How to Make Money as a Mediator

First, let me confess a bias, which after all is nothing more than a leaning in a particular direction. When I first started in mediation, I listened to everyone who had anything to say about the subject. It wasn't long before I learned enough to be able to sort the wheat from the chaff. Time is fleeting and one doesn't want to spend too much of it chewing on the indigestible. So when I came across a person who talked sense first time, next time and all the time, I developed a leaning in his favor.

J.R. talks sense – one reason is that he has mediated several thousand major cases. Another is that he is self-reflective; he thinks about what he is doing. A third is that he has never been afraid to be innovative. I learned this in informal seminar situations, but I learned it in aces and spades when, as a lawyer, I retained J.R. as mediator. That was a mediation to remember, particularly because it was preceded by no fewer than five unsuccessful mediations with other mediators, four of them retired judges. During the course of a 10-hour day, J.R. cracked the long-standing impasse by a series of creative improvisational moves, increasing the highest value previously placed on the case by 175%. That is why his articles, were an instant success and much sought after by mediators. It contains thirty actual accounts of particularly awkward situations arising during real-life mediations, and recounts how they were solved, with intriguing articles.

Now, after a career in dispute resolution that has taken him to the top of his field and kept him there for more than twenty years, J.R. has leapt into print for the second time this year, with 'How to Make Money as a Mediator,'. He should know a bit about earning fees and I know a bit about paying them, for not only was I partly responsible for paying J.R.'s fees, but also we were fortunate to get an appointment at all inside three months.

So, how does one make money as a mediator? To answer this question, J.R. has turned to consider the habits of 30 highly successful people, comprising a Who's Who of top mediators from Canada to New Zealand and across the United States, all of whom are liberally quoted. Each of these people found a different path to mediation and different approaches to what success requires, yet there are also striking similarities. All the top mediators view mediation as a calling. While all love, the practice of mediation, none are particularly drawn to the business of marketing, yet all realize its essential importance. J.R. does 150 mediations a years yet finds that marketing time 'far outstrips' mediating time: 'You have to do it. Swim or die. Get used to it.' None achieved success immediately; most required several years of hard work to build a practice – 'It takes a three-to-five year plan to make this work,' says J.R. 'You need endurance,'

Everyone emphasizes the intensely personal nature of the business, making marketing far more a matter of making and maintaining personal contacts than print advertising. James Taylor finds it a 'waste to time' to do generic mass-market advertising. 'Target your specialty' insists James Evans. Yet all agree on the value, indeed the necessity, of a Web site – 'They expect you to have a Web site' says J.R. 'Our Web site has been very good for us,'.

The articles outlines different fee structures and methods of billing, as well as different methods

of using support staff. Most highly paid mediators expect payment upfront; 'You get the people committed,' and you don't spend time billing people or collecting money. The issue of staffing is also addressed. Because 'face time' is so critical, and because that includes both marketing and the mediation session, top mediators need a support staff. Only a few seem to use full-time staff; most seem to prefer 'unbundled services,' that is to say, they rent space in a full-service suite which takes care of reception, additional conference rooms, mail sorting, and telephone answering. Then they use outside billing services for their bookkeeping. They organize themselves to outsource as much administration as possible. Some mediators use outside marketing services, placing advertisements in strategic magazines, but also rely heavily on obtaining speaking engagements to different groups. The clientele of top mediators is primarily, though by no means exclusively, the legal community, because, as bank robber Willie Sutton said with timeless simplicity: 'That's where the money is.' However, the dozen of mediation marketing, services finds a continuing trend towards 'proactive mediation' by industries such as 'hospitals, hospitality, construction, film studios,' even 'linen supply companies.'

J.R. quotes Jeffry Abrams "I see a bright future for everyone,' yet notes some not-so-hopeful trends that the profession will have to deal with, including a trend towards institutionalization, the 'stale' mediator, 'instant mediators' which goes to the lack of, and resistance to, any kind of accreditation, and rising business costs. There are also many hopeful trends, including the undeniable fact, as veteran J.R. notes: '…mediation has grown dramatically over the last fifteen years.' J.R. also approves of the increase in mentoring, almost a revival of the old apprenticeship system, or as it is still called at the English bar, 'pupillage.' And he sees an increase in mediator partnering across borders, that might prove a boon to mediators with language skills, and increasing use of mediation in the public policy and non-profit sectors, and a slow trend to view mediation not as the 'alternative,' but as the first choice in dispute resolution.

While sprinkling the articles with the views of numerous of his colleagues, the articles in all its essentials belongs to J.R. himself. The articles are a detailed account of a busy, thoughtful mediator who has watched the profession grow up around him. This little review cannot hope to do justice to all of the articles J.R. has written over the years his training material are crammed with practical tips and the accumulated experience of so many successful mediators.

How To Pick a Mediator

To your client, your choice of a mediator reflects on you every bit as much as your choice of experts, jury consultants, or other professionals. So you had better pick right. But how? Conventional wisdom holds that you ought to ask prospective mediators about their personalities and past professional work. But painful experiences show that this hardly distinguishes competence as a mediator.

So, let's get outside the box. Here are 10 questions for prospective mediators and some likely responses. The mediators with the better answers are more likely to have your clients—and you—delighted with both the process and the result. And that's in everybody's interest. Try out this new "Top 10" list and see what happens.

1. What Is the Purpose of the Mediation?

The best answers will focus on the client's ability to make smart decisions at day's end about whether or not to settle the case, and "settlement if at all reasonably possible." The purpose of the mediation is to work hard to develop options for the client, to evaluate those options, and then to choose among them. To make the best decisions as to whether or not to settle, the client needs the best information possible. So the typical mediation will include an exchange of information in one form or another, and then a negotiation.

The negotiation will generally involve the amount of money necessary to obtain a release, and may also include some exploration of broadening the scope of the discussion to include other interests, concerns, or considerations. When people have reached the point at which they appear unwilling to go any further, the client then weighs the pluses and minuses of the best-available settlement option against the pluses and minuses of the litigation option, and decides. The ability to make that decision as well as possible is mediation's true goal. Settlements will usually result.

Worse answers will stress some variant of "settlement for settlement's sake" or "settlement at all costs." Beware of these answers. They are far different than "settlement if at all reasonably possible." The mediator who is attached to settlement at all costs may press you for unprincipled concessions just to get a deal done. If you capitulate to settle, your client will eventually blame you for allowing yourself to be bullied. If you stay stubborn to force the other side to be the ones who capitulate, it will probably backfire. Neither side will move, and a possible settlement may be lost.

