The best negotiations end in a resolution that satisfies all parties. Successful negotiations often end in trade-offs, where each party gives up something of lesser value to that party in return for something of greater value. Successful negotiators are generally assertive, confident, and prudent. A mediator's incentive is to reach *any* agreement. The mediator can try to get both parties to make similar concessions, get the more powerful party to concede, or get the weaker party to concede. By doing so, mediators may compromise a party's interest by suggesting concessions that are clearly one-sided, just to get an agreement. Nonetheless, mediators often can ensure that the maximum amount of imagination is brought to the negotiations without endangering future cooperation between the principals.

This Chapter focuses on mediation, but also discusses negotiation at several points throughout the Chapter. It discusses why parties choose mediation, describes what mediation looks like, examines the law affecting the mediation process, and considers ethical issues that frequently arise in mediation. It focuses on legal dispute mediation within an individual non-union employment relations model. Grievance mediation is introduced at the end of the chapter to illustrate how mediation can function in the collective unionized model.

A. DESCRIPTION OF THE PROCESS

ALTERNATIVE DISPUTE RESOLUTION: AN INTRODUCTION

Carolyn Chalmers and Laura Cooper.
1997.

Little can be said about the mediation process that will be true of all mediations. Mediation, by its very nature, is a malleable model of dispute resolution. Indeed, of all the ADR processes, mediation grants the parties and their advocates the greatest control over both the shape of the process and the substantive outcome. The nature of the neutral's participation varies greatly depending on the individual mediator. Mediation also assumes different features depending on the subject matter being mediated.

Consider the following employment discrimination dispute as an illustration of the mediation process. The employer's attorney, the manager of the division involved, and perhaps a human resource professional would typically represent the company. The plaintiff worker, her lawyer, and perhaps a friend, family member, or supporting witness would be present for the plaintiff. The mediator might begin with a group meeting with all the participants to ensure that no lingering conflict of interest issues exist and to discuss the process. Frequently, counsel will make opening remarks about the client's settlement position. After these

remarks conclude, the mediator might elicit general information from the parties about the nature of the dispute. From here, the group might split into separate caucuses. In meeting with the plaintiff and her counsel, the mediator would elicit more of the plaintiff's story, attempt to identify her current interests, and identify her settlement demand. The mediator's subsequent meeting with the employer and its counsel would also involve listening, identifying interests, and obtaining a settlement proposal. These first two caucus meetings may absorb half of a day. The parties' storytelling and the mediator's listening are essential elements to developing rapport and building the foundation of trust necessary for the difficult decisions that lie ahead.

The mediator may focus the next round of caucus meetings on "reality testing" the parties' perceptions of the dispute. In these meetings, the mediator helps parties identify the weaknesses in their case and the strengths of the opposing party's case. Additional settlement proposals and counter-proposals are exchanged. As the process proceeds, the caucus meetings with the mediator get shorter and the pace of the shuttle diplomacy quickens. The parties focus increasingly on what compromises they are willing to accept to settle the dispute.

Toward the end of the process, difficult compromises are usually made. Settlements are generally both below what one party expected and above what the other had planned. As the choice between litigation and settlement emerges, parties may have strong emotional reactions. If the mediator negotiates this stage successfully, she may write down the provisions of the agreement for parties and counsel to review. This can lead to the identification of additional issues best resolved before the parties adjourn the mediation. At the close of the process, the mediator often reconvenes the group meeting to confirm the agreement, if one has been reached, and to thank the parties for their active participation.

THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT

Christopher W. Moore.
212–19; 221; 227–29 (2003).

The mediator's first activities in this phase of intervention should set a positive tone and meet the basic needs of safety. A mediator accomplishes this nonverbally through the physical arrangement of the parties in the room and verbally with his or her opening statement. The opening statement usually contains approximately eleven elements. These include:

1. Introduction of the mediator and, if appropriate, the parties

2. Commendation of the willingness of the parties to cooperate and seek a solution to their problems and to address relationship issues

3. Definition of mediation and the mediator's role
4. Statement of impartiality and neutrality (when appropriate)
5. Description of mediation procedures
6. Explanation of the concept of the caucus (private meetings)
7. Definition of the parameters of confidentiality (when appropriate)
8. Description of logistics, scheduling, and length of meetings
9. Suggestions for behavioral guidelines or ground rules
10. Answers to questions posed by the parties
11. Joint commitment to begin

