights Act of 1964



- Prohibits discrimination on the basis of race, color, or national origin in any program, service, or activity receiving financial assistance from the federal government.
- Includes discrimination based on an inability to speak English; discrimination based upon language is a national origin discrimination in violation of Title VI.



MAP Purpose

[New Model Protocol Addressing Language Barriers in Georgia Courts](#)

Purpose of MAP (p. 3):

- Provide GA Courts with a standardized guide.
- Administrative handling – provisions of court interpreters as a language access resource in local courts



Working with an Interpreter

- Be understanding if they are late – they have tight schedules traveling/moving from case to case.
- Look at the *party* when you are speaking, not the interpreter.
- Give the interpreter time to orally relay messages, including the agreement to mediate and any agreements they may sign.
- Easier to work in caucus settings.



Supreme Court of GA Rules and Commission on Interpreters

- Rules confirm existence of the Commission
- Requires that LEP and DHH litigants and witnesses be provided an interpreter at *each* critical stage of a court proceeding at no cost in all matters criminal, civil, and juvenile.
- <https://jcaoc.georgiacourts.gov/>





Safety

Safety and Mediation

If you only have one dangerous case in your career...

- Would you know how to handle it?
- Who would you call to report the threat/violence?
- What are the ethics rules that would guide you?
- How might you de-escalate the situation?



Safety in Mediation: Throwing Punches and Chairs Study

Have you ever mediated a case in which the parties threatened violence against each other during the mediation?

- “Yes” 28%
- If yes, how many times has this happened in your career?
 - 1-3 times: 25%
 - 4-5 times: 13%
 - 6-10 times: 13%

Have you ever mediated a case in which you were physically threatened, as the mediator?

- “Yes”: 33%
- “No”: 64%



Safety in Mediation: Examples

- Gun in car
- Family dogs
- Lunging across the table
- Threats in the workplace, probate, landlord-tenant



Escalating Tensions

- Terminate mediation if you suspect a party is under influence.
- Address tensions early.
- Create/assert ground rules as appropriate.
- If you suspect that violence may be an issue, mediate in a courthouse where there are metal detectors and bailiffs. Have a bailiff in the room, by request.



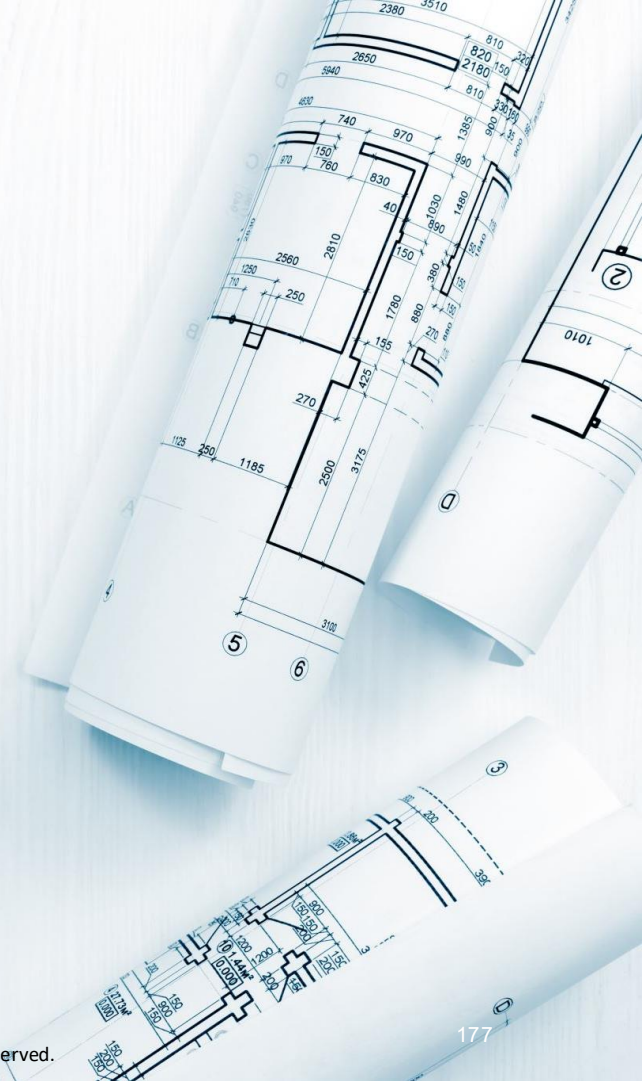
De-escalation Techniques

- Employ listening skills.
- Validate emotions.
- Highlight the "wins" thus far.
- Remind parties that they control the outcome.
- Use caucus.
- Terminate the mediation in a safe manner if tension is escalating towards violence.



Activity: Safety Plan

Develop a safety plan from de-escalation ideas to how you would terminate mediation if needed and get the parties out of the mediation space.





Mediation as a Profession

GODR Registration & Website

<https://godr.org/>

Building a Mediation Practice

- Mediations inside and outside of court
- State/federal agency mediation
- Private growth areas for mediation: HOA, Elder care, small business
- Process for getting registered
- Finding court programs in your area
- Getting on rosters
- Diversifying income stream
- Specialization versus casting a broad net
- Questions?



Professional Challenges

- Getting parties to mediation.
- Getting paid.
- Educating parties and the public about mediation.
- Work-life balance.
- Accessibility.
- Administrative hassles.
- Keeping up with the literature.



Get paid !

- (For private mediators) Consider the most efficient and effective way to get paid.
- (For private/court mediators) Be clear about your fee structure and expectations for payment **before** mediation.
- Build and maintain a strong reputation.
- Build networks and relationships with roster managers, judges, companies, and others.
- Typically: hourly rate, may charge a deposit and/or travel/mileage costs for private.



Final Notes on Practice

- If you work in/for an organization, closely examine ethics, rules, processes, and regulations.
- Consider regularly observing and co-mediating cases.
- Do your continuing education (3 hours) annually.
- Keep up your GODR registration.
- Continue expanding your network and referrals list.





28-Hour General Mediation Training Completed