2. As Mediator, Who Is Your Client?

The best answers will focus on you and your own clients. The best mediators presume that lawyers come to mediations well prepared and put their clients' interests ahead of their own. Sometimes, though, lawyers need a mediator's help. Often, this includes finding a graceful way to break bad news to one's clients or helping to bring unrealistic expectations down to Planet Earth. A mediator thus benefits your client enormously, albeit indirectly, by viewing you—the

lawyer—as her "client" and by helping you do the best job possible advising your own clients of their true situations.

Worse answers will be along the lines of, "My client is the deal." As with the mediator who is unduly attached to settlement for settlement's sake, this mediator will pressure you for unprincipled compromises just to get a deal done, sooner or later earning you the ire of your client if you capitulate and losing possible settlements if you don't.

3. Will You Ask for My Bottom Line?

The best mediators will not ask for your bottom line, at least not early in the process. If a mediator asks for your bottom line early on, respectfully evade the question. If you disclose your bottom line early on, you deprive yourself of the opportunity to do any better in the negotiation. After all, if the mediator knows what you will pay (or take), why should the mediator work any harder than necessary so that you can pay less (or take more)?

If you answer the question with an exaggerated number, you increase the chance that the mediator will declare an impasse because the parties "seem too far apart," and another possible settlement may be lost. On the other hand, late in the day, when an insurance adjuster expresses a willingness to call a superior for additional authority, it may be only fair to tell that adjuster how much more it will really take to get the deal done.

4. Will You Ask To Speak to My Client Outside My Presence?

The best mediators generally will not ask to speak to your clients outside your presence. Your clients are, after all, your clients, not the mediator's clients. Mediators do not have the right to undermine your relationship with them by going behind your back.

If a mediator has questions or concerns about the advice you are giving your client, the mediator should ask to speak to you away from your client, not the other way around. You might have a blind spot, and the mediator does you a favor by bringing it to your attention. Or the mediator might not fully understand the facts and circumstances on which you base your views.

5. What Is Your Mediation Format?

The best mediators are not wedded to a one-size-fits-all format, and do not, for example, either require or dispense with opening joint sessions on a routine basis. Look for a mediator who will work with you and the other lawyers involved to customize a format to meet everyone's needs. Beware of the mediator who has "Their Way."

6. What Is Your Mediation Style?

Similarly, the best mediators are flexible, and will use different styles at different times and with different people, as appropriate. The best lawyers do not use a single "style" of cross-examination with every witness in every case. So the best mediators do not use a single "style"

either.

7. Will You Talk to Me before the Mediation?

To determine the format and styles that are most likely to be effective, the best mediators will talk to you in advance. There are often some considerations that are too sensitive to put into writing. Those are the considerations the mediator most needs to know to help resolve the disagreement. So if a mediator does not call you before the mediation, you might want to call the mediator.

Mediators are not arbitrators, so the prohibition on ex parte communications does not apply. If you are going to call the mediator, you might want to tell opposing counsel that you are going to do so, and give opposing counsel the chance to call the mediator as well.

8. Will You Follow Up If the Case Doesn't Settle?

The best mediators will follow up by phone calls or otherwise to see whether anything has changed and a settlement has become reasonably possible. Generally, mediators will not charge for short or unsolicited phone calls, but may charge if the additional work becomes material. Mediators should be up-front about when they are charging and when they are not.

9. Are There Administrative Fees or Other "Hidden Costs"?

Different mediators have different ways of billing. Make sure that you know your mediator's billing practices in advance.

10. Does the Mediator Provide a Settlement Agreement?

Settlement agreements include many terms that may benefit one side more than the other. The scope of a release may be broad or narrow. A confidentiality provision may be onerous, or absent altogether. Even something as basic as a waiver of unknown claims can, in some cases, be a bone of contention.

If a mediator provides "their" form of settlement agreement, and it contains terms that you don't like, it is difficult to negotiate anything different. After all, those terms have the mediator's imprimatur of propriety. So an ounce of prevention is worth a pound of cure. Prepare your own form of settlement agreement. If you have a template, send it to opposing counsel before the mediation. Try to work out your differences as to form in advance.

Conclusion

Good mediators are committed to helping get cases settled whenever reasonably possible, but are not attached to settlement for settlement's sake. Settlement or not, though, lawyers and clients should leave the mediator's office feeling it was time and money well spent, and neither should feel they were embarrassed in the eyes of the other. These 10 questions will help you get the information that will allow you to select the mediators best able to get the job done.

Early Mediation Initiative

The resolution of many disputes can be unnecessarily costly and time consuming. Though some disputes require a judicial finding and occasionally the substance of the dispute must be submitted to the appellate courts for greater scrutiny, experience has taught us that if the parties and their attorneys accommodate the resolution process, the vast majority of disputes can be resolved before it is necessary to engage in formal discovery, spend significant sums of money and devote an enormous amount of energy preparing cases that will almost certainly resolve via a negotiated resolution.

In state court proceedings, significant resources are often devoted to the discovery process. The Federal Rules of Civil Procedure have eliminated or greatly reduced the types of discovery wars that characterize civil litigation in the state court system. The initiative was drafted with the belief that many disputes would be resolved short of lengthy, expensive and often vexatious litigation if the parties were required to exchange documentary evidence and then participate in early mediation. The provisions of the proposed initiative are intended to reduce gamesmanship in litigation, encourage greater transparency and, thereby, impose less of a financial burden on the litigants. The provisions of the initiative are also intended to impose a sanction on those parties and their attorneys who frustrate the process by failing or refusing to exchange documents and who, by their actions, encourage unnecessary and time consuming litigation.

Mr. Kesten is working to have an initiative placed on the State of California 2008 ballot, which would, among other things, require pre-litigation mediation.

