

A PRACTICAL AND COMPREHENSIVE TEMPLATE FOR MEDIATION

By

Cynthia Dillion

An Independent Study Paper Submitted in Partial Fulfillment
of the Requirements for the LL.M. Degree in Dispute Resolution

Straus Institute for Dispute Resolution
Pepperdine University
School of Law
Malibu, California

Faculty Advisor: Jim Craven

April 15, 2016

Faculty Advisor's Certificate of Approval:

I have read and give final approval for this Independent Study paper entitled A Practical and Comprehensive Template for Mediation written by Cynthia Dillion in partial fulfillment of the requirements for the LL.M. Degree in Dispute Resolution conferred by the Straus Institute for Dispute Resolution, Pepperdine University School of Law.

Date: _____

Jim Craven, Faculty Advisor

A PRACTICAL AND COMPREHENSIVE TEMPLATE FOR MEDIATION

“Only two things appear infinite, the universe and man’s inability to get along with his fellow man – and I’m not sure about the former.” Albert Einstein

Alternative Dispute Resolution techniques, especially mediation, have matured into widely used, powerful tools for resolving conflict.¹ Studies have shown the preferred method of dispute resolution in corporate America is mediation or some other form of ADR.² Mediation is favored because it can yield a settlement designed by the parties, protect relationships and confidentiality, and save money otherwise expended on ongoing litigation by resolving the conflict sooner.³ Mediation is difficult to describe with all its benefits, pitfalls, techniques, interrelationships and personality components. Many scholars have created diagrams to explain various aspects of mediation and ADR;⁴ however, none of the existing diagrams provides a simple but comprehensive template detailing the interrelationships and responsibilities of the parties to a mediation. The purpose of this paper is to provide a comprehensive template that in one page can serve as a practical guide and reference tool for the mediator and educate and prepare the parties for successful mediation.⁵

¹ Thomas J. Stipanowich, ADR and the “Vanishing Trial”: What we know – and what we don’t, 10 Disp. Resol. Mag. 7 (Summer 2004).

² Phillip M. Armstrong, Why We Still Litigate, 8 Pepp. Disp. Resol. L.J. 379 (2008).

³ Michael G. Nowakowski, Mediation Can Be Your Client’s Best Alternative to Litigation, 93 Mich. B.J. 40 (January 2014).

⁴ Riskin’s Grid updated in Leonard L. Riskin, Retiring and Replacing the Grid of Mediator Orientations, 21 Alternatives to High Cost Litig. 69 (April 2003), Gary T. Furlong, Conflict Resolution Toolbox, Models & Maps for Analyzing, Diagnosing and Resolving Conflict (2005) discussing eight models, including the Circle of Conflict, the Triangle of Satisfaction, the Boundary Model, the Interests/Rights/Powers Model, the Dynamics of Trust, the Dimensions Model, the Social Styles Model and the graph for Moving Beyond Conflict. See Appendix A for models.

⁵ Paul M. Lurie, Factors Influencing a Successful Mediation, 22 Construction Law 18 (2002). “A common reason for failure is that the participants in the process don’t understand how mediation works....A lack of knowledge of the mediation process often results in poorly planned mediations with participants who are unprepared for the process. It is the responsibility of lawyers, who are entrusted by their clients with managing the dispute resolution process, to ensure a properly designed mediation.”

A proper model for mediation should address not only the relationship between the parties and each party with the mediator, but should set out the responsibilities, opportunities and potential traps for each party. In addition, the model should recognize the challenges to resolution of the conflict. The model should help the mediator stay on task and avoid distractions. It also should give the parties a checklist to prepare for mediation and detail behaviors of the parties likely to lead to resolution or to an impasse. The model will be explained through and distilled into a simple diagram of three interconnected circles. As the model and diagram are developed, the essential attributes of each circle and their interrelation will be delineated and become clear. The finished template will serve as a step-by-step description and a complete paradigm of the mediation process to be shared with the parties and used by both the mediator and the parties to create a successful mediation.

MODEL DIAGRAM

The basic diagram of the model consists of just three interlocking and overlapping circles. These circles form a

simple means by which to

represent visually the

interrelationship of the mediator

with the parties and between the

parties themselves.⁶ As shown by

the intersections between each

circle, the mediator has a

relationship with each party and the parties have a relationship with each other. As the analysis

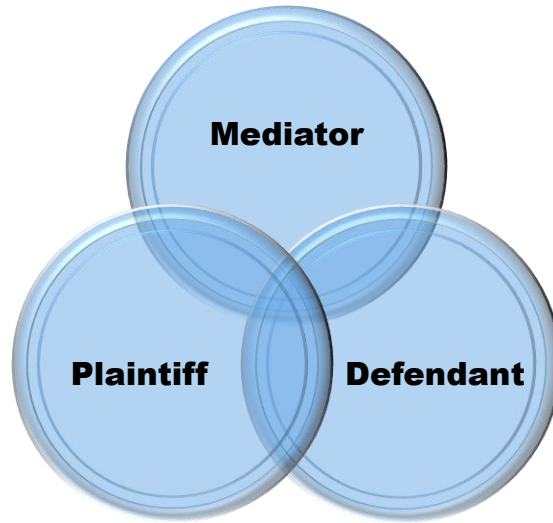
deepens, the model will unfold to describe the interrelationships among the mediator and the

parties, identify the responsibilities of each to the mediation, set out possible roadblocks to

resolution, and share types of behaviors likely to lead to or prevent a resolution of the dispute. As

the model unfolds in each titled section below, the substance of that section will be incorporated

into the appropriate sectors of the interlocking and overlapping model diagram.

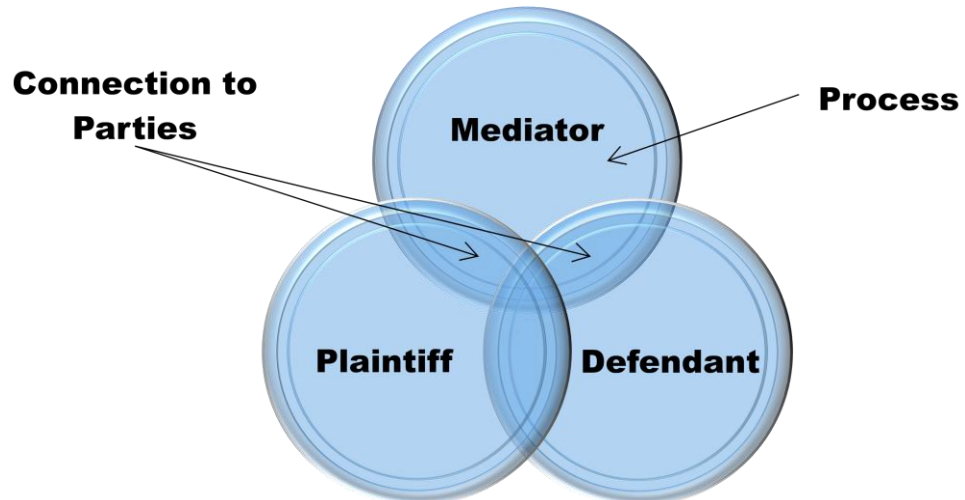


⁶ Cynthia S. Dillion, Using Time Scarcity in Mediation to Its Best Advantage: An Alternative Paradigm of Mediation, April 2015.

DIAGRAM BASICS

The mediator connection to the parties is depicted by the mediator circle intersecting separately with that of each party. Studies have shown that process is key to satisfaction of the parties so the

mediator circle represents the mediator's focus on process⁷ as opposed to the dispute between the parties or on



the parties themselves. Mediator connection to each party is independent from the other party and equal in size to represent the impartiality and fairness of the mediator.

At the intersection of the parties' circles is their dispute. This dispute intersection is separate from the

mediator to reinforce that

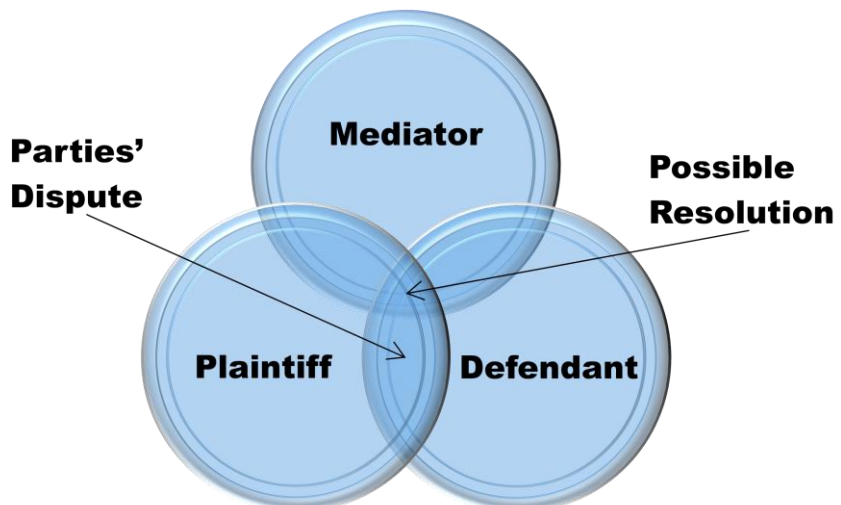
it is the parties' dispute.

The potential resolution of

the conflict lies in that

small area where the

parties' dispute overlaps



⁷ Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 Wash. U.L.Q. 787 (Fall 2001). The perception of procedural justice by parties to mediation is influenced by the way things are done and how they are treated. They are more likely to accept the outcome if they feel they were treated fairly.

with the mediator's process. The focus of the mediator circle on process and the individual relationship with each party illustrates the distance the mediator maintains from the dispute and his or her impartiality. This distance supports the mediator's independent search for the possibilities for and boundaries of resolution. As well, the diagram shows the mediator's flexibility to interact with the parties separately or together and to convey allowed information that a party may not want to deliver personally to the other party.

With the mediator's and each party's interactions represented, the circles and intersections will be filled with the characteristics, responsibilities and skills of successful negotiation and mediation, as well as the mindsets and behaviors that can cause either success or failure. This information will provide a checklist for seasoned participants familiar with mediation and an introduction to the process to participants with limited or no experience with mediation. The following is not an exhaustive description and explanation of all possible mediation characteristics, responsibilities, skills, mindsets or behaviors but those listed are the most salient in providing a comprehensive template that will provide a practical guide and reference tool for the mediator, and educate and prepare the parties for a successful mediation.

CONSTRUCTING THE TEMPLATE

MEDIATOR CIRCLE

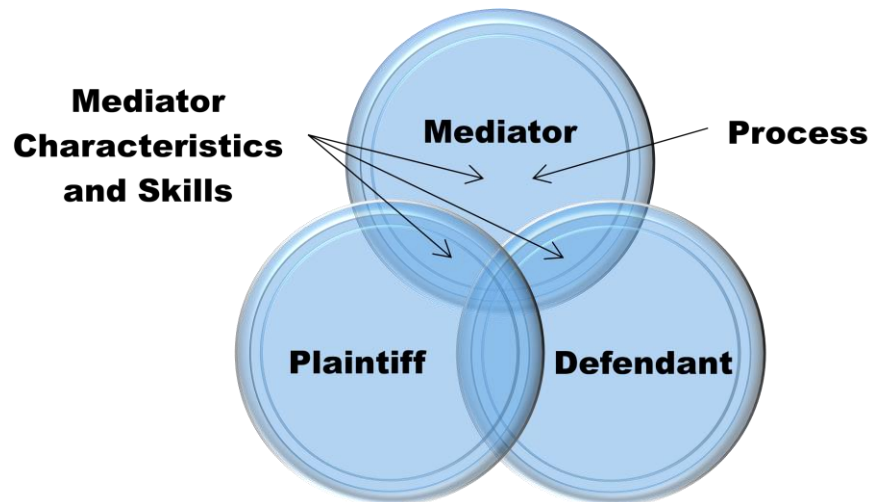
Process, Characteristics and Skills

“How you climb a mountain is more important than reaching the top.”

Yvon Chouinard, Let My People Go Surfing: The Education of a Reluctant Businessman

The highest duty of the mediator is not to secure a settlement, but rather to host a process that the participants respect, while putting the parties in the best possible position to resolve the conflict, if they wish to do so. The mediator’s deepest obligation is to the integrity of the process.⁸ Hosting a process that the participants respect can be divided into creating confidence in the process and confidence in the mediator. In addition, certain characteristics of mediators have been identified as

supporting the perception of proper process,⁹ while other characteristics have been identified as undermining it.¹⁰ These



⁸ Wayne D. Brazil, Thoughts About Spiritual Fatigue: Sustaining Our Energy by Staying Centered, 2008 J. Disp. Resol. 411, 420 (2008). See also, Brazil at 412, mediators and participants seek integrity of process.