* * *

DEFINITION OF MEDIATION AND THE MEDIATOR'S ROLE

[T]he mediator should define mediation and the mediator's role in dispute resolution. * * * Mediators * * * usually try to explain mediation and the mediator's role in the most informal language possible. Explanations vary considerably, but they usually cover (1) a brief description of what the parties will do during the current session; (2) what a mediator is; (3) what the mediator can do for the parties; and (4) the potential outcome of mediation. For example:

*During the next meeting or two, you will be engaging in discussions and searching for a joint solution that will meet your needs and satisfy your interests. * * * My role as mediator will be to help you identify problems or issues that you want to talk about, help you clarify needs that must be met, assist you in developing a problem-solving process that will enable you to reach your goals, [and] keep you focused and on the right track * * *.*

Next, the mediator should describe his or her authority relationship with the disputants:

*As I told each of you previously, mediation is a voluntary process. You are here because you want to see if you can find solutions to issues that concern you * * *. My role is to assist you in doing this. I do not have the authority, nor will I attempt, to make decisions for you. * * * My role is to advise you on procedure, and on how you might best talk about these issues. If you reach an agreement, we (or I) will write it down in the form of a memorandum of understanding. This agreement can become legally binding if it involves issues covered by law, or it may be left as an informal agreement. * * * You do not lose any rights to go to court if you use mediation and are unable to reach an agreement. * * **

DESCRIPTION OF MEDIATION PROCEDURES

Next, the mediator should describe the procedures to be followed. * * * Here is a common description of negotiation procedures:

*At this time, I would like to briefly describe the process that I propose you follow to begin the session. * * * Both of you have a significant amount of information about the situation that you are responding to. Although I have briefly spoken with each of you about these matters, I do not have the detailed understanding that each of you does. I suggest that we begin the discussion today with a brief description from each of you about the situation and issues that brought you to mediation. This will educate all of us about the issues you want to discuss and the interests that are important to you and give us a common perception of the problem. Each of you will have a chance * * * to present your view of the situation. I request that you not interrupt the other while he or she is explaining a viewpoint, and that you hold your questions until the end of the presentation. * * **

During your presentations, I may ask some clarifying questions or probe your description so that I can gain a greater understanding of how you perceive the situation. My probing is not to put you on the spot but rather to broaden our mutual understanding of the problem. At the end of each of your presentations, there will be a time for the other person (or parties) to ask questions of clarification. This is not a time to debate the issues, but to clarify issues and perceptions about the problem(s) at hand.

*At the end of the presentation and questions we will turn to the other (or next) person (or party) to repeat the process until a representative of each view has had an opportunity to speak. At this point, we will clearly identify both the issues that you would like to discuss in more depth and the interests that you would like to have satisfied. [Then we will] develop some potential solutions and assess whether one or more of these options will meet your needs. * * **

The mediator should clearly explain the stages of the problem-solving process and should take care not to present herself as an authority figure. It is the disputants' process, not the mediator's. The process description is a procedural suggestion, not an order.

EXPLANATION OF THE CAUCUS OR PRIVATE MEETINGS

Next, the mediator should explain the concept of the caucus with each party:

There may be a need, at some time in the course of our meetings, for each of you to take some time for yourself away from the joint meeting (and confer with other members of your group, if it is a group dispute) or to meet with me individually as a mediator. This type of break or meeting is not unusual. It allows you time to refocus and reflect on your short-and long-term goals, handle strong emotions, explore options or proposals,

gather your facts to develop new settlement options, or reach a consensus within your group (if applicable). At times, I may call such a meeting, but you may initiate one also. If I call a separate meeting, it is not to make a deal but to explore issues that might be more comfortable for you to discuss in private. What is discussed in these separate meetings will be considered by me to be confidential. I will not reveal what we have talked about with the other party (or parties) unless you instruct me to do so. * * *

SUGGESTIONS FOR BEHAVIORAL GUIDELINES

At this time, the mediator should shift his or her focus to behavioral guidelines that will facilitate an orderly discussion. Guidelines that mediators may suggest include procedures to handle interruptions, agreements about the role of witnesses and relationships with the press, conditions for smoking, identification of those with whom disputants may discuss negotiations, delineation of what can or should be disclosed by the parties, and so on.