EARLY MEDIATION INITIATIVE

a. The purpose of this legislation is to encourage the use of mediation by litigants in the Superior Court of the State of California without abrogating the fundamental rights of any party. The intent of the initiative is accomplished by strongly encouraging parties to litigation mediate their claims after filing a court action and service on Defendants is complete but before Defendants or Cross Defendants file an answer, general denial or attack on the complaint and before statutory discovery begins. The mechanism for engaging in early mediation J.R. be as follows:

b. After the commencement of a legal action in the Superior Court of the State of California, Plaintiff(s) or Cross-Complainant(s) must offer, in writing, by a verifiable communication and within ten days of serving a party, a copy of this statute and an offer to engage in mediation with any and all Defendants and Cross Defendants. The verifiable communication of the offer to mediate J.R. toll all applicable time limits for all Defendants and Cross Defendants to file an answer, general denial or attack on the complaint or cross complaint or otherwise attempt to defeat the action for one hundred and twenty (120) days after service of the notice to mediate on at least one other party. A party's right to seek a TRO, injunction or other form of immediate relief or court intervention remains unaffected by the language of this statute. The statute is not applicable to unlawful detainer actions.

c. The party receiving a communication from Plaintiff or Cross-Complainant proposing mediation must respond, by verifiable means, to the offer within thirty (30) days after receipt expressly stating a willingness to participate in the proposed mediation or refusal to participate. For good cause shown, the time within which a party is required to respond to an offer to mediate may be extended by any court having jurisdiction over the dispute or the parties can, by mutual written agreement, extend the time to respond to an offer to mediate for up to an additional sixty (60) days.

d. If Plaintiff's or Cross-Complainant's offer to mediate is accepted, the mediation involving Plaintiff(s), Cross-Complainant(s) and all named Defendants and Cross Defendants J.R. take place as early as practical within the one hundred and twenty (120) day tolling period. The one hundred and twenty (120) day tolling period and the time by which Defendant(s) and Cross Defendant(s) must file an answer, general denial or attack on the pleadings may be extended by the court in which the action is filed.

e. The mediation s J.R. be conducted at a location mutually agreed to by the parties engaging in the mediation. If the parties are unable to agree on a location for the mediation, the presiding judge of the court having jurisdiction over the dispute, or any court personnel as may be appointed by the presiding judge, s J.R. designate a location upon the ex parte request of any party to the proposed mediation. Any party seeking court intervention s J.R. give no less than twenty-four (24) hours' notice to all affected parties of that party's intent to appear in court and seek judicial assistance. The party seeking judicial assistance in the setting of a mediation, extending the time for a party to respond to the complaint or cross complaint, or any other matter addressed herein s J.R. submit a written application to the court.

f. Subject to claims of privilege, each party may request from other parties, in writing, the production of documents and things relevant to the dispute. The presiding judge of the court having jurisdiction over the matter, or any court personnel as may be appointed by the presiding judge, J.R. have the authority and discretion to exclude from evidence at time of trial or other proceeding any documents or things not produced in mediation pursuant to a request.

g. The mediator s J.R. be selected by mutual agreement of the parties and to the extent feasible the selection s J.R. not impose a monetary burden disproportionate to the amount in controversy on any party agreeing to engage in mediation. If a mutually agreeable mediator cannot be selected and retained by the parties to the mediation within sixty (60) days after all parties have responded to an offer to mediate, any party may petition the court by means of an ex parte appearance, with no less than twenty-four (24) hours' notice to all other parties. The petitioning party s J.R. submits a written application to the court. The presiding judge of the court having jurisdiction over the matter, or any court personnel as may be appointed by the presiding judge, J.R. select and appoint a mediator from the names of proposed mediators submitted by the parties and designate a location for the mediation and date by which the mediation is to take place. The applicable statutes controlling the time for a Defendant or Cross Defendant to enter an answer, general denial or attack on the pleadings J.R. be tolled until the conclusion of the mediation provided it occurs on or before the date set by the court. Defendants and Cross Defendants J.R. have ten (10) days after the conclusion of meditation or ten (10) days after the last date to mediate set by the court, whichever is earlier, to file an answer, general denial or

attack on the pleadings.

h. If a Plaintiff or Cross-Complainant fails to initiate or participate in mediation, or if a Defendant(s) or Cross Defendant(s) refuses to participate in the mediation process that party J.R. be required to pay the attorney fees and costs of the opposing party(s) in the event a civil action is litigated to judgment and provided the party not participating in or refusing to initiate or engage in mediation fails to prevail in the litigation. If the prevailing party in the court action fails to offer other parties the opportunity to mediate or refuses to mediate when such an offer is made, that party J.R. not be entitled to recover costs of suit or attorney fees of the opposing parties whether or not that party would otherwise be entitled to such recovery by contract or statute.

i. Superior Court filing fees will be increased one hundred dollars ($100.00) to offset the court's administrative costs associated with coordinating early mediation of claims.

Domestic Violence and Mediation: Concerns and Recommendations

Is mediation an appropriate forum for conflicted couples to resolve issues of marital dissolution and child custody? A review of the literature indicates that serious concerns have been raised about issues of safety, power imbalances, and the rights of the battered woman when mediation is used instead of court litigation (Charbonneau, et. al. 1992; Thoennnes, Salem & Pearson, 1994; Newmark, Harrell and Salem, 1994, Geffner & Pagelow, 1990; Perry, 1994; Fischer, Vidmar & Ellis, 1993.) This article synthesizes recommendations of several researchers and studies conducted during the 1990's to develop a mediation protocol that addresses concerns about the efficacy of mediating with couples who have a history of domestic violence. In addition to suggested techniques and procedures, the article concludes with insights into the societal issues of violence and a long-term strategy for reducing the incidence of domestic abuse.

Why is Domestic Violence an Issue for Mediators?

Domestic violence is prevalent and common in American families. Mediation as a pre-litigation alternative for divorcing couples is growing in popularity and usage. A growing number of states now mandate that couples mediate for family issues such as custody and visitation prior to court intervention. Today, there is a growing potential that domestic violence will be a factor in many cases referred for family mediation. Recent studies have estimated that spousal abuse is present in at least half of custody and visitation disputes referred to family court mediation programs (Newmark, Harrell & Salem, 1994; Pearson, 1997). The abusive relationship may not be disclosed to the mediator in many cases, for many reasons. However, disclosed or not, mediators must understand the potential for one of every two cases referred to them as being domestic violence cases. Family mediators need to know how to identify and process these couples in the most appropriate manner.

Recognizing and Identifying Domestic Violence

Domestic violence is not always obvious or easily recognized. There is a strong tendency to keep it a secret, to deny and minimize what has happened or simply to accept the behavior as a "normal" way of functioning in the relationship. If the couple is unable to identify and label the abuse in their relationship and understand it as abuse, the mediator intervening needs to be alert to interactions they describe that may fit a pattern and history of domestic violence.

The phrase "culture of battering" describes the phenomenon of domestic violence in a way that shifts the focus from isolated episodes of abuse and captures dynamics of a relationship where there is a pattern of domination and control (Fischer, Vidmar & Ellis, 1993). When isolated interactions are described, such as *the silent treatment, a glaring look, a stern voice or a critical tone*, it is easy to overlook the context of these behaviors and minimize them until they disappear into insignificance. Those outside the intimate relationship cannot understand the meaning of the communication that extends far beyond the words or non-verbal cues. Dutton

(1994) cautions that domestic violence should not be understood as simply a list of episodes or a list of aggressive behaviors that can be added up. Rather it is a pattern of interaction that influences the dynamics of the intimate relationship.