⁹ See, Stephen B. Goldberg, The Secrets to Successful and Unsuccessful Mediators, 24, 81 (2006) (“Goldberg Study #1” surveying mediators), Stephen B. Goldberg & Margaret L. Shaw, The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three, 23 Negotiation Journal 393 (October 2007) (“Goldberg & Shaw Study #2 and #3” surveying mediation advocates and participants), Stephen B. Goldberg & Margaret L. Shaw, Further Investigation into the Secrets of Successful and Unsuccessful Mediators, 26 Alternatives 149 (2008) (“Goldberg & Shaw Study Summary” (collectively, the “Goldberg Studies”). “The most frequently cited behavior correlated to mediator success involved the mediator’s ability to gain the parties’ confidence.” Pathways to gaining the parties’ confidence included being friendly, empathetic, likable, sincere, compassionate, patient, persistent, honest, etc. Reasons for failure included lack of integrity, failure to prepare, lack of neutrality, being merely a messenger between the parties, lack of understanding of parties’ positions or legal issues and talking too much.

¹⁰ Alain Pekar Lempereur, Identifying Some Obstacles to Successful Mediation Process (October 25, 2011), electronic copy available at: <http://ssrn.com/abstract=1949463>, discussing intuitive behaviors of mediators that may

characteristics, along with skills and techniques, will be placed in the mediator circle to be used in the intersection with each of the parties to remind the mediator of the different tools available.

Creating Confidence in the Mediation - Procedural Justice

“Reality is Irrelevant; Perception is everything.” Terry Goodkind

Mediation can be an opportunity for both sides to present their factual and legal positions and negotiate to find the dollar amount or other remedy that will provide a resolution acceptable to all concerned. It also can provide more than a mere resolution of the dispute, perhaps creating an innovative and creative solution or preserving, repairing or improving the parties’ relationship.¹¹ In either situation, the parties are entitled to have the process provide value for their time, effort and fees and to have confidence in the legitimacy of the mediation.

Party satisfaction with dispute resolution has two parts, procedural justice and distributive justice. Procedural justice is the perception of the fairness of the proceedings leading to the outcome and distributive justice is the perception of the substantive fairness of the outcome.¹² Studies have shown that parties’ perception of procedural justice not only influences their perception of distributive justice, but also improves compliance with the result.¹³ If the parties perceive that they were treated fairly, they are more likely to accept and abide by even an unfavorable outcome.¹⁴

have negative effects on the mediation and the process including hasty behavior, overconfidence in unstructured process, problem claiming by the mediator, and dividing attention unequally.

¹¹ Dwight Golann & Jay Folberg, Mediation, The Roles of Advocate and Neutral 108-109 (2d ed. 2011).

¹² Morton Deutsch, Justice and Conflict, in *The Handbook of Conflict Resolution: Theory and Practice* (2000). Lempereur, *supra*, Note 10 at 2, talks about defining success in mediation in terms of a subjective approach (do the parties or the mediator think the mediation has been successful) or an objective approach (is there an agreement). Using either definition, the parties should be better off after the mediation for it to be considered a success.

¹³ Welsh, *supra*, Note 7 at 792.

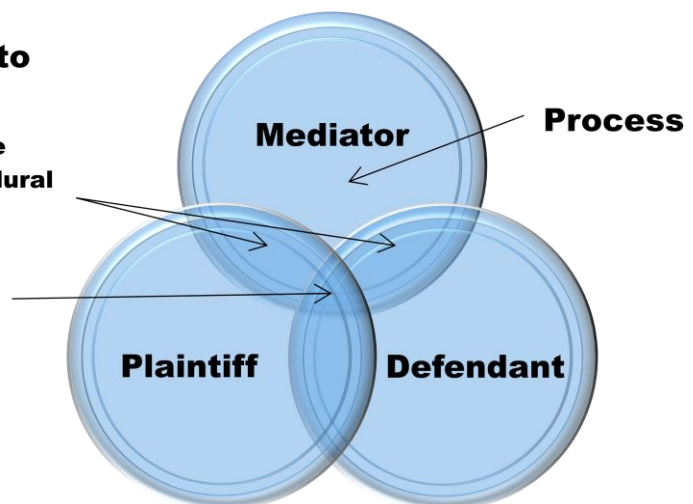
¹⁴ Id. Robert Folger and Mary A. Konovsky, Effects of Procedural and Distributive Justice on Reaction to Pay Raise Decisions, 32 *Academy of Management Journal* (1989) 115-130. Procedural justice in pay raises correlated with trust in supervisors and commitment to the organization. Procedural justice also positively impacted pay satisfaction. Fair procedures can convey regard for dignity and self-respect.

Parties' perceptions of procedural justice are based on whether they were able to tell their story in their own words, whether they felt that they had been heard by the mediator and the other side, whether they believed the mediator was trying to be fair and whether they were treated respectfully and with dignity.¹⁵ These are all needs that can be met through a proper process. In addition, procedural justice affects the parties' assessment of the legitimacy of the mediation.¹⁶ Confidence in the mediation and its legitimacy is in the hands of the mediator and the conduct of the mediation. The mediator must remain focused on the process of the mediation to ensure that the parties are satisfied with the proceedings, regardless of the outcome. To highlight the importance of ensuring procedural justice, the diagram illustrates: (i) the mediator's focus on hosting the

process and
procedural justice as
the largest,
standalone part of the
mediator circle; and
(ii) the resolution and

distributive justice as the smallest part of the mediator circle.

**Connection to
Parties**
**Confidence in the
Mediation/Procedural
Justice**
**Distributive
Justice =
Resolution**



Creating Confidence in the Mediator

"Today you are You, that is truer than true. There is no one alive who is Youer than You." Dr. Seuss

Every interaction is unique and what creates confidence in a mediator in one situation may not do so at another time or with another person. Nevertheless, studies have shown that

¹⁵ Welsh, *supra*, Note 7 at 817.

¹⁶ Id. at 792.

mediator success is closely correlated with the parties' confidence in the mediator¹⁷ and the personal qualities and 'presence' or 'peace' a mediator brings to the process.¹⁸ People may meet and feel like they have known each other forever or creating that intimacy may take a great deal of effort. Personal attributes that make mediators successful are similar to attributes that make people successful in all endeavors, being friendly and likeable, for example.¹⁹

Connection to Parties: Personal Relationship - It is important to create a personal relationship with

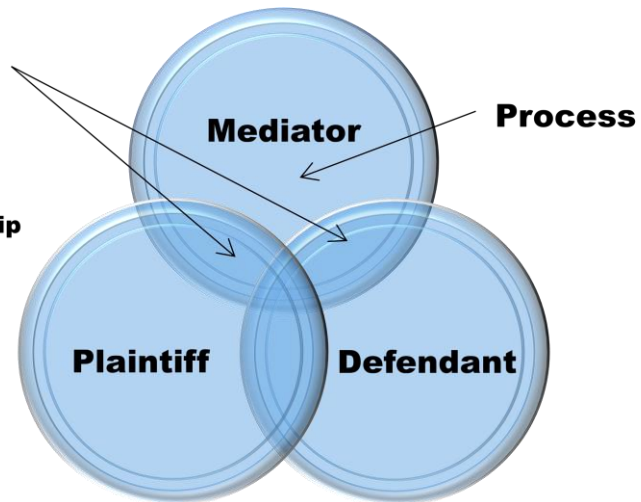
the parties.²⁰

Staying connected to the parties keeps the mediator from becoming a

detached referee.

Connection to Parties

Confidence in the Mediator:
•Personal Relationship
•Integrity, Fairness, Trustworthiness
•Competence and Authenticity



The rapport created with the parties frees them to communicate more openly with the mediator,²¹ but does not undermine mediator impartiality. In addition, however it is created, confidence in

¹⁷ Goldberg Study #1, *supra*, Note 9 at 4 and Goldberg & Shaw Study #2 and #3, *supra*, Note 9 at 401.

¹⁸ Daniel Bowling & David Hoffman, Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation, 16 Negotiation J. 5, 11 (January 2000). "[T]here are certain qualities that the mediator's presence brings to the mediation process that exert a powerful influence, and enhance the impact of the interventions employed by the mediator." See also, James E. Purcell, What Makes a Great Mediator, 64-DEC R.I.B.J. 23, 26 (Nov/Dec 2015). "A great mediator brings peace into the room by his/her presence, comportment, gravitas, persistence and touch."

¹⁹ In Goldberg & Shaw Study #2 and #3, *supra*, Note 9 at 397, the authors grouped twenty skills/attributes into three categories that will be a part of the diagram. The three categories are confidence building attributes, process skills and evaluative skills. See also, Robert B. Cialdini, Influence: The Psychology of Persuasion (1984), chapter on Liking: The Friendly Thief.

²⁰ Goldberg Study #1, *supra*, Note 9 at 1, found that 75% of the mediators surveyed believed the "key element in successful mediation is developing rapport with the parties." Jennifer W. Reynolds, Breaking BATNAs: Negotiating Lessons from Walter White, 45 N.M.L. Rev. 611, 612 (Spring 2015), "[e]xperienced negotiators say the ability to build rapport and trust promotes success in negotiations."

²¹ Roy J. Lewicki, Trust and Distrust, in *The Negotiators Fieldbook: The Desk Reference for the Experienced Negotiator* 191 Andrea Kupfer Schneider et al eds. 2006 (building rapport and trust is essential to negotiation

the mediator is highly valued by participants.²² Being friendly and likeable, as well as empathetic, are basic people skills necessary to being a successful mediator.²³ Participants also want to feel the mediator can relate to them and want to support them in their search for solutions.²⁴ Perceptions of procedural justice are also supported by meeting these desires. The quicker the interpersonal bond is created, the faster the mediation is able to move forward in a positive fashion.²⁵ In the diagram, this bond is represented by the intersection of the mediator circle with the independent circle of each party. The intersection is limited and does not include the dispute except to the extent the resolution of the conflict brings all three parties to the intersection of all of the circles.

Connection to Parties: Integrity, Fairness and Trustworthiness – In addition to creating a personal bond with the parties and confidence in the mediator’s commitment to the mediation, there are several characteristics integral to the mediator role that must be demonstrated early in the process and modeled throughout the mediation. First among them is integrity. Integrity is the quality of “being honest and fair or the state of being complete and whole”, but is generally understood to mean ‘correct’ behavior.²⁶ The simple answer to integrity

allowing parties to share information more freely and rely on the relationship for performance of an agreement rather than on penalties or enticements).

²² Goldberg & Shaw Study #2 and #3, *supra*, Note 9 at 399.

²³ Sheldon E. Friedman, The Basics of Effective Mediation, 38-AUG Colo. Law. 73, 76 (Aug. 2009) (the mediator does not need to be best friends with the parties but must be likable and pleasant to be around).

²⁴ Goldberg & Shaw Study #2 and #3, *supra*, Note 9 at 398.

²⁵ Goldberg Study #1, *supra*, Note 9 at 12 found the surveyed mediators cited reasons for mediator failure as a lack of confidence-building attributes, specifically self-absorbed, self-important, not empathetic, not respectful, did not care, were not interested and did not listen. Goldberg & Shaw Study Summary, *supra*, Note 9 at 159, et seq., reporting on the views of surveyed mediation advocates on reasons for mediator failure cited a lack of confidence building attributes such as empathy and an interest in the parties.

²⁶ Merriam-Webster Dictionary definition available at www.merriam-webster.com/dictionary/integrity. Werner Erhard, Michael C. Jensen, Steve Zaffron, Integrity: A Positive Model that Incorporates Normative Phenomena of Morality, Ethics and Legality 8, 46 (March 23, 2009) Harv. Bus. School Nom Working Paper No. 06-11; Barbados Group Working Paper No. 06-03; Simon School Working Paper No. FR 08-05. “Integrity, morality and ethics are commonly understood to provide standards of ‘correct’ behavior.” “For an individual, we distinguish integrity as a matter of that person’s word being whole and complete.”

is do not lie, cheat, steal or trick people and be a person of your word.²⁷ Litigation breeds feelings of mistrust and animosity and parties want to see the mediator as a person of high integrity²⁸ and above the fray. They want to feel there are no preconceived ideas about how the matter should be resolved and want to know the mediator will be impartial, honest and trustworthy.²⁹ Of course, consistent with perceptions of procedural justice, they want to be treated fairly and in a ‘dignified and respectful manner’.³⁰

Mediation often requires the mediator to relay messages and offers between the parties so a perception of integrity gives the parties confidence the mediator will be truthful in relaying information to all the parties.³¹ An equally important corollary to the parties’ belief that their comments will be conveyed accurately is their belief the mediator will protect confidential information.³² The need for impartiality and protection of confidences is why the mediator circle in the diagram is largely separate from the circles of the parties with only a small but equal intersection with each party. The intersection represents the importance of the connection and

²⁷ Ron Ashkenas, Why Integrity Is Never Easy, Harv. Bus. Rev (Feb. 8, 2011). Dan Ariely, Predictably Irrational: The Hidden Forces That Shape Our Decisions (2009). at 271 noting that employee workplace theft and fraud exceeds \$500 billion per year. Sissela Bok, Lying, Moral Choice in Public and Private Life (1989).

²⁸ Goldberg & Shaw Study #2 and #3, *supra*, Note 9 at 400. Robert C. Prather, Sr., Joe L. Cope, A Few Thoughts on Success, Tex. Prac. Guide ADR Section 9.1 (2015).

²⁹ Erhard, *supra*, Note 25 at 30. “[Integrity] provides an actionable pathway to earning the trust of others.” Ashkenas, *supra*, Note 27. Integrity should be an absolute and not subject to gray areas, but absolute integrity is a challenge with the competing interests of our day-to-day lives and our seemingly limitless ability to rationalize our behavior with personal definitions of integrity; any cost-benefit analysis undermines integrity. Friedman, *supra*, Note 23 at 76, a mediator must establish s/he is worthy of the parties’ trust.