* * *

OPENING STATEMENTS BY PARTIES

Parties in dispute usually start with opening statements of their own. These statements are usually designed to outline their substantive interests, establish a bargaining procedure, and build rapport with the other side. * * *

FACILITATION OF COMMUNICATION AND INFORMATION EXCHANGE

The most critical task for disputants at this stage of negotiation is to maximize accurate information exchange. They may be hindered in doing so by * * * excessive posturing, extreme demands designed to signal how intensely the parties feel about the issues or how much they want the other party or parties to move, jumbled or unstructured communication, inaccurate listening, intense emotional outbursts, or total dysfunction of one or more parties.

The mediator's main task, therefore, is to help the parties communicate about substantive issues in dispute and minimize the psychological damage resulting from emotional exchanges. To facilitate this communication, mediators use a variety of communication techniques, * * * includ[ing]:

Restatement. The mediator listens to what has been said and feeds back the content to the party in the party's own words.

Paraphrase. The mediator listens to what has been said and restates the content back to the party using different words that have the same meaning as the original statement. This is often called reframing.

Active Listening. The mediator decodes a spoken message and then feeds back to the speaker the emotions of the message. This is commonly used in conciliation.

Summarization. The mediator condenses the message of a speaker.

Expansion. The mediator receives a message, feeds it back to the listener in an expanded and elaborated form, and then checks to verify accurate perception.

Ordering. The mediator helps a speaker order ideas into some form of sequence (historical, size, importance, amount, and so on).

Grouping. The mediator helps a speaker identify common ideas or issues and combine them into logical units.

Structuring. The mediator assists a speaker in organizing and arranging his or her thoughts and speech into a coherent message.

Separating or fractionating. The mediator divides an idea or an issue into smaller component parts.

Generalization. The mediator identifies general points or principles in a speaker's presentation.

Probing questions. The mediator asks questions to encourage a speaker to elaborate on an idea.

Questions of clarification. The mediator asks questions to obtain clarification of particular points.

Mediators use these communication skills to help parties communicate more accurately with each other. Ideally, the parties use them too.

NOTES AND QUESTIONS

1. Consider how the following factors should affect the structure of the mediation:

(a) The number of parties.

(b) The type of dispute (e.g., discrimination, claim for overtime compensation, wrongful discharge).

(c) The personalities of the parties.

(d) The personalities of the lawyers.

(e) The reluctance of one or more of the parties to mediate the dispute.

(f) Whether the mediation is voluntary or court-ordered.

(g) The amount of time that the parties have allotted to the mediation session.

process. Critics of mediation, supported by a growing body of empirical data, have suggested that mediating disputes involving allegations of discrimination or abuse of power effectively masks rights-based objectives altogether.

Do you agree?

C. THE MEDIATOR'S ROLE

"WHAT'S GOING ON" IN MEDIATION: AN EMPIRICAL ANALYSIS OF THE INFLUENCE OF A MEDIATOR'S STYLE ON PARTY SATISFACTION AND MONETARY BENEFIT

E. Patrick McDermott and Ruth Obar.
9 Harvard Negotiation Law Review 75, 80–83, 85–86, 89–90, 105, 107 (2004).

The use of mediation to resolve a wide range of legal and other disputes continues to increase. As mediation enters the mainstream, business, community, and legal dispute resolution scholars have paid increasing attention to the dynamics of the mediation process. We use quantitative analysis from a large database of cases mediated at the Equal Employment Opportunity Commission (EEOC) to describe "what's going on" in the field of mediation.

Using a database of 645 employment law cases mediated under the EEOC's mediation program, we analyzed various self-reported mediator behavior. We first examined the types of mediator behavior (facilitative, evaluative or hybrid) used by mediators in this "facilitative" program. [The types of mediation are described below.] We then examined whether a particular mediation style resulted in a higher participant satisfaction rating across procedural due process and distributive variables, whether a particular style resulted in a higher settlement agreement, and whether representation affected the amount of money obtained in mediation. * * *

VI. THE LITERATURE—EVALUATION VERSUS FACILITATION

In order to determine how facilitative and evaluative techniques are being used in mediation, we first had to identify these techniques. We note at the outset that there is no consensus in the field regarding the exact characteristics of facilitative versus evaluative mediator conduct. We present an overview of the literature. We then classify mediator behavior for our analysis.