Domestic violence and abuse can be grouped into three general categories: physical abuse, sexual abuse and psychological abuse, which include intentional harm to property and pets. Some form of psychological abuse often accompanies physical abuse and sexual abuse. The function of the abuse is to maintain control over another. Physical and sexual violence is easier to identify than psychological abuse. Examples of psychological abuse include (Dutton, 1994):

Threats and intimidation - threats to take the children away or to destroy her financially; attempts to coerce her into illegal activity; displaying or threatening with weapons; destroying objects; menacing gestures; isolation or limited use of telephone or contact with others.

Minimization, denial and blaming - blaming the woman when violence occurs or acting like the abuse is non-existent or not a problem

Using children - to relay messages of intimidation or threat; using custody or visitation proceedings to gain access to the woman or to control her whereabouts.

Using economic resources - unilaterally maintaining exclusive access to cash, credit cards, bank accounts; accruing debt in the woman's name; withholding child support payments.

Use of "male privilege" - making unilateral decisions about such issues as where to live, major purchases, whether she is employed outside the home; sleep or food deprivation; controlling her perceptions by limiting access to information

Emotional abuse and degradation - name calling, insults, inducing altered states through hypnosis or forced drug/alcohol use.

Stalking - repeatedly sending letters, appearing at her work or home, and incessant phone calls that carry the message of intimidation.

Strategies Women Use to Resist Domestic Violence

Many find it very difficult to understand why a woman would allow or put up with an abusive relationship. Those who have not experienced domestic violence may assume that termination of the relationship would equal termination of the violence. That is not always the case, however. The separation process can sometimes signal an abrupt increase in violence; the most dangerous time for women in abusive relationships is when they are in the process of attempting to separate physically or legally. Research has indicated that the frequency and severity of abusive attacks increases just prior to or during the time that they have made the decision to leave or to separate (Geffner & Pagelow, 1990; Dutton, 1994; Pearson, 1997).

The strategy of separating or terminating the relationship is not always sensible or preferred due to economic, health and social factors as well as children's needs. It is simply not a viable

option for many battered women. These women do, however, resist the violence and abuse in a number of ways. Dutton (1994) categorizes battered women's *help-seeking strategies* into three classifications: personal, informal and formal. Personal strategies for resisting domestic violence include hiding, disguising her appearance, compliance with his demands, or fighting back. Informal ways that women seek help in their resistance include telling family or friends, seeking shelter, and seeking support groups. The third category consists of formal strategies such as calling the police, filing for divorce or separation, seeking mental health or medical intervention.

Behaviors that are associated with feelings of powerlessness take many forms depending on the nature of the relationship and the characteristics of the partners. The partner who is feeling powerless may use competitive strategies such as aggression, violence, opposition, manipulation, fighting back, or using power over others. She may exhibit attitudes of distrust, suspicion and defensiveness. She could be clannish, isolated and withdrawn or hypersensitive and paranoid.

Since domestic violence in a frequent problem in family mediation (Pearson, 1997), family mediators need to look for the potential for domestic violence even though both parties may deny it. When there are descriptions of fighting and confrontation, calling the police, hiding from him, or seeking shelter with friends or family members, these are signals of abuse in the relationship that should not be ignored by the mediator. Signs and Signals That Violence / Abuse Might be Present in the Family.

When a contested custody case reaches mediation, particularly in states where mediation is mandatory for these cases, it is important for the mediator to understand that there is a very strong likelihood that domestic violence does or has characterized the relationship (Pearson, 1997). Batterers use violence to maintain the upper hand and control their spouses. Thus a woman in mediation usually cannot advocate for herself without fearing the response of her abusive partner (Geffner & Pagelow, 1990).

Mediators need to be alert to the common occurrence of minimizing domestic violence and reframing the intentions of the abuser. Victims regularly erase the violence against them by glossing over the reality of violence in their descriptions, or leaving out significant aspects of the violent episodes. Battered women may also assign innocent intentions to the abusive partner, convincing themselves and others that it was only an accident or he did not intend to cause pain (Cobb, 1997). Women often tend to deny their suffering while the abusers deny their culpability.

Werner (1994) researched communication behaviors in mediators and parties involved in child custody mediation. While the study was not focused on issues of domestic violence, it noted the behavior of unsuccessful couples as being more competitive. They used behavior that was confrontative such as blaming, faultfinding, accusing; dominating the conversation; interrupting; being critical; making threats. The implications of these findings for couples in mediation might be that highly conflicted couples exhibiting confrontative communication patterns such as those noted may be enmeshed in patterns of domestic violence.

Reactions to feelings of powerlessness are very strong in battered women. Her feelings may include insecurity, guilt, anger, resentment, exhaustion, hopelessness, inferiority, shame, incompetence, and helplessness. Grim feelings that may remain with her are fear, pain, depression, and self-hatred. Geffner and Pagelow (1990) argue that fear is always present when battered women confront their abusive partners. Batterers use their anger and violence to maintain the upper hand and control their partners. Thus a woman in mediation cannot advocate for herself without fearing her batterer's reaction.

Understanding How Partners Get Stuck in Abusive Relationships

While the prevalence of abuse between spouses is well documented, the tendency to keep it a secret is still quite common. Pearson (1997) notes that relatively few people acknowledge domestic violence unless asked in a very direct and specific manner. It is very difficult for a woman to admit what is going on and there is often a cover up by both the woman and her abusive partner. She may be in a state of denial. She may minimize the abuse to fit with her own self-concept that she does not deserve such treatment, therefore it is not happening. Mary Ann Dutton describes cases where the secrecy of domestic violence has been so complete that no one other than the battered woman has clear knowledge of it. Family and friends either deny it or were shielded from knowledge of the abuse; bruises were hidden by clothing; and absentee employment was masked by sick leave or changing jobs (Dutton, 1994).

Mediators who have never experienced such abuse on an interpersonal level, or who have not been trained to identify and cope with domestic violence may have difficulty understanding or believing what they hear from either or both partners.. One question that is perplexing for those who have never been exposed to such abuse is "why didn't she leave if it was really that bad?" Another common myth is that the woman brought the violence on herself and therefore she can change her behavior to stop or resolve it (Cobb, 1997; Dutton, 1994). Both of these reactions are flawed.