³⁰ Welsh, *supra*, Note 7; Goldberg & Shaw Study #2 and #3, *supra*, Note 9 at 400.

³¹ Welsh, *supra*, Note 7; Goldberg Study #1, *supra*, Note 9 at 12 also found that the surveyed mediators had a consistent list of characteristics related to mediator failure. The mediator list of reasons for failure were “due to lack of integrity, not neutral, disclosed confidential information, failed to accurately convey position, inconsistent evaluations, interested in settlement at all costs, too quick to reach conclusions”. Goldberg & Shaw Study Summary, *supra*, Note 9 at 159 noting surveyed mediator advocates most often mentioned lack of integrity as reasons for mediator failure. See *also*, Golann & Folberg, *supra*, Note 11 at 92 reporting on the viewpoints of several lawyers on the value of mediation and Jay Folberg & Dwight Golann, Lawyer Negotiation Theory, Practice, and Law, 57 (2d ed. 2011) identifying stages of a negotiation.

³² Peter Lovenheim, Humor, Trustworthiness, and Even Drama: Assessing Whether You Have What It Takes to Be a Mediator, 20 Alternatives 169 (Oct. 2002). “Keeping confidences is the currency of a good mediator; without the ability to keep confidences, no one can, or should, be mediating.”

rapport established with each party, but it also represents the distance from the parties' dispute, which protects the integrity of the process and the mediator integrity, fairness and impartiality.³³

Connection to Parties: Competence and Authenticity – Mediators who are smart, well-prepared, do their homework on the facts, and are ready to talk about the particulars of the case are perceived as competent.³⁴ Being prepared with command of the relevant facts and law inspires party confidence in the mediator and optimism about resolution.³⁵ Asking good questions and listening carefully add to the perception of being smart and a quick study. Mediators who are confident will seem more competent. It is basic that *appearing* competent and confident should make the parties feel more comfortable, but it is another step to actually gain the confidence of the parties and establish a relationship of trust. The mediator needs to present a whole package of characteristics that together lead to party confidence in the mediator's ability to support them in reaching a resolution. A key aspect of that package is authenticity, for without authenticity, all other characteristics, no matter how polished in presentation, eventually will be found to be fraudulent. The mediator circle focus on process includes competence and authenticity as core components that are demonstrated when the mediator exhibits the process skills discussed below.

³³ Brazil, *supra*, Note 8 at 414 suggests mediators "need to stop seeing ourselves . . . at the center [of the mediation process]. Lempereur, *supra*, Note 10 at 8 "each party needs to take responsibility for their part of the problem".

³⁴ Goldberg & Shaw Study #2 and #3, *supra*, Note 9 at 400. Marshall H. Tanick, Seven More Sins of Mediators, 59-JUN Bench & B. Minn. 35 (May/June 2002) citing as top among the original sins, unpreparedness.

³⁵ Goldberg Study #1, *supra*, Note 9 at 12 including within lack of confidence-building attributes that lead to unsuccessful mediators, failure to understand the issues, applicable law, and not being well prepared. Goldberg & Shaw Study Summary, *supra*, Note 9 at 159, indicating mediation advocates echoed the mediator assessment that failure was largely due to lack of preparation on the relevant issues and law (along with lack of integrity and self-interest at the expense of resolving the dispute mentioned above).

Mediator Process Skills

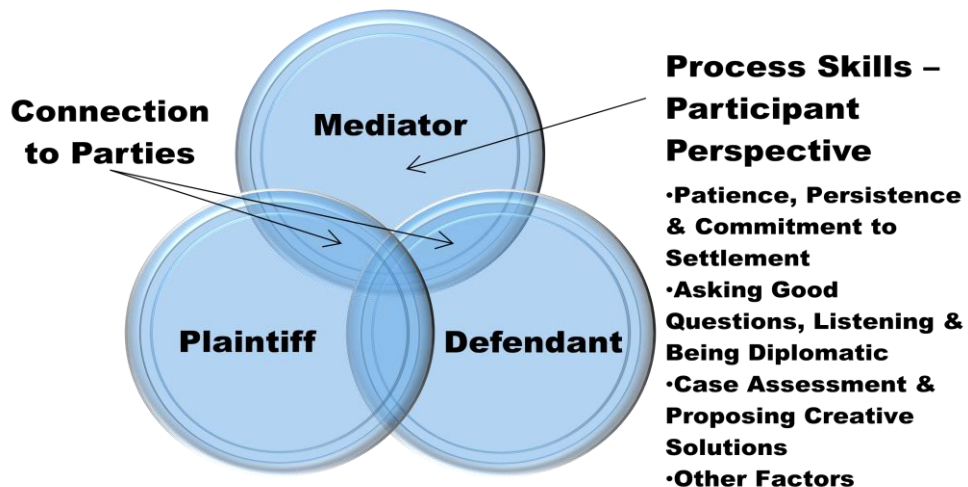
“I never failed once. It just happened to be a 2,000 step process.” Thomas Edison

Process skills are included in the intersection of the mediator circle with each party's circle.³⁶ Process skills are interrelated and overlap but are used in a fairly standard order in a mediation; however, participants', mediators' and mediator advocates' views of the relative importance of various process skills to a successful mediation is not so linear.³⁷ These lists have a small amount of overlap but are provided from different perspectives in the diagram and as a base level discussion of process skills the mediator can use for staying on task and the parties can use to become acquainted with the course of the mediation.

Process Skills Participant Perspective

Perceptions of parties often are evaluated in hindsight and the mediation is viewed as a whole instead of as a step-by-step process as a mediator might view it. These hindsight observations provide a good overview of the process skills perceived by participants to be important and can be useful to the mediator as a practical double check on the flow of the mediation. A

basic set of skills is listed in the diagram as a reference for the mediator, but



can be supplemented or modified as appropriate for the particular mediation.

³⁶ Golann & Folberg, *supra*, Note 11. Chapter 7 discusses Process Skills as a means to overcome obstacles to settlement. In addition, the authors address cognitive impediments and differing valuations as barriers to settlement, discussed below. Goldberg Studies, *supra*, at Note 9 including process skills as attributes of successful mediators.

³⁷ Goldberg Studies, *supra*, at Note 9.

Process Skills Participant Perspective: Patience, Persistence and Commitment to

Settlement - Patience and persistence are necessary skills to successful mediations.³⁸ If the parties could have reached a resolution by discussing the controversy, they would have done so themselves before mediation. A mediation is an involved process which often reaches resolution just when the parties are about to give up. Scarcity theory would say that the settlement agreement only happens when the pressure of a deadline causes people to focus on the matter at hand.³⁹ Being patient and tenacious and continuing contact with the parties, even after a mediation may end without an agreement can be key to getting a settlement. Accordingly, these characteristics are included in the mediator circle as process skills, which serves as reminder of the importance of acting in a manner consistent with resolution.

Process Skills Participant Perspective: Asking Good Questions, Listening and Being

Diplomatic - Asking good questions shows the mediator is well prepared, an important factor in confidence building. The questions are only half of the skill, though, as listening carefully to the answers is an important part of showing the mediator cares about the parties and wants to find a resolution.⁴⁰ The manner in which the questions are posed can also support the perception of the fairness of the proceedings and the neutrality of the mediator. Sensitivity to the impact of the message being conveyed by the mediator and tact in delivery support the perception of respect for and caring about the parties.⁴¹ Delivering bad news diplomatically is a part of maintaining rapport with the parties. Mediators create confidence in their impartiality by enabling both sides to feel like they are winning, or at least not losing, as the mediation progresses. These

³⁸ Id. Gregg F. Relyea, Parties Need Mediators with Personal and Professional Tenacity, 19 Alternatives 151, 165 (June 2001) stating that tenacity, personal commitment and professional resources are necessary to resolution.

³⁹ Dillion, *supra*, at Note 6; Sendhil Mullainathan and Eldar Shafir, Scarcity: The New Science of Having Less and How It Defines Our Lives (2013),

⁴⁰ Friedman, *supra*, Note 23 at 74, effective mediation requires listening and hearing. *See also*, Goldberg Studies *supra*, at Note 9 and Golann & Folberg, *supra*, at Note 11. *See, also*, discussion of Listening below.

⁴¹ See discussion of Reframing below.

communication skills are the core of the interaction between the parties and the mediator and detailing them in the diagram shows their importance to the progress of the mediation.

Process Skills Participant Perspective: Case Assessment and Proposing Creative Solutions – Many participants value candid assessments of the strengths and weaknesses of their case.⁴² However, these assessments need to be delivered in an even-handed, non-confrontational manner. Communications in this fashion support confidence in the impartiality of the mediator and further the perception of treating parties with respect and in a dignified manner. Creative problem solving by the mediator also shows the mediator's interest in the parties and reaching a settlement.⁴³ Pushing parties to be creative empowers the parties to own their dispute and its resolution. Many mediation advocates believe the mediator assessment of the risk of going to trial and the associated costs versus the mediated settlement carries greater weight than when delivered by the advocate.⁴⁴ The diagram highlights the parties' desire for the mediator to actively support steps toward resolution.

Process Skills Participant Perspective: Other Factors - Other factors also have been identified as contributing to successful mediation.⁴⁵ Keeping the parties focused on the issues keeps the mediation moving toward a resolution. Being good at reading people and their interpersonal relationships is a positive to enable the mediator to quickly assess the motivations and how hard to push the parties.⁴⁶ Finally, keeping the parties and the mediation calm and

⁴² See discussion of Reality Testing below.

⁴³ Mediator's proposals for settlement often are valued in a commercial context and may be made at the request of a party to avoid Reactive Devaluation, discussed below.

⁴⁴ Goldberg & Shaw Study Summary, *supra*, Note 9 at 157.

⁴⁵ *Id.*

⁴⁶ Lovenheim, *supra*, Note 32 “[T]he ability to read people is a largely intuitive ability to sense the things we are not being told; to perceive emotions that linger just below the surface, and to push with questions a bit further in a particular direction, which can go a long way toward making one successful as a mediator.”

peaceful, while still allowing them to vent and be emotional was important.⁴⁷ Flexibility in the process, humor, confidence and optimism all contributed to successful mediations. Generally, the attributes add up to someone a party would be willing to spend a long, emotional, and arduous day with and who can assist the parties in moving toward a settlement.

The template includes process skills from a participant perspective to illustrate the importance to the parties of the mediator actively pursuing resolution, communicating thoughtfully, supporting problem solving and simply being easy to be around. The diagram also supports including preferences for the most effective process skills used by an individual mediator and keeps a broader listing of skills available if progress stalls.

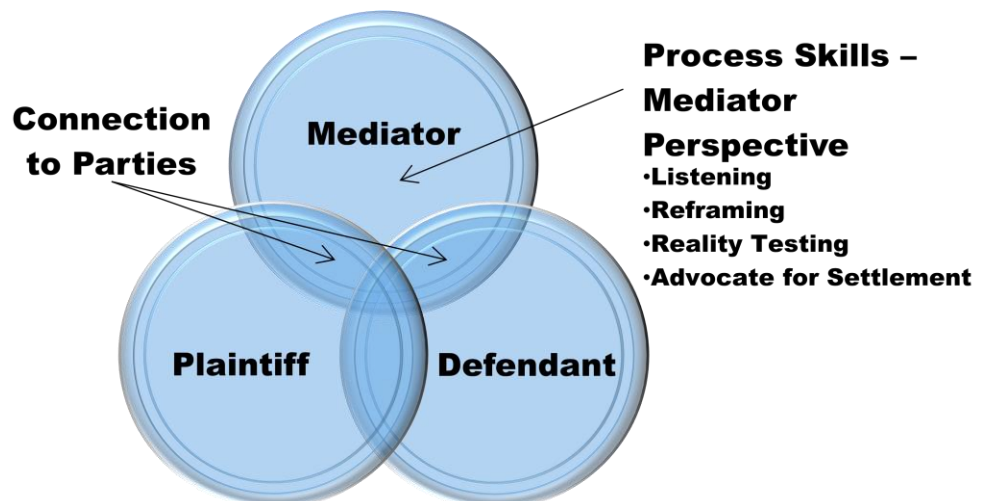
⁴⁷ Id. “Parties in mediation are under stress. . . [t]he mediator, therefore, needs to be able to project a sense of calm to help them feel safe and relaxed enough to participate in the mediation.”

Process Skills Mediator Perspective

From a mediator's more linear view, the process skills are used in sequential stages of a mediation.⁴⁸ There will be overlap with participants' views and this more specific detailing of the process skills also will be included in the mediator circle.

Processing Skills Mediator Perspective: Listening - A mediator must be a good listener. Parties often feel that no one is listening to their story or hearing their side, so it is so important to the parties' perception of a proper process for the mediator to model positive conflict resolution behaviors starting with listening to the parties.⁴⁹ Since the parties want an opportunity to tell

their story and to feel their views and concerns are being considered along with the evidence, mediators must



avoid the tendency to quickly judge the situation.⁵⁰ Good listening skills include being attentive and not being distracted, judgmental or critical.⁵¹ Of course, not interrupting the speaker is important, but acting in a manner which invites the speaker to continue talking as well as asking open-ended questions, is a good listening technique. Letting the speaker finish the subject

⁴⁸ Golann & Folberg, *supra*, Note 11 at 159-175.