A. Facilitative Mediation and Its Advocates

Robert A. Baruch Bush and Joseph Folger advocate a form of facilitative mediation known as transformative mediation.[25] They see the mediator as a process person who does not contribute any information to the process other than agenda structuring. Transformative mediation

[25] Robert A. Baruch Bush & Joseph Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (1994), at 81–95 * * *.

takes a "social/communicative view of conflict." Thus, transformative mediation posits that the transformation of the negative interaction between parties in conflict into a positive relationship based on mutual empowerment and recognition is what matters most to the parties, even more than the particular terms of a settlement.

Mediator conduct in this style includes facilitating "recognition" by each party of the other party's vantage point. Such conduct includes paraphrasing and reframing to encourage complementary validation. Bush and Folger oppose any evaluative conduct, believing that evaluative mediation undermines such validation and also inhibits creativity in the mediation problem-solving process. Bush and other facilitative advocates such as Kovach and Love, believe that evaluation necessarily involves mediator coercion and pressure. * * *

Professors Kimberlee Kovach and Lela Love are prominent proponents of facilitative mediation.[33] They entered the debate by excoriating evaluative mediation, arguing that it is not mediation but rather some other type of dispute resolution process. * * * Kovach and Love appear to depart from Folger and Bush's description of facilitative mediation as agenda structuring that avoids any mediator coercion or pressure. Kovach and Love support the use of some evaluative behavior in mediation. They state that so long as the mediator does not take an actual position, as would a judge, arbitrator, or neutral expert, this conduct is reconcilable in a pure facilitative mediation model. For example, they claim that the following activities, while admittedly evaluative, are appropriate as "essential parts of a mediator's facilitative role * * *." These activities include:

- reframing;
- structuring of the bargaining agenda;
- probing of assessments and positions;
- challenging proposals;
- urging parties to obtain additional resources or information;
- suggesting possible resolutions (for the purpose of stimulating parties to generate options); and
- reality testing or checking.

According to Kovach and Love, if these activities are motivated by and result in the stimulation of party evaluation and decision-making, they "comport more with a facilitative orientation." * * * Kovach and Love believe that as long as the mediator does not give an opinion on the merits/damages due to a party, all other mediator opinions, assertions,

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[33] Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation is an Oxymoron*, 14 Alternatives to High Cost Litigation 31, 31 (1996)[;] * * * Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 Florida State University Law Review 937, 938–39 (1997).

challenges, and actions are acceptable in a facilitative mediation. The mediator must not " 'answer' the question posed by the dispute" or the mediator would be engaging in improper evaluative conduct. * * *

B. Evaluative Mediation

Leonard R. Riskin posits that "the mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement-based on law, industry practice or technology—and that she is qualified to give such guidance by virtue of her training, experience, and objectivity."[59] Thus, an evaluative mediator helps the parties to understand the strengths and weaknesses of their positions and the likely outcome of litigation or whatever other process they will use if they fail to reach a resolution in mediation. According to Riskin, mediator techniques that are associated with evaluative mediation include:

- assessing the strengths and weaknesses of each side's case;
- predicting outcomes of court or other processes;
- proposing position-based compromise agreements;
- urging or pushing the parties to settle or to accept a particular settlement proposal or range;
- educating herself about the underlying interests;
- predicting the impact of not settling; and
- developing and offering proposals.

Riskin notes that much of this evaluative conduct occurs in private caucus.

In response to those who claim that evaluative mediation is not mediation, Riskin replies, "It is too late for commentators or mediation organizations to tell practitioners who are widely recognized as mediators that they are not, in the same sense that it is too late for the Pizza Association of Naples, Italy to tell Domino's that its product is not the genuine article."[65] * * *

VII. THE RESEARCH

This paper is based on data from our comprehensive study of the EEOC mediation program. Our first study was a comprehensive study of charging party and respondent opinions regarding various procedural and distributive elements of the EEOC mediation program. Our second study addressed mediator feedback on the dynamics of the mediation process, including participant (charging party, respondent, mediator) conduct that facilitates resolution of the dispute, reasons the dispute was not resolved,

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[59] [Leonard R. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harvard Negotiation Law Review 7 (1996).]

[65] *Id.* at 24.