Leaving the relationship is an option that may be open for a minority of women. But as noted earlier, there are inherent risks of safety, since violence tends to escalate following the decision to terminate or separate from the relationship (Geffner & Pagelow, 1990; Dutton, 1994; Pearson, 1997). In addition to safety factors there are other difficult barriers to leaving that include the children's wellbeing, economic and social issues. Battered women stay with their partners due to fear, lack of money, and lack of a place to go. Isolation is common for many battered women; they do not have a network of family and friends to support them (Warters, 1986).

The second false assumption centers on the woman's responsibility for the abuse; her behavior toward her partner caused him to abuse her. This misconception leads to the erroneous conclusion that she can stop or reduce the violence by changing her behavior toward him. Dutton (1995) notes that both professionals and laypersons often believe the battered woman can stop the violence if only she does the right thing. She notes that "sometimes batterers stop their violent and abusive behavior, but whether they do depends on the batterer, not on the battered woman's response to violence." (Dutton, 1995, p. 26). Cobb analyzed the mediation discourse for several cases involving family violence and found that mediators deflected the

woman's requests to address issues of abusive language toward her by her ex-husband. In response to her repeated requests to ask him to agree to stop calling her names, the mediators suggested that she consider what she could do to limit it or not answer when he makes a remark. "Women are constructed as more able to change and therefore as bearing more responsibility for ending violence. By implication, victims are responsible for their own victimization." (Cobb, 1997, p. 20).

These pervasive attitudes - the fear and shame of the battered woman, the notion that the woman causes the abuse and therefore can stop it, and the insinuation that the woman is responsible for changing her behavior to minimize the violence directed toward her - keep women stuck in abusive relationships. Our society has historically maintained the "sanctity of the family." Public involvement in family matters is only a recent phenomena; and many members of our criminal justice system still believe that men are entitled to rule the family without much intervention from the law or the court. As long as society lacks the supports to enable women to be heard and understood, as well as to provide her with viable options, countless women will have no real choice but to stay in abusive relationships.

What Interventions Help Mediation Programs Deal with Cases of Domestic Violence?

It is clear that domestic violence is common in disputes involving divorce, child custody and visitation issues. Given the prevalence and changes of these cases, mediation programs should be prepared to deal effectively with them. There are three general approaches to this preparation: 1) education and training of family mediators 2) screening of all divorce and post-divorce cases to determine which cases are appropriate for mediation 3) employing specialized techniques and procedures before, during and after the mediation sessions. In this section, the specialized techniques and procedures are outlined. Discussion of the first two interventions - screening of cases and training of mediators - follows in subsequent sections.

Just as the foremost rule of any professional intervention should always be *first do no harm,* mediation programs should consider the safety of the parties to be of primary concern. There are features that should be introduced in family mediation programs to address the parties' safety, the mediator's safety and measure that are related to facilities and atmosphere. Chance and Gerencser (1996) list several measures to modify the facilities, such as:

- Spacious conference rooms that allow for easy and unencumbered escape
- Conference tables the provide a barrier to immediate contact
- Clearly marked exits
- Separate and safe waiting areas
- Metal detection devices

Measures to safeguard the parties should recognize the inherent risks in allowing a violent person to know the time and place where his partner will be present for mediation (Pearson, 1997). Such personal measures could include the visible presence of a peace officer and escorts to accompany clients to the parking lot after mediation. It is also important that the woman have a safety plan if violence has escalated or if she anticipates that it will. The mediator may be able to help her think through strategies to safeguard her and the children. She should also be

informed about how to secure restraining or protection orders, if necessary.

Apart from policies and procedures to protect the clients from risks from the violent partner, mediation programs can incorporate a variety of techniques to employ during the mediation process. The most important technique is pre-mediation screening, which will be more fully discussed later. The purpose of pre-mediation screening for domestic violence is to determine whether the case is appropriate for mediation. Once it has been determined by a trained and qualified interviewer/mediator that the couple is suitable for mediation, the mediator should use techniques to balance power. The mediator is encouraged to make use of the private caucus, so the woman does not have to agree to anything in her partner's presence. Private meetings give the woman an opportunity to disclose any fears or concerns. (Perry, 1994).

Additional techniques recommended by Salem and Milne (1995) include mediation methods where the parties are not in face to face contact. Shuttle mediation is when the mediator moves back and forth while the parties are in separate rooms, or attending sessions at different times. Telephone mediation is suggested when travel and safety issues are a concern. Chance and Gerencser (1996) recommend limited contact during the mediation process when domestic violence has been an issue.

Ground rules can be used to restrict discussion topics and to preclude topics the batterers may want to negotiate such as dropping the abuse charges or modification of protection orders (Salem & Milne, 1995).

Screening Domestic Violence Cases that are not Appropriate for Mediation

Preliminary screening of couples referred for family mediation is conducted to determine whether the dispute and the parties are good candidates for mediation. Pre-mediation screening is highly recommended by many practitioners in the field to determine which cases can be mediated and which cases are not suitable for mediation (Girdner, 1990; Perry, 1994; Chance & Gerencser, 1996; Pearson, 1997; Salem & Milne, 1995; Thoennes, Salem & Pearson, 1994). Writing for the Florida Bar Journal, Judge Chester Chance and mediator Alison Gerencser argue that "Screening all family mediations is imperative and should be mandated for all cases involving family issues." (Chance & Gerencser, 1996, p.54). They further recommend that all participants in family law mediation work together to develop appropriate screening tools.

Salem and Milne (1995) outline several features of a screening process. Battered women are unlikely to disclose abuse without an effective and sensitively administered process. Preliminary screening may include a written questionnaire that is sent to the parties before an appointment or administered at an intake session. Screening may also be conducted over the telephone before the first session. However, the privacy of the screening process should never be compromised (Salem & Milne, p. 37).

There are tools in existence that have been designed to assess issues of domestic violence. The interviewer asks questions specifically about domestic violence. Some of these screening tools include the Tolman Screening Model developed by Richard Tolman at the University of Illinois; Screening Questionnaire used in the study conducted by Newmark, Harrell and Salem

(1994); the Ellis Screening Model used in the Maine Domestic Abuse and Mediation Project (1992); and the Conflict Assessment Protocol (CAP) developed by Linda Girdner (1990).

Linda Girdner believes it is the responsibility of mediators to attempt to identify which parties from abusive relationships can benefit from mediation and those that need to be excluded from mediation and referred to other resources. The CAP identifies the parties' patterns of decision-making, fighting and expressing anger, as well as their history of abusive behaviors. The mediator can use this information to assess the dimensions of power and control in the relationship. (Girdner, 1990).