⁴⁹ Welsh, *supra*, Note 7.

⁵⁰ Lempereur, *supra*, Note 10 at 5 regarding the danger of creating a negative process with "hasty behavior".

⁵¹ Richard Salem, *Empathic Listening, Beyond Intractability*, Eds. Guy Burgess and Heidi Burges, Conflict Information Consortium, University of Colorado, Boulder, Posted July 2003, available at <http://www.beyondintractability.org/essay/empathic-listening>. Empathic listening benefits are building trust and respect, releasing emotions, reducing tensions, encouraging information exchange and creating a safe environment conducive to collaborative problem solving.

without continually asking questions or giving advice are positive listening skills. Part of listening means the mediator should not be rehearsing responses or questions in their mind. The mediator is impartial but always creating a relationship with the parties and who they each are inevitably impacts the mediation.⁵² The parties' confidence in a resolution exists squarely in the mediator intersection with the parties and can "align the process in a positive direction".⁵³ The diagram includes listening as a core process skill and as a valuable communication tool to support the mediator's process.

Processing Skills Mediator Perspective: Reframing – Reframing is taking a negative statement and restating it in positive terms.⁵⁴ The mediator must be able to reframe information in a more neutral format. Reframing allows the parties to modify their perspective of their facts so they can acknowledge their adversary truly believes their own version of the events.⁵⁵ A mediator must be good at identifying the different ways that the parties view the facts and be able to assist them stand in the other party's shoes. By putting the parties' statements in more neutral terms, reframing allows the parties the opportunity to look at the problem in a more positive manner. Good listening allows the mediator to hear the parties' statements accurately and then reframing permits a new dynamic in the mediation. The goal of reframing is to change the focus of the communication from blaming to problem-solving and from dwelling on the past and the different versions of what occurred to what can be done in the future. The template includes reframing in the basic process skills to keep focus on communication skills that move the parties from their "I am right and they are wrong" mindset toward resolution.

⁵² Bowling & Hoffman, *supra*, Note 18 at 11, the personal qualities of the mediator impacts the parties and vice versa.

⁵³ *Id.*

⁵⁴ John W. Cooley, Mediation, Improvisation, and All That Jazz, 2007 J. Disp. Resol. 325, 370 (2007). "Reframing is a technique by which resistance can be surreptitiously bypassed."

⁵⁵ Ken Bryant and Dana L. Curtis, Reframing (2004).

Processing Skills Mediator Perspective: Reality Testing - Reality testing is asking the parties questions to cause them to realistically examine their positions.⁵⁶ After listening to the parties' stories and reframing the issues in a more positive and forward-looking fashion, the mediator may ask questions about the likely outcome of different settlement options and in continued litigation.⁵⁷ Being able to identify issues and express them in a non-judgmental and non-confrontational manner are important to effective reality testing.⁵⁸ The parties need to be able to understand the strengths and most significant weaknesses in their positions without feeling threatened. Facts are facts, but each party's perception of the facts will be different.⁵⁹ It is not important to the settlement that the parties agree on the facts. It is important that the parties control the resolution of the controversy and decide to settle or move forward to litigation having considered fully the information shared and the possibilities for settlement.⁶⁰ Reality testing is included in the template because of its powerful impact as a mediator skill.

Processing Skills Mediator Perspective: Mediator as Advocate for Settlement - The mediator needs to be an advocate for settlement and work to identify the interests of the parties that will lead to a settlement;⁶¹ merely carrying messages back and forth between the parties is considered a major factor in unsuccessful mediations.⁶² The mediator generally meets parties when they have been bickering over their positions in litigation and have created a negative environment marked by mistrust and misinformation or a lack of information. The mediator

⁵⁶ Jay E. Grenig, 1 Alt. Disp. Resol. Section 5:21 (3d ed. Updated Sept. 2015). "In testing reality, the mediator should compel the parties to evaluate the risks each faces if they do not reach a voluntary settlement."

⁵⁷ Folberg & Golann, *supra*, Note 11 (Lawyer Negotiation) at 302.

⁵⁸ Goldberg & Shaw Study Summary, *supra*, at Note 9.

⁵⁹ See discussion of Psychological Barriers below.

⁶⁰ Brazil, *supra*, Note 8 at 420. "A party who reliably knows her best alternative to going forward with the litigation, and which line of reasoning supports her opponent's position, is much more likely to feel well-grounded in a decision to litigate" See discussion of BATNA and WATNA below.

⁶¹ Golann & Folberg, *supra*, Note 11 page 92 and 166.

⁶² Goldberg & Shaw Study #2 and #3, *supra*, Note 2 at 412. Tanick, *supra*, Note 34 (being a 'carrier pigeon' is a sin of mediators who are otherwise in the best position to identify strengths and weaknesses of both sides of the dispute).

seeks to change this dynamic and support the parties' journey toward a resolution. Being an advocate for settlement is a process skill in the diagram from both the parties and the mediator perspectives for its integral role in the mediation. Part of hosting a proper process is keeping the prospect of reaching a mutually satisfactory resolution as a high priority.

The diagram is structured so the mediator is reminded of the skills participants value alongside the textbook skills. It also provides for flexibility to respond to the unfolding of the mediation with a variety of process skills, including communication, problem-solving, and resolution facilitating skills. The process skills identified in the diagram will be supplemented by additional skills and party traits that can be identified as the negotiation continues.

PARTY CIRCLES

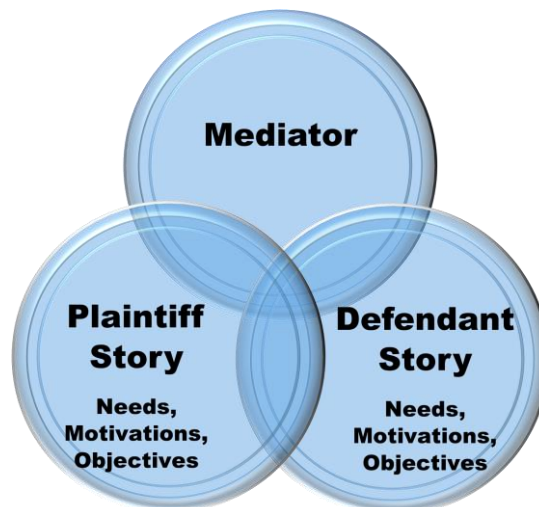
The parties have been living, breathing and eating their dispute. The litigation has likely been dragging on with high points and low points along the way, an emotional roller coaster for all involved. It has been an enormous distraction from the everyday lives of the parties, personally as well as professionally. They do not feel understood or that anyone is listening to their explanation of what happened. If they could just explain what happened, the mediator and opposing party would see they were right. They are emotional, frustrated, angry, discouraged and insulted that no one understands and sees the facts as they do. So, the circles of the parties must include their differing versions of the events and the overwhelming desire to tell their story at least to the mediator, if not to the other side.

The mediator listens to, and supports, the telling of each story. Each party's perceptions of the events necessarily will color the telling of their story. These perceptions do not align and that is why the parties remain in litigation. In sharing their story, the parties will not only tell the facts, but can be prompted to share their needs, motivations and objectives. Within these needs, motivations and objectives is the foundation for moving beyond a competitive win/lose result to an interest-based settlement.

Settlement can be pursued in a competitive fashion where each party seeks to win at the expense of the other party or it can be pursued as an interest based negotiation.

Changing the focus from a completely

economic result to a search for common or complementary interests can help overcome hidden



barriers, increase the value of settling, reduce feelings of losing and reduce bickering over positions.⁶³ An interest based mediation seeks a settlement that produces a better result for each side than was expected.

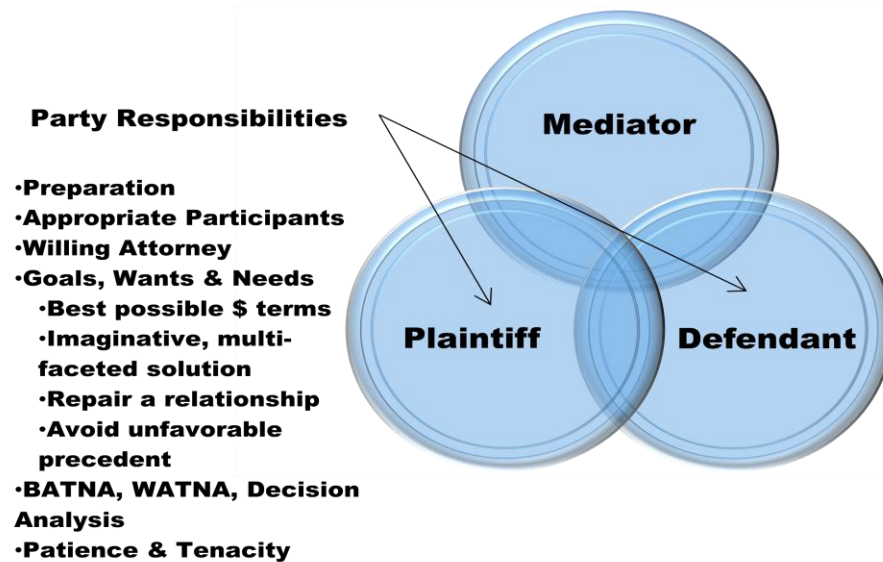
The circles of the parties also contain the biases of the parties and psychological impediments to settlement. In addition, potential irrational behaviors reside in the parties' circles. The diagram will be expanded to include these biases and behaviors so the participants can determine if any are occurring and how they may be influencing the negotiation. Including these elements in the diagram is designed not only to help the parties prepare for mediation but also to help the parties recognize behaviors that may stall or derail mediation. Recognizing biases and impediments in themselves and in the other party may enable the parties to understand each other better and be able to view the dispute from a different perspective that might support settlement. At a minimum, they will be able to speak a similar language on the issues.

⁶³ Golann & Folberg, *supra*, Note 11 page 166.

Responsibilities of the Parties

“Peace is not absence of conflict; it is the ability to handle conflict by peaceful means.” Ronald Reagan

The party circles contain the responsibilities of the parties to a mediation. The most important responsibility of the parties is to properly prepare for the mediation and so preparation is listed first in the template to emphasize it. A lack of preparation undermines the parties’ ability



to use mediation to its full potential.⁶⁴ A part of proper preparation shown in the diagram is identifying the

people who should attend the mediation. The appropriate participants, including someone with settlement authority, need to attend the mediation.⁶⁵ The lawyer at the mediation should be interested in finding a resolution and recognize the potential importance to a settlement of preserving relationships, saving costs and avoiding the emotional price of continued litigation.

Part of preparing for mediation is identifying party goals, including determining the needs and wants of the party.⁶⁶ The diagram also identifies thorough consideration of the party’s case

⁶⁴ Brazil, *supra*, Note 8 at 416. Robert A. Merring, Five Steps (and Several Suggestions) That Lead to A Successful Mediation, 50-OCT Orange County Law. 34 (Oct. 2008) citing as a first step for advocates to ‘be prepared’.

⁶⁵ Tom Arnold, Twenty Common Errors in Mediation Advocacy, 13 Alternatives 69 (1995), Problem 1 is having the wrong client in the room. Merring, *supra*, Note 64 (The ‘A Team’ of advocates as well as the ‘A Team’ of decision makers should attend).

⁶⁶ Lurie, *supra*, Note 5. Merring, *supra*, Note 64 (Step 4 of the 5 Steps to successful mediation is asking what your client really wants and needs).

and what the party wants and needs for a resolution as responsibilities. Possible bases for resolution that should be considered by the parties to be well-prepared for the mediation are:

- The most favorable monetary terms – this is a narrow approach that just looks at how to get the best monetary terms in exchange for ending litigation. This is known as a distributive result or a fixed pie.⁶⁷ It is generally reached through a more evaluative review of the facts with the focus primarily on legal arguments and bargaining over positions and ultimately money. This would be a competitive or adversarial win/lose negotiation.⁶⁸
- An imaginative, multi-faceted solution – this is an interest based resolution which may provide a greater value to each party than a purely monetary solution.⁶⁹ It is broad based and facilitative, considering the interests of the parties and how they might each benefit from looking outside of the confines of the disputed facts. Sharing information about wants and needs is important to being able to identify the relevant interests of the parties.⁷⁰

⁶⁷ Charles B. Craver, The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions, 12 Cardozo J. Conflict Resol. 1 (Fall 2010) discussing a ‘fixed pie’.

⁶⁸ Charles B. Craver, The Impact of Negotiation Styles on Bargaining Transactions, 35 Am. J. Trial Advoc. 1 (Summer 2011). “Competitive/Adversarial negotiators move psychologically against their opponents, try to maximize their own returns, seek extreme results, begin with less realistic opening offers, behave in an adversarial and insincere manner, focus primarily on their own positions rather than rely on objective standards, frequently resort to threats, minimize the disclosure of their own information, are closed and untrusting, seek to satisfy the interests of their own side, try to make minimal concessions, and manipulate opponents.”