The CAP has four parts: 1) introduction, 2) questions about patterns of decision-making, conflict management and anger expression, and 3) questions about specific abusive behaviors, and 4) closure to the separate screening session. The interviewer doing the screening may or may not be a mediator, but should be trained in recognizing signs of domestic violence. Fischer, et. al recommend that screening should not be done by those with interests in mediation, but by independent persons with skills and sensitivity to identify and assist cases of domestic violence. (Fischer, Vidmar & Ellis, 1993). After the screening interview, cases are sorted in three categories which represent a continuum from non-abusive and non-controlling relationships with equal power on one end to severely abusive, controlling, potentially lethal relationships on the other end (Girdner, 1990).

Three different approaches to mediation are recommended depending on how the couple is assessed with the CAP. Couples who have not had control as a central feature of their relationship and have never had any patterns of abusive behavior (emotional, physical, sexual or economic) by either party are those likely to benefit from mediation conducted in the customary manner.

The second group of couples are likely to benefit if mediation proceeds with specific ground rules, resources and skills available. Couples in this category may have experienced abusive relationship, but none of the factors described in category three (below) are present to exclude the case. The mediator working with these couples must be highly skilled in power balancing, be very knowledgeable about domestic violence and its impact on children and families, and they must have an excellent network of community resources. Ground rules to which both parties must agree for mediation to be effective with these couples are the following: (Girdner, 1990).

Acknowledgment of past abuse

- Encouragement of the abused partner to pursue an order for protection
- Requiring and monitoring attendance at anger management classes or therapy for the abuser
- Requiring and monitoring the participation of the abused partner in services for battered women or therapy for the abused partner.

The couples in the third category are those most likely to experience harm and should be excluded from mediation. If one or both parties are unable to negotiate, or if indicators exist

that the abuser is capable of seriously injuring his partner, these cases cannot be safely mediated. Interviewers conducting the pre-mediation screening should exclude from mediation couples with the following situational factors: (Girdner, 1990)

- Abusers who seem to have a need to control the abused partner
- An abuser who is easily frustrated by the idea of not getting all that he wants
- An abuser who accepts no responsibility for the abuse
- An abused partner who discloses that she has been abused, but does not want it revealed to the abuser
- Patterns of psychological abuse (with or without physical abuse) that has led to a situation where the abused partner identifies with the abuser's needs as primary and necessary for her survival.

In addition to Girdner's criteria, Salem and Milne (1995) warn that mediation is inappropriate when there is ongoing abuse or the batterer uses or threatens to use a weapon. In the report for the Maine Domestic Abuse and Mediation Project (1992), a sample protocol is included for dangerous assessment, aimed at batterers who are life endangering.

Jessica Pearson reviewed court-based divorce mediation program to determine how domestic violence cases are being handled. She found that 80% of the programs surveyed reported screening for domestic violence, but only half of the programs use private interviews to question clients specifically about violence (Pearson, 1997).

Some examples of pre-screening practices include mediation programs in Honolulu, Tucson, Chicago, Portland, Maine, Santa Ana, California, and Litchfield, Connecticut. It is beyond the scope of this paper to describe each site's practices, but two will be described. The others can be found in Jessica Pearson's article in Mediation Quarterly (1997).

In Litchfield, Connecticut, family relations counselors of the court screen all custody and visitation disputes at the point of referral. If family violence issues are noted, the couple and their attorneys are interviewed to determine if mediation is appropriate. If not, the cases are referred for evaluation rather than mediation. All mediation is conducted by male-female co-mediation teams, and parties may opt out of mediation without fear of sanctions. (Pearson, 1997).

In Honolulu, the Neighborhood Justice Center uses telephone screening interviews. If abuse is identified, the abused partner is referred to a pre-mediation counseling program for further assessment. The assessment center may determine she is able to mediate without additional support; or that she can mediate with the support of an advocate; or she is unable to mediation at that time, in which case she may be provided with counseling or referred to other services (Perry, 1994).

Training and Education of Mediators and Family Law Participants

It has been stated earlier in this work that those who mediate domestic violence cases must have very special skills, sensitivity and a network of resources. Perry's (1995) review of the literature

indicates a high degree of consensus on this point. The need for training and education of all participants in the family law process - lawyers, judges, clerks of court, and mediators - has been argued by Judge Chance and Alison Gerencser (1996). The training requirements for family law participants do not necessarily reflect expertise or skill in recognizing or responding to signs of domestic violence. "Emerging research shows that because of mediators' orientation and training, they do not know how to respond to the signs of violence or threats of violence; thus, they transform them into procedural issues with the consequences that victims' rights are delegitimized." (Fischer, Vidmar & Ellis, 1993). Sara Cobb's analysis of the domestication of violence in mediation clearly illustrates this concept (Cobb, 1997).

Mediation professionals are drawn from a wide array of disciplines - law, psychology, social work, education and mental health - and bring with them vastly different perspectives. Family mediators who will work with highly conflicted couples need sufficient training to make them aware of the dynamics of family violence and how to respond to it (Salem & Milne, 1995). Even those who work with couples who "passed" pre-mediation screening and were found to be suitable for mediation may pose issues of power and control that were hidden during preliminary screening. Training and education for domestic violence, therefore, needs to be extended to all family mediators, particularly given our historical societal preference for keeping family matters private.

In their review of current policies and practices in mediation and domestic violence, Thoennes, Salem and Pearson (1994) indicate that in programs where mediators receive training in domestic violence issues, they are more likely to ask follow-up screening questions to ensure both safety of parties and integrity of the process. They also noted that programs with heavy caseloads are more likely to have mediators who are trained in domestic violence issues; these trained mediators use special mediation techniques, such as private caucusing, when abuse is identified. (Thoennes, Salem & Pearson, 1994.)

Suggested Protocol for Family Mediation Cases

A simplified summary of the steps and procedures that should be taken to determine the viability of mediation in all cases of conflicted couples would include the following:

1. Family Mediators need to be trained in various aspects of domestic violence
a) How to recognize and identify domestic violence
b) Understanding the woman's options or lack of them in choosing to stay or leave
c) Types of abuse including physical, emotional and sexual
d) Special techniques such as private caucusing and power balancing
e) The safety issues for all involved
f) Common characteristics of abusive partners and abused partners

2. Screening needs to precede mediation. Cases should be categorized based on the results of screening into three categories:
a) Those likely to benefit from mediation conducted in the customary manner.
b) Those likely to benefit if mediation proceeds with specific ground rules, resources and skills available.

c) Those most likely to experience harm and should be excluded from mediation.