⁶⁹ Id. “Cooperative/Problem-Solving negotiators move psychologically toward their opponents, try to maximize the joint returns achieved by the bargaining parties, seek reasonable results, begin with realistic opening positions, behave in a courteous and sincere manner, rely upon objective standards to guide discussions, rarely resort to threats, maximize the disclosure of relevant information, are open and trusting, work diligently to satisfy the underlying interests of themselves and their opponents, are willing to make unilateral concessions, and try to reason with people on the other side.”

⁷⁰ Craver, *supra*, Note 68 at 9 retelling the story begun by Mary Parker Follett, a business consultant in the early 1900’s, about two sisters who split an orange in half because they only had one orange. What they failed to discover was the more elegant solution they could have found if they had shared their wants and needs that one sister wanted the orange pulp and one sister wanted the orange peel for baking.

- Repair a damaged relationship – some disputes are more about repairing a damaged relationship than they are about the monetary settlement.⁷¹ The dispute has changed an ongoing relationship and finding a way to continue the relationship in a positive manner may be important to the parties. Resolving the monetary aspects of the conflict may follow easily from a repair of the relationship.
- Avoiding an unfavorable precedent and privacy concerns– the resolution of a dispute may have a limited impact on one party and have long-term consequences for the other party, including creating a precedent that may not transfer well to other situations.⁷² One party may want the resolution to remain private, for example, keeping the resolution confidential and out of the press. A result may be considered negative or embarrassing for a party and a mediated settlement can contain confidentiality provisions to protect the details of the resolution.

In preparing for the mediation and reviewing the litigation, the parties should determine the Best Alternative to a Negotiated Agreement (“BATNA”). This is the best possible outcome in litigation compared to what the negotiated settlement might be. The Worst Alternative to a Negotiated Agreement (“WATNA”) must be considered as well. This is the worst possible outcome in litigation compared to a negotiated settlement. In identifying the best and worst alternatives, the party can be prepared with a range for settlement agreement considerations.⁷³ Another option for assessing chances of success is a decision analysis, where the likelihood of

⁷¹ Dwight Golann, Is Legal Mediation a Process of Repair—Or Separation? An Empirical Study, and Its Implications, 7 Harv. Negotiation L. Rev. 301, 302 (Spring 2002). “The potential for repair of relationships may be greater in neighborhood and family cases.”

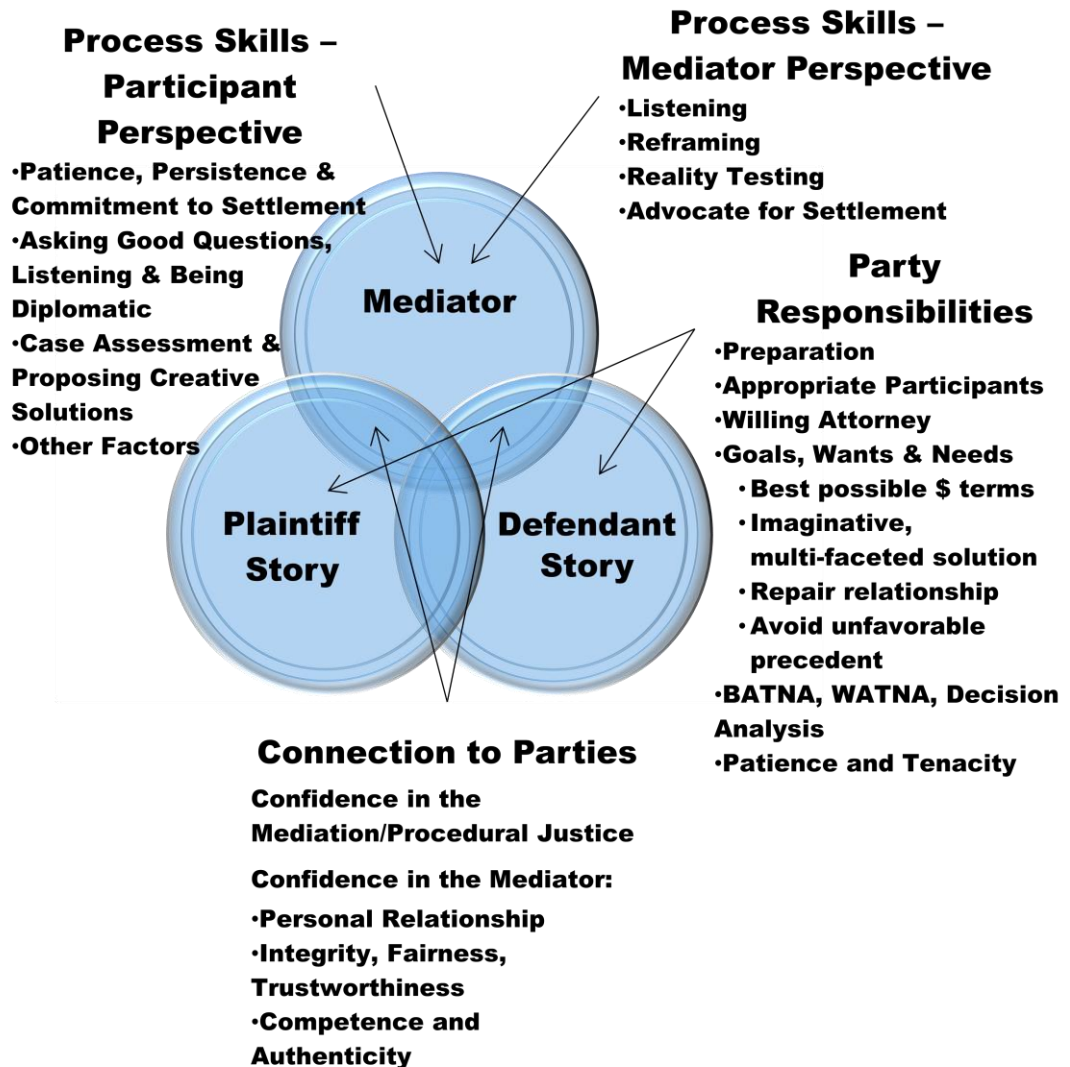
⁷² Amy B. Jenkins, Preparing for Effective Participation in Mediation, 21, 22 27-OCT Wyo. Law. (October 2004). “Some cases are resolved in mediation to avoid the possibility of an adverse precedent that might be detrimental in future business dealings or future litigation.”

⁷³ Golann & Folberg, *supra*, Note 11 at 209 discussing BATNA and WATNA.

events is quantified and assigned a dollar amount.⁷⁴ The BATNA and WATNA are not necessarily just a dollar amount and can include creative considerations and relationship concerns. Understanding this range will be important to the negotiations during the mediation and the template highlights determining BATNA and WATNA as key self-education responsibilities of the parties.

At this point in building the template, the mediator has been focused on process skills and creating a

positive
relationship
with the
parties and
the parties
have
identified
their
responsibiliti
es. The
several
layers of the
diagram so
far are:



⁷⁴ Id. at 213 and Jeffrey M. Senger, *Decision Analysis in Negotiation*, 87 Marq. L. Rev. 723 (Special Issue 2004). See also, Folberg & Golann, *supra*, Note 11 at 133, Richard Birke, *Decision Trees – Made Easy* (2010).

Mediation is attractive because it allows the parties to decide their own destiny so it is important the parties not only talk to each other, but also listen to each other's stories, wants, needs and objectives and recognize where the disconnect between them exists. The parties must own their dispute and work together to resolve it and the diagram depicts this by keeping the dispute only in the intersection of the party circles. In addition, the mediator circle focus on process, process skills and the relationship with each party leaves the conflict outside of the mediator circle to emphasize impartiality. The party circles represent the different versions of the facts and the diagram reminds the parties by keeping their stories separated that they do not need to agree on the facts to reach a resolution.⁷⁵ The mediator can help the parties recognize that their independent versions of the facts can remain in the distinct portion of each party's circle and do not need to be reconciled to reach the settlement area in the intersection with the mediator. The diagram also reminds the parties they must work together in the intersection of the party circles to reach the settlement area. The mediator is able to and can support them in making choices toward a resolution.⁷⁶ The mediator can also help the parties realize the mediation is a process for all involved and it may take time to adjust the parties' thinking, so it is important for the parties to be patient and tenacious as well.⁷⁷

Psychological Traps

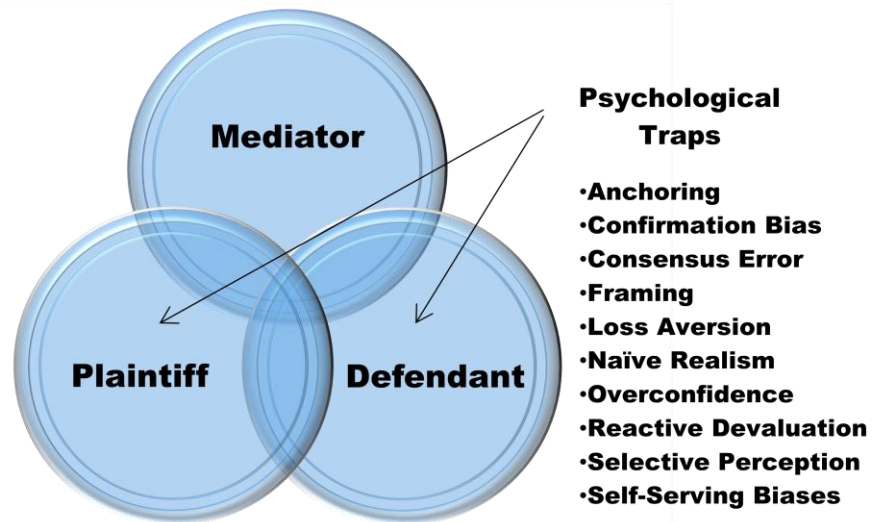
Several of the most common psychological traps that can keep people embroiled in their conflict are identified in the circles of the parties. The parties have a view of the facts that

⁷⁵ Lempereur, *supra*, Note 10 at 12.

⁷⁶ Gary Friedman & Jack Himmelstein, Challenging Conflict: Mediation Through Understanding, xxv (American Bar Association, 2008)

⁷⁷ Merring, *supra*, Note 64(Step 5 Put on Your Dancing Shoes and Be Patient). Arnold, *supra*, Note 62 (Problem 19 is lack of patience and perseverance).

generally is most favorable to them and these perspectives make it difficult to come to agreement.⁷⁸ Our biases diminish the likelihood of agreeing on the facts as our personal investment in the problem grows during the litigation and the passage of time helps us forget or misremember the past in a way that makes us feel better about ourselves. Lawyers can also be caught up in these biases when zealously representing their clients. Studies have shown that these cognitive traps impact negotiation behavior.⁷⁹ Since these cognitive biases are often subconscious, awareness may be the only way one can overcome them. The diagram keeps the possibility of these psychological impediments to settlement available for reference by the parties should an impasse occur.⁸⁰



The literature on cognitive biases is substantial and the listing in the diagram is not exhaustive but is meant to be a trigger to help parties recognize the possibility of bias in the negotiation. The short summaries that follow are to aid in recognition. The most common psychological traps and the techniques mediators can use to overcome these impediments are:

⁷⁸ Leigh Thompson & Janice Nadler, *Judgmental Biases in Conflict Resolution and How to Overcome Them*, in *The Handbook of Conflict Resolution: Theory and Practice*, Morton Deutsch and Peter T. Coleman, eds., 213-235 (2000), available at http://www.colorado.edu/conflict/peace/example/judgmental_biases.htm.

⁷⁹ Golann & Folberg, *supra*, Note 11 at 80. See also, Jennifer K. Robbennolt & Jean R. Sternlight, *Psychology for Lawyers* (1981).

⁸⁰ Penny L. Willrich & Jalae Ulicke, *Lessons learned From Peacemaking*, 51-FEB Ariz. Atty. 44, 46 (Feb. 2015). The success of mediation is dependent on recognition of attributes, attitudes and underlying biases of both mediators and of the parties and on knowledge of how to overcome those things that create roadblocks to resolution.

- **Anchoring** is when irrelevant values are used as a starting point and adjustments are made from that starting point.⁸¹ In negotiations, the first number provided “anchors” the following offers and influences the analysis of the appropriate number and changes expectations. Numbers that are available even though they do not have any relevance to the issue easily sway our thought processes. If parties have carefully reviewed their dispute and prepared their BATNA, WATNA or decision analysis, the anchoring effect of a first offer will be seen in light of the information gained in preparation and have less impact. Looking for objective standards will also diminish the impact of anchoring in a first offer.⁸²
- **Confirmation Bias** is the tendency to give more weight to information that supports existing views instead of looking objectively at the issue.⁸³ For parties, this would mean they more highly value information that supports their version of the events and accept only information that further supports their case, discounting the other party’s views and information that would support them. The mediator can assist the parties with confirmation bias, by asking questions designed to encourage the parties to look at the facts from other perspectives, including the perspective of the opponent. In addition, tactful reality testing will help the parties see the strengths and weaknesses of their position.

⁸¹ Dan Orr & Chris Guthrie, Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis, 21 Ohio St. J. on Disp. Resol. 597 (2006). “[W]e are often unduly influenced by the initial figure we encounter when estimating the value of an item.”

⁸² See discussion of negotiation behavior and using objective standards below.

⁸³ James Laflin, Deconstructing Deadlock, Some Brief Notes on Cognitive Error: or How Litigants (and their lawyers) Think Themselves Into Deadlock and Can Think Their Way Out Again, 29 No. 8 Cal.Tort Rep. 20 (Sept. 2008)(confirmation bias is ‘cognitive cherry picking’).

- **Consensus Error** is where people believe that everyone thinks the way they do or likes the same things they do.⁸⁴ Conflicts cannot be resolved when parties cannot accept that people can have different viewpoints. This inability to see other perspectives makes it difficult to stand in the other person's shoes and try to understand their issues and craft a resolution acceptable to both parties. The mediator can discuss ranges of normal behavior and expand the party's perception of what "everyone" thinks or likes.⁸⁵ Reframing negative situations into more neutral ones also can expand a party's horizons to allow consideration of other possible intents of the opponent.⁸⁶
- **Framing** flows from the manner in which an issue is presented. The outcome is a potential gain or a potential loss based on how the original question is framed,⁸⁷ much like the glass half empty or half-full analogy. Reframing by the mediator to a neutral outcome changes the perceptions of what is being said and opens the discussion up to more positive progress.
- **Loss Aversion** is the tendency to feel losses more greatly than equivalent gains.⁸⁸ A dollar lost is more valuable than a dollar gained. Loss aversion is closely related to

⁸⁴ Lawrence Solan, Terri Rosenblatt & Daniel Osherson, False Consensus Bias in Contract Interpretation, 108 Colum. L. Rev. 1268 (June 2008) (false consensus bias is "propensity to believe one's views are the predominant views, when in fact they are not").

⁸⁵ Melissa Janis, In the Eye of the Beholder: Using Perceptual Errors to Resolve Employment Disputes, 56 Disp. Res. J. 49 (August-October 2001) (mediators should maintain impartiality by reframing and highlighting common interests)

⁸⁶ Id. After identifying the misperception, Ms. Janis uses a tool for connecting feelings to needs: "if the party is angry, it's about respect; if the party is sad, it's about belonging, if the party is fearful, it's about safety."

⁸⁷ Amos Tversky & Daniel Kahneman, The Framing of Decisions and the Psychology of Choice, 211 *Science*, New Series, 453 (Jan 30, 1981) available at <http://links.jstor.org/sici?sici=0036-8075%2819810130%293%3A211%3A4481%3C453%3ATFODAT%3E2.0.CO%3B2-3>. "[D]ecision Frame" [refers] to the decision-maker's conception of the acts, outcome, and contingencies associated with a particular choice. The frame that a decision-maker adopts is controlled partly by the formulation of the problem and partly by the norms, habits, and personal characteristics of the decision-maker." Richard Birke, Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications 25 Ohio St. J. on Disp. Resol. 477, 497 (2010). "Many equivalent deals are accepted or rejected depending on the framing of the offer as opposed to the value of the offer."

⁸⁸ Tversky & Kahneman, *supra*, Note 87 at 456.

framing in that the original question can set up how the parties will feel about the resolution. Parties tend to believe their concessions in a negotiation are far more valuable than the concessions they receive because they overvalue what they have and do not want to lose it. Reframing in more positive language by the mediator can diminish feelings of loss, make the issue neutral or make it seem like a positive.

- **Naïve Realism** is the belief by a party that their view of the facts is the way it really happened and anyone seeing it differently is naïve.⁸⁹ Naïve realism is closely related to consensus error and confirmation bias continues the valuing of one-sided information. Using neutral or positive language to open the party to more possibilities, perceptions and realities of others makes moving toward settlement more likely.
- **Overconfidence** is the tendency to rate our own abilities or chances to win higher than is appropriate.⁹⁰ This includes the tendency to believe our assessments are accurate even when we do not have sufficient information. Our overconfidence can be exacerbated by our belief in the rightness of our position. Preparation of BATNA, WATNA and decision analysis can ameliorate overconfidence. Reality testing and broadening horizons also can help impact overconfidence.
- **Reactive Devaluation** is the discounting of any offer from the opponent just because it comes from the opponent.⁹¹ This includes the tendency to believe information offered is

⁸⁹ Birke, *supra*, Note 87 at 493. “People believe that they ‘see the world as it is’. . . .”

⁹⁰ Michael Palmer, J.D., Dr. Phil., Which is Better? The Deal or the Ordeal? An Examination of Some Challenges of Case Valuation, 36-FALL Vt. B. J. 34 (2010). Overconfidence is feeling we know more than we know; because of the uncertainty and complexity of a decision we search out certainty and come up with a prediction which may not be rational.

⁹¹ Russell Korobkin, How Neutrals Can Overcome The Psychology of Disputing: The Effect of Framing and Reactive Devaluation in Mediation, 24 Alternative 83, 85 (May 2006). “[A] concession or compromise is less desirable after it is offered than it appeared before it was offered.”

inherently less valuable than information withheld. The mediator often is asked to present a party's proposal as the mediator's proposal to avoid reactive devaluation.

- **Selective Perception** is assessing a situation with available data and discarding information that does not support that assessment,⁹² much like confirmation bias. It is the basis of self-fulfilling prophecies, where selectively accepting information supporting the perception makes the perception real for the holder. Again, reality testing and broadening perceptions will help.
- **Self-Serving Biases** is seeing oneself in the best light.⁹³ This includes finding the same behavior in others as a negative. In a dispute, our intentions are good and the other party's intentions are bad. We make a mistake, they deceive. Mediators can pose hypotheticals for the other party's intentions that are more neutral or understandable and outside the party's current assumptions.

The psychological traps are included in the diagram to ensure the parties and mediator do not overlook potential reasons for a failure to come to agreement. With knowledge of these traps available at the mediation through the template, the parties can consider ways to counteract or avoid the traps while they are negotiating.

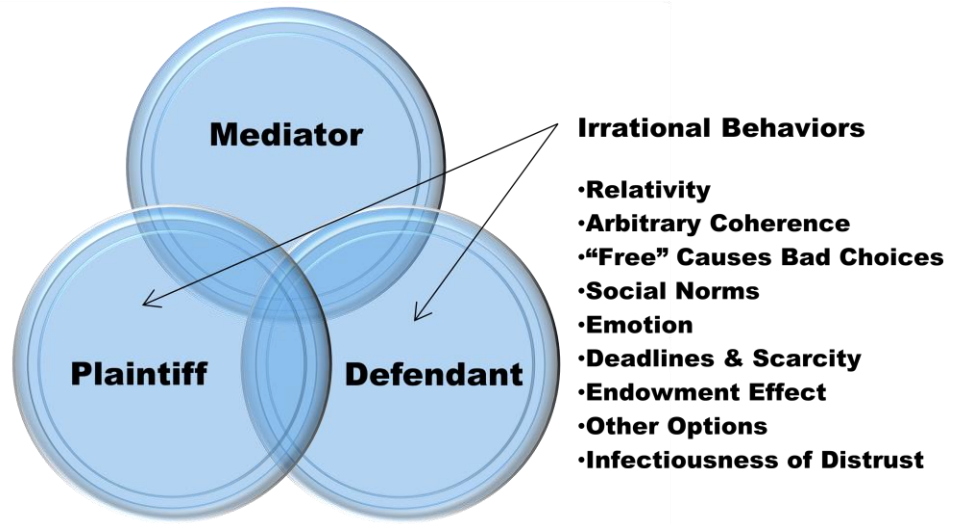
⁹² Joseph M. Epstein, The Powers of Psychodynamics in Shaping Mediation Outcomes, 33-JAN Colo. Law. 45, 49 (Jan. 2004). Selective perception is a form of stereotyping or self-fulfilling prophecies.

⁹³ David A. Hoffman & Richard N. Wolman, The Psychology of Mediation, 14 Cardozo J. Conflict Resol. 759, 792 (Spring 2013), "[w]e tend to think we are fairer, smarter, and more capable than we are."

Irrational Behaviors

The parties' circles also include human behaviors that are not rational. The reasons people make certain decisions is inconsistent with what is best for them or what might seem to make more sense if looked at from a dispassionate, unbiased view. Having knowledge of these behaviors

available during
the mediation
through the use
of the diagram
and being able
to recognize
them can help



parties make more rational decisions or understand how seemingly irrational decisions occur.

These irrational behaviors⁹⁴ include:

- **Relativity**, like anchoring, is the comparison of unrelated items to make a decision because there is no objective standard.⁹⁵ There is no intrinsic value so the focus is on the relative value of one thing against another. This is how settlement offers evolve. Offers are made and evaluated against each other or against some elusive, personal standard. If the parties prepare for the mediation by evaluating their case, they will be more likely to have as much information as possible to be able to compare offers more rationally.

⁹⁴ Ariely, *supra*, Note 27 discussing the concepts of relativity, arbitrary coherence, the cost of free, social norms, impact of arousal or deadlines, overvaluation of what is ours, other options as a distraction, self-fulfilling prophecies, infectiousness of distrust, dishonesty and peer pressure.

⁹⁵ *Id.* at 8.

- **Arbitrary coherence** means once we have made a decision, that decision will color how we make future decisions.⁹⁶ Even though the initial decision is arbitrary and has no comparison, we will be consistent with our initial decision and this effect lasts for a long time. Exploring other options and ways of looking at the dispute counteract arbitrary coherence.
- **“Free” causes bad choices.**⁹⁷ Between an item that is free and an item that is discounted, the presence of ‘free’ will skew how the free item is valued when compared to the item that is discounted. Choosing the free item may not be as desirable as the discounted item and can cause us to make choices that are not good for us. Mediator feedback, as an independent third party, can help the parties assess the value *to them* of items that are unknown or unknowable.
- **Social norms** motivate people to do things for a cause they would not do for cash.⁹⁸ We would volunteer to sell raffle tickets for a charity but we would not do it if we were being paid. Market exchanges are business transactions that are viewed in a different light than these social exchanges. If the market exchange creeps into the social exchange, for example, a friend offers to pay you for selling the raffle tickets, that may harm the social relationship in a way that is not easy to repair. Salvaging a personal relationship in a mediation may be a more important goal than maximizing the monetary settlement. However, a party may want a resolution that provides “justice” or keeps the same problem from happening to others. This mixes a social norm with a market transaction of

⁹⁶ Hoffman, *supra*, Note 93 at 798. Arbitrary coherence is also called ‘sunk costs’. Birke, *supra*, Note 87 at 495. “Sunk Costs compel continued funding of losing struggles.”

⁹⁷ Henry C. Su, Thinking Fast, Free and Fashionable: Competition and Consumer Protection in a Mobile Internet World, 27-FALL Antitrust 82, 84 (Fall 2012), “free may result in suboptimal consumer choices and negatively impact innovation and consumer welfare”.

⁹⁸ Maurice Stucke, Money is What I Want: Competition Policy and the Role of Behavioral Economics, 50 Santa Clara L. Rev. 893, 914 (2010), appealing to ethical or religious norms can deter unwanted self-interested behavior.

settlement and the resulting behavior may not make sense to the other party. The mediator may be able to speak with each party separately to help them identify what is most important to them.

- **Emotion** causes people to make poor choices⁹⁹ so high emotions in a mediation can derail settlement. How much attitudes change due to emotion is an unknown, but what seems reasonable in the peace of preparation may fall apart in the emotion of the mediation. The mediator must use his or her best peacemaking skills and keep the parties calm and able to make progress. Good preparation by the parties may help keep emotions at bay.
- **Deadlines and scarcity** of time make us focus on the matter at hand.¹⁰⁰ Settlement takes until the time available has ended or even longer because people cannot focus until the deadline looms. We tend to abandon our long-term goals for a short-term fix, i.e., I will diet tomorrow. There is a bit of procrastination involved and a lot of avoidance. Mediators can try to keep the pressure on to move the mediation along.
- **Endowment effect** is when people will ask more to sell something than they would pay to purchase it.¹⁰¹ This disconnect in sales and purchase prices for the same item is related to loss aversion and our preference for things to stay the same or our status quo bias. The endowment effect causes people to make uneconomic decisions. In mediation, the endowment effect will lead to problems finding common ground so the mediator may need to step in to help the parties make their valuations more consistent.

⁹⁹ Richard Birke, *supra*, Note 87 at 518 we underestimate the impact of emotion on our future state of mind when we try to predict future actions.

¹⁰⁰ Mullainathan, *supra*, Note 43.

¹⁰¹ Golann & Folberg, *supra*, Note 11 at 191. *See, also*, Birke, *supra*, Note 87 at 495. “A thing possessed becomes more valuable to the holder than to the market.”

- **Other options** distract us from the main objective. Great effort is expended to keep multiple options available, especially in the context of a mediation. Having many options available keeps the parties from focusing on what needs to be accomplished to settle their dispute.¹⁰² Keeping options open is related to loss aversion because we do not want any options foreclosed for fear something might be lost. In addition to the energy that is expended to keep the options available, there are consequences to failing to decide. There is a lost opportunity cost, wasted time, and a decision may not be made timely; pointing out the downsides of keeping options open by the mediator may assist the parties to come to resolution.
- **Self-fulfilling prophecies** are the result of relying on expectations rather than the actual occurrence.¹⁰³ If we believe something will be favorable, generally it will be favorable; but if we think it will be unfavorable, it will be so. If we expect the worst of the other party, that expectation is likely to fulfill regardless of how the other party acts. Therefore, it is important to present offers in a way that encourages acceptance. It is important for the mediator to identify and keep in mind expectations that will be fulfilled by settlement.
- **Infectiousness of distrust** in litigation arises partially from our self-serving biases exacerbated by selective perception and self-fulfilling prophecies. We believe the other side is dishonest and has bad motives (while we are honest with good motives) and as the conflict continues and perhaps grows during the course of litigation, our negative feelings about the other party grow.¹⁰⁴ The negative feelings come from an inability to relate to or understand the other party's perspectives and can be addressed by the mediator. The

¹⁰² Ariely, *supra*, Note 27 at 184.