3. Process skills and special techniques designed to balance power and create an expectation of cooperation and the mediator should skillfully employ fairness. These techniques could include power-balancing moves, appropriate use of structured and directive questioning and private caucusing.

Mediators Can Cultivate an Understanding of Violence in a Societal Context

Mediators need to be sensitive to unconscious attitudes of their own about the strength and dominance of the man and the submissiveness and flexibility of the woman. It is common for mediators to discount violence by reframing it away; it is also common for mediators to expect the woman to change her behavior during abusive episodes. Cobb (1997) analyzed 30 community mediations sessions and found that in 80% of the sessions, mediators "domesticated" the violence stories told by the parties until the violence disappeared. Through the process of transforming complaints into requests, the violence becomes irrelevant and "DE historicized." Women are constructed by mediators as more able to change their behavior and attitudes; therefore when women ask for agreements from men to stop their abusive behavior, the mediators turn this request back to the woman, asking her "what can you do to change your behavior?" (Cobb, 1997)

Family violence is a manifestation of generations of culturally learned behavior and attitudes that place aggression and dominance on par with leadership and success. Galtung (1996) sees violence as either direct, such as killing or inflicting injury, or structural, such as exploitation, repression, and marginalization of individuals or groups. Structural violence is "built into" society and condoned and legitimized through generations of traditions. Examples of ways we have legitimized violence and the male's dominance over the woman are in attitudes such as "the man rules the roost" and "a man's home is his castle". Our society glamorizes the military, which is traditionally male and traditionally violent.

Mediators who are dealing with conflicted couples need to be aware of their own feelings about gender roles, power and violence in order to perceive the issues objectively. At a time when feminists are suggesting that mediation keeps the "secret" of domestic violence locked out of public view, each one of us needs to ask how we can, as mediators, be part of the solution to the societal dilemma of domestic violence.

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Dealing With Nonverbal Cues: A Key To Mediator Effectiveness

It is commonplace that mediation should be safe and comfortable and promote a spirit of cooperation. The effective mediator contributes to these ends both verbally and nonverbally. Most trained mediators are adept with verbal mediation strategies but may be less familiar with the nonverbal dimension. Nonverbal effectiveness not only comes through sensitive planning and making appropriate choices, but also through anticipating and sidestepping errors that might generate impasse.

Nonverbal communication encompasses all the ways we communicate other than through the use of words. The verbal (i.e., words) and the nonverbal together generate a mosaic resulting in a meaningful message. Where words mainly carry the message content, the nonverbal enhances emotional meaning. It is said that every expressed message has two meanings, i.e., what is meant using words (verbal) and what is said nonverbally. Although the nonverbal, at times, can stand alone (e.g., a clinched fist), usually it works with the verbal to generate clear and, most likely, effective messages.

It is important to realize that it is fallacious to draw complex inferences from isolated nonverbal cues. For instance, a person who crosses his/her arms is not necessarily being resistant, it could simply be that he/she is responding to a chill in the room. Although an effective mediator will look for additional cues before drawing a complex inference, an isolated cue might trigger a probe for greater understanding. In this article we isolate nine aspects of nonverbal behavior relevant to mediation and indicate how the mediator might consider each and make effective choices regarding him/her and the situation.

Nonverbal Vocal

The scientific label for nonverbal vocal expression is paralinguistic. Relevant to mediation, the voice has two dimensions -- voice set and vocalizations. Voice set refers to information revealed about a speaker through the sound of the voice, i.e., maturity, gender, self-concept and psychological condition, while vocalizations are non-word sounds, such as yawning, laughing and crying, that are often used to express emotion.

The mediator should be highly aware of his/her own voice set. A deep and steady vocal tone can help communicate maturity, credibility, professionalism and calmness. To these ends the mediator's expression is generally free of dominant vocalizations by avoiding flares in pitch and rate. This is especially important as the parties are likely to model the tone set by the mediation. To promote a perception of fairness and neutrality the amount of mediator vocalizations toward each party should be about equal.

The alert mediator will attend to messages expressed through vocalizations. For instance, a sigh

of despair by a party when reflecting what the other will not do might provide an insight into an underlying interest. Regarding vocalizations, in a small claims dispute a defendant objected to paying a roofer's minor add-on charge for lumber. In caucus, the defendant sighed and said "and the roof leaks but he'll never fix it." The alert mediator would have processed the sigh of despair. No doubt the defendant would have agreed to pay the add-on charge if the settlement had obligated the roofer to fix the leak in a reasonable amount of time.

Space

The study of communication through the allocation of space is referred to as proxemics, (distance between persons, location, seating arrangement, etc.). Proper social distance is when persons feel comfortable in social situations. Although there are cultural variations, social distance in the U.S. is about four to seven feet. Mediation should occur on neutral territory so neither party will have the "home court advantage." Ideally, a caucus will occur in a different location than the mediation. If parties are potentially hostile, they should be kept separated prior to the mediation.

Seating arrangement is a variation on the use of space which can regulate social distance among the mediator and the parties. A rectangular table is often present; if used incorrectly, it can become as a symbol of the parties' differences and hamper the cooperation the mediator wants to generate. One seating arrangement seems highly workable. At the onset of the mediation the parties, separated by an empty chair, are seated on the same side of the table with the mediator on the opposite side (see Modonik p.8). During the storytelling phase each party will speak primarily to the mediator; however, in the discussion and agreement phases, when the parties talk to each other, they can face each other and talk over the chair. Support persons should sit near, but slightly behind, their respective spokespersons. A similar triangular pattern could be superimposed on a round table. In any case, the mediator should sit equidistant from the parties. Closer proximity to one may cause the other to generate a perception of mediator bias. It is also important that the parties are seated in identical chairs so that one party does not sit higher than the other. When preparing to caucus, the mediator and the party should exit the mediation room and "go to" the caucus location. It would be an error for the mediator to ask one party to temporarily leave the mediation location allowing the exiting party a potential opportunity to listen in on the caucus discussion.

Objects

The study of the use of objects to communicate is objectics. Objects can range from props to jewelry, to furniture, to support persons. The mediator should provide the parties with pencil and paper and encourage them to jot down objections or concerns as they occur. This politely instructs each party to not interrupt when the other is telling his/her side of the dispute. Objects, as props, are sometimes used to provide explanations or support for arguments. When both parties are mutually focused on an object, a spirit of cooperation is enhanced. A small flower in a vase could be placed on the table to evoke a desire for peace. In some cultures, parties bring objects symbolizing the dispute to be destroyed upon arriving at a settlement. The mediator, however, should ensure that such objects will not create perceptions of danger or discomfort. Occasionally, the parties will use persons as objects. The number of persons associated with

one side might generate a sense of power, i.e., ganging up. In concern for fairness, the mediator should monitor the number of support persons and allow each party to select roughly an equal amount.