¹⁰³ Epstein, *supra*, Note 92. "Stereotyping is an easy and convenient way to deal with people and their positions . . . [that] also may be labeled 'selective perception' or 'self-fulfilling prophecies'."

¹⁰⁴ Ariely, *supra*, Note 27 at 259.

mediator should acknowledge the mistrust and encourage the parties to talk directly about any unknowns about how the conflict happened that might explain away mistrust issues.

The mediator also can counterbalance the feelings of dishonesty by treating both sides fairly and respectfully, modeling trustworthy behavior for the parties. Careful drafting of provisions that both parties have an incentive to see fully performed can minimize distrust that would undermine certainty of performance of a settlement agreement.

The mediator may be able to lessen the impact of these irrational behaviors by maintaining commitment to the process. Being fair, giving equal time to each party, maintaining a calm environment, letting the parties vent but requiring them to be respectful with each other, for example, will create a positive environment for finding common interests and a settlement. The diagram includes irrational behaviors as a reminder that some (or maybe most) actions are not meant to be a personal affront but may arise for completely unrelated, and possibly irrational, reasons.

THE INTERSECTION OF THE CIRCLES OF THE PARTIES

“Dialogue is the most effective way of resolving conflict.” Tenzin Gyatso, the 14th Dalai Lama

The parties separate interests are contained within their own circle and the intersection of their circles is not only their dispute but also their shared interests. The template identifies finding shared interests as an important part of the negotiation and defining a settlement. The mediator is not a party to this overlap except to the extent the mediator can harmonize the dispute and shared interests to come to a resolution where all three circles intersect.¹⁰⁵

Good negotiation techniques help the parties identify the shared interests that exist along with their dispute in the intersection of the party circles. This good negotiating behavior requires respectful communication between the parties with a goal of a mutually acceptable resolution.¹⁰⁶

It does not help the situation if parties resort to insults, accusations, and rehashing the same old complaints because, at the end of the mediation, the parties must still have enough trust in each other to perform

the settlement

agreement. A

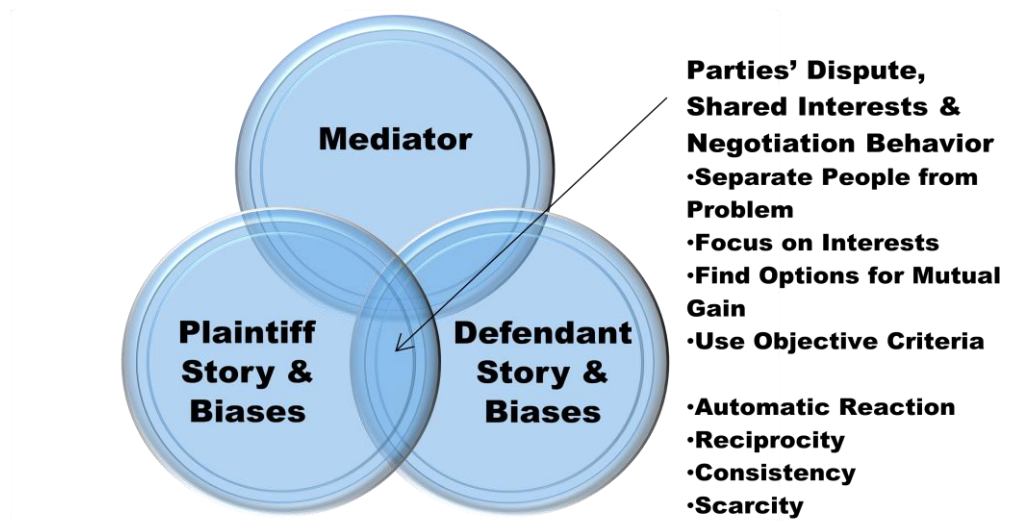
cooperative

approach to

negotiation is

often successful

in mediations to



¹⁰⁵ Bowling & Hoffman, *supra*, Note 18 at 210 suggesting the mediator becomes a part of the conflict. The mediator can be a positive role model and “align the mediation process in a more proactive direction”.

¹⁰⁶ Korobkin, *supra*, Note 90 at 87. “If the parties perceive interactionally just treatment, the bargaining zone will be larger and mutually desirable settlement terms will be more likely to exist.”

bring the parties to a settlement agreement.¹⁰⁷ The key factors in a cooperative, principled, problem-solving approach as outlined by Roger Fisher, William Ury and Bruce Patton in *Getting to Yes* (1991) are:

- *Separate the people from the problem*¹⁰⁸— do not let egos and the people get in the way of a good settlement, but do let people have their say. Listen actively to what the opposing side is saying. Avoid assigning blame or embarrassing anyone as that is not helpful to coming to agreement. The parties should remember to look at the issues from the other party's point of view and stand in their shoes to understand what motivates them. Also, make sure both parties participate in the negotiation process so they are more likely to approve the result of the negotiations.
- *Focus on interests not positions*¹⁰⁹— desires and concerns are the parties' interests which motivate them to decide on their positions. Parties can find a compromise between their positions, but understanding the interests, desires and concerns that led them to that position may reveal more commonality than the positions might indicate and lead to a better result for each party. To identify the breadth of possible interests underlying a position, ask why the other party has a particular position and not another position and be specific about concerns.¹¹⁰ Considering these multiple interests with a strong dose of flexibility can lead to very creative problem solving.

¹⁰⁷ Roger Fisher & William Ury (& revised ed. Bruce Patton), Getting to Yes, Negotiating Agreement Without Giving In, 44 & 50 (3d ed. 2011).

¹⁰⁸ Id. at 19-41.

¹⁰⁹ Id. at 42-57.

¹¹⁰ Reynolds, *supra*, Note 20 at 621 arguing “[n]egotiations based on assumptions about previous identity and interest-based prerogatives can lead to suboptimal results that do not meet present needs . . . an understanding of self and other must be willing to investigate, question, visit, revisit, complicate, and develop provisional conclusions that remain open to reexamination and change.”

- *Looking for options for mutual gain*¹¹¹– requires considering a variety of potential solutions. Maintain an open mind, consider the various alternatives, look outside the conflict for compatible interests and stay invested in finding a solution.¹¹² Consider brainstorming¹¹³ ideas to broaden possible solutions on the table and match or dovetail interests to identify creative solutions.
- *Use objective criteria*¹¹⁴– rely on independent information or other quantifiable data to negotiate. Objective criteria keep the negotiation from being a battle of wills and wits and allow parties to discuss issues with reference to a shared standard. A wise and durable agreement is easier to produce if the negotiation includes jointly agreed upon standards of fairness, efficiency or scientific merit.¹¹⁵ Parties can look to a scientific or professional standard, to market value or appraisal information or perhaps a cost basis; as long as the criteria is independent of either party and the determination of the criteria to be used are deemed by each party to be fair.

There are also subtle influence factors that bear on negotiation.¹¹⁶

- *Automatic Reaction* – is automatic, stereotyped behavior consisting of reactions to triggers that are consistent.¹¹⁷ People tend to agree to requests for favors if given a reason. The reason does not need to be compelling or even convincing. Another automatic reaction is perceptual contrast, a feeling of relief when told bad news if even worse news is told first. This ‘set up’ happens when we negotiate a price and then the

¹¹¹ Fisher, *supra*, Note 107 at 58-81.

¹¹² Reynolds, *supra*, Note 20 at 626 arguing for knowing one’s enemy and never overestimating the strength of the other party’s bargaining position or underestimating how knowledge of the opponent’s interests can be leveraged.

¹¹³ Fisher, *supra*, Note 107 at 62 for suggested brainstorming structure.

¹¹⁴ Id. at 82-95.

¹¹⁵ Id. at 85.

¹¹⁶ Cialdini, *supra*, Note 19.

¹¹⁷ Id. at 3. Robbenolt & Sternlight, *supra*, Note 79 at 116 (there are two paths to persuasion: (i) a “deliberate, effortful and elaborate thinking; and (ii) a “more intuitive” and superficial shortcut known as heuristics; Epstein, *supra*, Note 92 at 48 (“first impression, lasting impression”).

cost of the additional options seems insignificant compared to the overall cost and are more likely to be accepted. Give reasons for the settlement offer and make the offer better news than what it could have been.

- *Reciprocity* – requires us to repay in kind what we have received.¹¹⁸ This is the back and forth of negotiation and it is important to parties to feel their “generosity” in coming toward a middle ground is reciprocated. A failure to make a reciprocal offer of similar significance can stall or end negotiations.
- *Consistency* – is the desire to be consistent with prior actions.¹¹⁹ Being consistent is viewed as a positive personal trait and in negotiation it implies a soundness of position. Couching settlement offers in a way that allows the parties to be consistent with their earlier positions is more likely to move the process forward than is asking the other party to abandon their earlier stance.
- *Scarcity* – is important as it relates time in mediation. First, as the end of the day approaches (or the date for trial), settlement negotiations intensify and the likelihood of a resolution increases. The pressure of the deadline and the end of the ability to create a settlement causes people to focus on the task at hand.¹²⁰ In addition, the possibility of losing an opportunity to settle because the offer on the table will expire motivates people to make a decision on settlement.

The template keeps good negotiation behavior on the minds of the parties by including it in the conflict and shared interests circle. The list also helps the parties to consider their approach to the negotiation in their preparation for mediation. The subtle influences are included in the

¹¹⁸ Cialdini, *supra*, Note 19 at 17. Birke, *supra*, Note 86 at 496. “Reciprocation of Concessions: People feel obliged to reciprocate for acts of goodwill even if the act produces no value and was not requested or wanted.”

¹¹⁹ Cialdini, *supra*, Note 19 at 60.

¹²⁰ *Id.* at 238.

intersection to help the parties be aware of the potential for their own and the other party's tendencies in situations involving persuasion.

THE INTERSECTION OF THE THREE CIRCLES

“In the middle of difficulty lies opportunity.” Albert Einstein

The intersection of all three circles contains the potential for settlement. If the mediator has focused on process and exemplified characteristics and skills of successful mediators and the parties have been well-

prepared and engaged in

principled negotiation,

enlightened self-interest

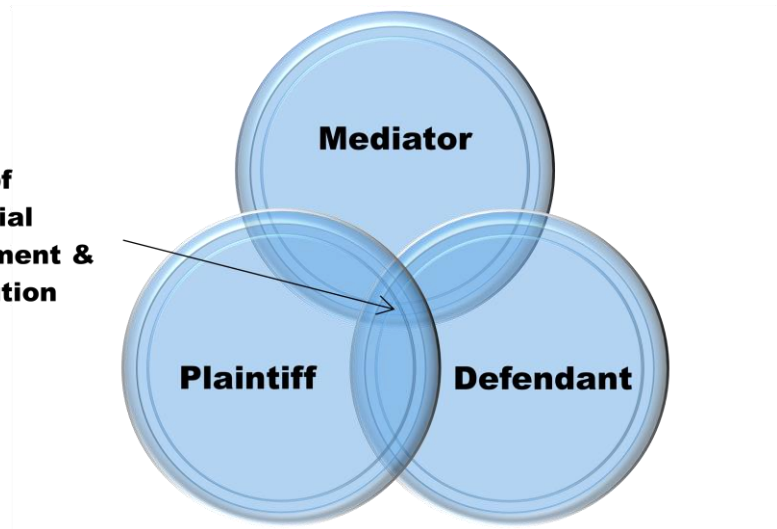
should lead the parties to

find common ground for a

resolution depicted in the

intersection of the

**Zone of
Potential
Agreement &
Resolution**



participants' circles. Within this intersection of the diagram is the Zone of Potential Agreement, the overlap of what a party is willing to pay or do with what the other party is willing to accept.

The mediator can help the parties come to resolution in several ways:

- Allow the parties to tell their story and express their emotions.¹²¹ Make sure the parties feel they have been able to explain why things happened the way they did and why they feel they are not at fault. Identify emotional issues and encourage parties to address them.

- Facilitate and assist the parties in negotiating positively and using objective criteria.¹²²

Make sure the parties have the information they need to make an informed decision about settlement options.

¹²¹ Golann & Folberg, *supra*, Note 11 at 118 & 139.

¹²² Fisher & Ury, *supra*, Note 107 at 86.

- Identify outside the box settlement ideas. Ask about the interests of the parties and ask each party to tell about the opponent's interests.¹²³ Ask the parties for suggestions. Look for differences in relative valuation, different priorities, inconsistent risk tolerances and forecasts which may together create an enduring settlement where each party's concerns are addressed.¹²⁴ These differences might be addressed successfully by contingent provisions. Each party's preferences for settlement terms might lead to complementary terms.
- Identify other parties who might be a logical part of a settlement or a restructured contract, support a particular resolution or benefit from a particular resolution.
- Identify reputation or apology issues.¹²⁵ Determine if the confidentiality of the settlement is important to a party or if precedence value is a factor.¹²⁶
- Develop specific settlement options. Let everyone brainstorm ideas for settlement. The mediator can make an unacceptable proposal, which contains acceptable parts, and start a productive discussion.¹²⁷

¹²³ Golann & Folberg, *supra*, Note 11 at 171.

¹²⁴ Fisher & Ury, *supra*, Note 107 at 76.

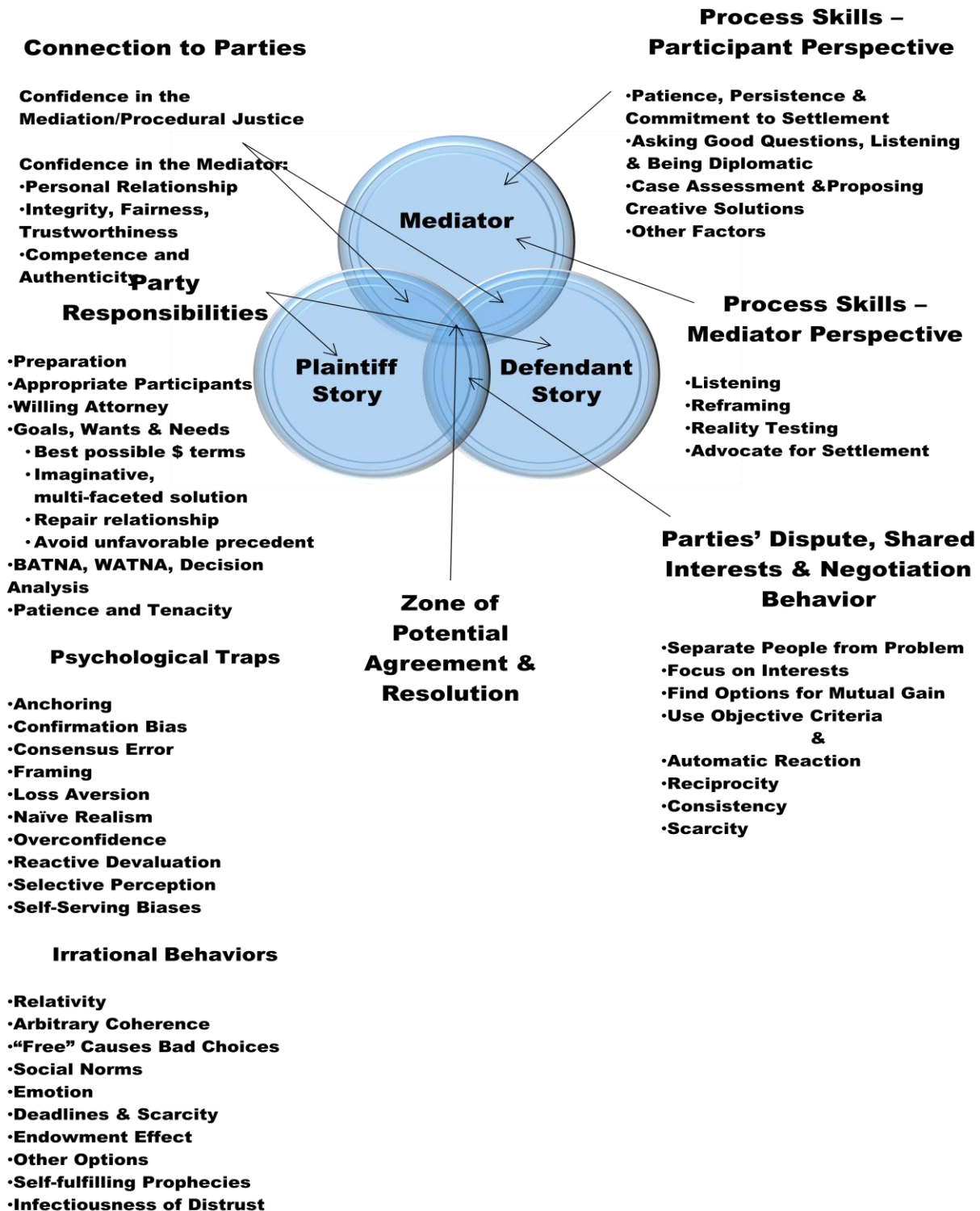
¹²⁵ Golann & Folberg, *supra*, Note 11 at 182.

¹²⁶ Jenkins, *supra*, Note 69; Fisher & Ury, *supra*, Note 107 at 110.

¹²⁷ Golann & Folberg, *supra*, Note 11 at 173.

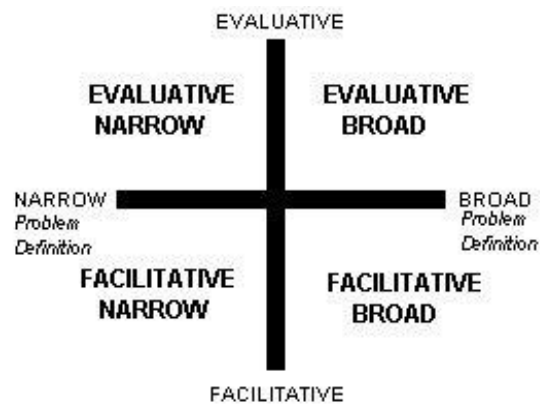
COMPLETE TEMPLATE

The complete template provides a practical and comprehensive paradigm for mediation that can be used as step-by-step guide to a successful or at least satisfying mediation. Prior to the mediation, following the prompts in the diagram will educate and prepare the parties to use their time in mediation most effectively and to avoid the traps and behaviors that prevent resolution. The three circles are simple, consisting of the mediator, plaintiff and defendant, each with a separate relationship. The equal intersections of the mediator and each party circle represent the independent, impartial and fair relationship of the mediator with each party. The mediator brings process skills to the mediation in the mediator circle. The parties' story of the dispute remains in their distinct circles. Their dispute and shared interests are represented in the intersection of the party circles. The possible resolution of the dispute lies in the intersection of what the mediator and the parties have brought to the mediation. To enhance the opportunities for a successful mediation, the party circles detail responsibilities and highlight the psychological traps and irrational and unpredictable behaviors that can sabotage a mediation. Within their dispute and shared interest overlap, there are negotiating behaviors that can enhance the chances of reaching agreement. By following the diagram and using it as a checklist in preparation for mediation and as a reference during mediation, the mediator and the parties can approach the mediation well-prepared with the same mindset and focused on resolution. In short, by implementing this template, the mediator and the parties will have the best chance to engage in a satisfying mediation that constructs a resolution that fulfills their common desire for both procedural and distributive justice.

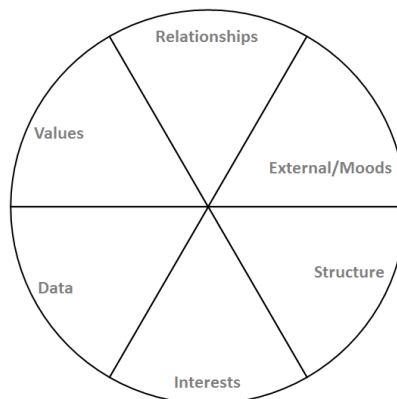


APPENDIX A

RISKIN'S GRID



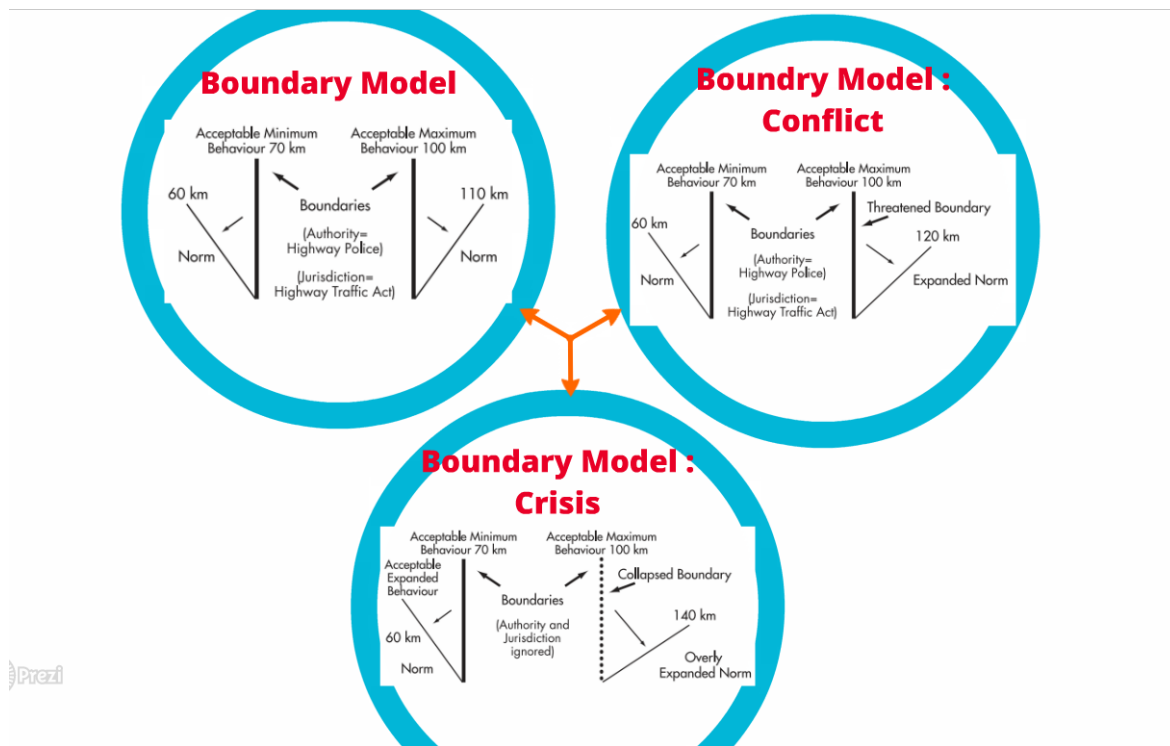
CIRCLE OF CONFLICT



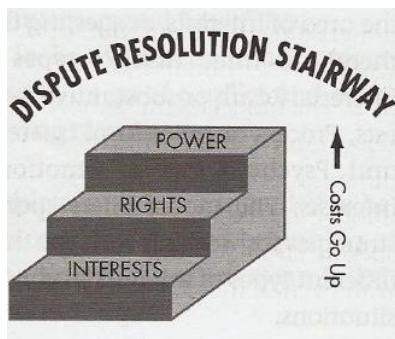
TRIANGLE OF SATISFACTION



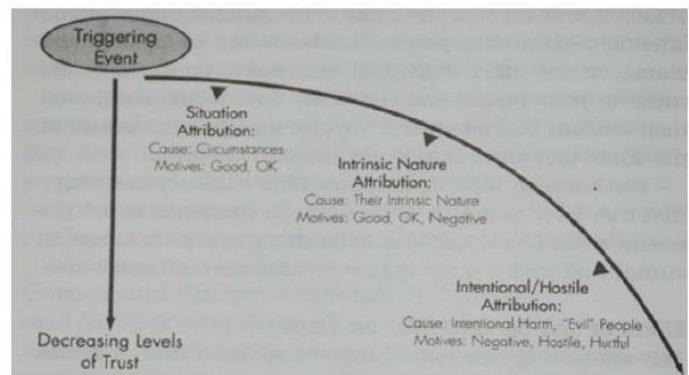
BOUNDARY MODEL



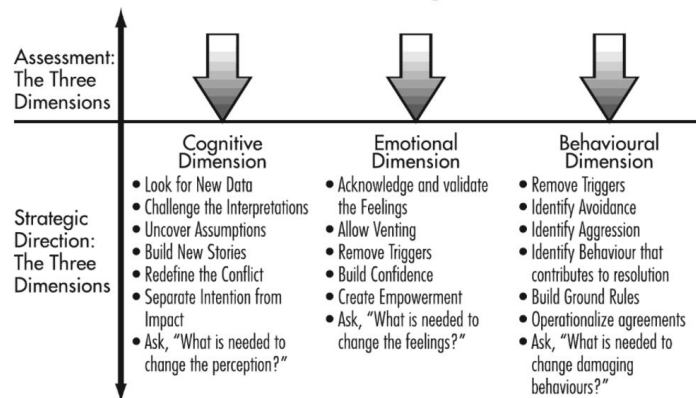
INTERESTS, RIGHTS, POWER MODEL



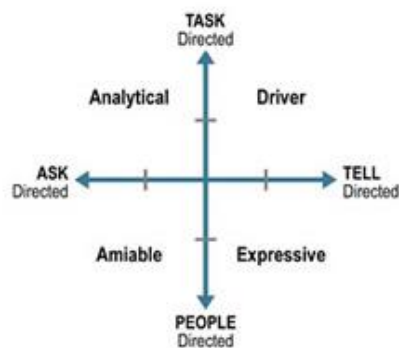
DYNAMICS OF TRUST MODEL



THE DIMENSIONS MODEL



SOCIAL STYLES MODEL



MOVING BEYOND CONFLICT