Objects can help identify a mediator's role through a badge, lapel pin or professional attire. However, with professionalism in mind, the mediator should adapt to the attire of the parties, i.e., the mediator's attire could be different when dealing with juveniles and adults. In adult-adult disputes mediators should default to basic professional standards. Perhaps overt efforts at power dressing on the part of the mediator might attract undue attention to the mediator and serve to alienate the parties.

Color

The study of how persons use color to communicate is colonics. It refers to the color of walls, clothes, objects, etc. When arranging the mediation, the mediator should select a tranquil environment of pale green or pale blue walls. A gang member may try to wear gang colors to intimidate the other party. The mediator should be aware of local gang colors and determine if the colors are negatively influencing the mediation; if so, the mediator should use his/her authority to prevent the display. Studies of business attire suggest that dark blue and dark grey tend to communicate authority and credibility. To these ends, the mediator should select his/her colors carefully.

Facial Expressions

Facial expressions, called pictics, in Western culture are highly expressive of emotional states. The human face exhibits six primary emotions: happiness, sadness, surprise, fear, anger, and disgust or contempt. A child’s facial expressions will easily register feelings of happiness or sadness, but by adulthood, socialization has taught us to occasionally conceal or alter our facial expressions to mask or minimize our true emotions. For example, the recipient of a less than undesirable gift is likely to show surprise and happiness rather than disappointment.

Since facial expressions can be contrary to underlying emotions, a mediator must be astute to what a person’s facial expression might be suggesting rather than actually conveying. For example, a disputant who smiles frequently while the other disputant is stating his/her side of the story might be indicating the level of discomfort and anxiety. It can be beneficial for the mediator to comment on a facial expression and probe the disputant in order to elaborate on what is being communicated. The mediator is reminded that his/her feelings about the content of the mediation should not enter in. Hence, the mediator should learn to control his/her facial displays. In short, even when surprised, the mediator should not flinch or raise an eyebrow.

Eye Contact

The study of communication through the eyes is oculesics. Using their eyes, parties can communicate attitudes of cooperation and non-cooperation. A juvenile who closes his/her eyes or participates in eyeball rolling is likely bored and in a mood that is not conducive to mediation. This is usually accompanied by other physical cues such as slumping and tapping.

Although there are cultural interpretations, avoiding eye contact with the mediator and the other party may send an emotional message that needs to be probed in caucus. The eye contact of the mediator can serve as a directional indicator of communication. The amount of mediator eye contact should be relatively equal between the parties.

Movement

The use of body movement to communicate is kinesics. The primary kinesics components are gestures (nods, hand movement, etc.) and posture. Gestures, evidenced by the fact that hand movements produce sign language, constitute a rich area of nonverbal communication. Some movements, called illustrators, are direct indicators of verbal messages. For example, a disputant who is stretching and yawning is likely saying he/she is tired of the process. An angry disputant might point a finger to accentuate an argument. The alert mediator will probe to determine if the behavior is threatening and ask that it be curtailed. Adaptors are movements that help a party respond to a personal need. As mentioned earlier, a disputant who crosses his/her arms might be adapting to the air conditioning rather than conveying resistance or defensiveness. In such cases, the mediator should seek additional cues rather than draw complex inferences from a single gesture. There are other movements, called regulators, exemplified by such actions of a disputant suddenly sitting upright and pulling his/her chair closer and leaning forward with elbows on the table. This usually indicates a heightened interest in the topic and a desire to be more involved in the discussion. This type of action is often accompanied by direct eye contact and a vocal utterance indicating a desire to speak.

In keeping with expectations of professionalism, alertness and credibility, the mediator should maintain an upright posture. Hand gestures should be used sparingly--perhaps to direct interaction. The mediator should make sure that his/her movements compliment verbal messages and serve to promote perceptions of comfort, safety and cooperation.

Time

Time is referred to as chromatics. Some people are known as being monochromic; they prefer to do one thing at a time, giving considerable attention to deadlines and schedules. Others are polychromic; they don’t worry about schedules, believing they can do several things at once. Polychromic individuals value relationships over work and are less concerned about deadlines than monochromic individuals. Although there is a growing Latin American population in the U.S. that is polychromic by origin, Americans tend to be predominately monochromic.

A monochromic mediator may make the error of assuming that parties entering the mediation process are monochromic and will adhere to his/her timelines. This can be problematic if one or both parties are polychromic and the mediator makes the faulty assumption that they are not serious about mediating the dispute. If one party is polychromic the mediator should have something for the monochromic party to do (filling out forms, etc) while waiting for the other party to arrive. The mediator, who should never be late him/herself, might negotiate time management expectations at the beginning of the process.

Touch

The technical term for touch is haptic. Touch is an area of nonverbal communication that is highly prone to communication problems. A person's touch ethic, i.e., the amount of touch one initiates and tolerates, is formed through childhood exposure to parents and extended family. Whether affectionate touch was commonly demonstrated between family members will determine a person's touch ethic and the extent he/she would prefer a hug to a handshake or appreciate a pat on the back.

Apart from the introductory (and possibly, congratulatory) handshake, touch is not a form of expression common to mediation. The mediator should always be alert to such behavior between the disputants and be prepared to intercede if aggressive touch is initiated. There are rare instances when touch is acceptable such as when one party is a relational couple and one rests a hand on the other's knee to provide support and reassurance.

In conclusion, nonverbal behavior is important and, when used thoughtfully, can contribute to mediation effectiveness. The mediator should ensure consistency between his/her verbal and nonverbal cues and model the nonverbal behaviors the parties should adopt. In this article we have explicated nine aspects of nonverbal behavior and related them to mediation. We have indicated that mediators should attend to crucial aspects of their own nonverbal behavior. The mediator also supports the mediation process by avoiding drawing complex inferences from isolated nonverbal cues and probing for information from the parties to confirm or negate non-verbal messages.

Everyday Conflict Management: Tips for Transforming Conflict

When you think of the word “conflict” what comes to mind? Many would say disagreements, arguing, maybe even fighting and war. When confronted with conflicts that occur naturally between people in relationships, we have the opportunity to decide how we will respond. Some of the most common choices for a response include anger and retaliation or ignoring, burying and avoiding the issue. Let's focus a bit on what each response may mean to us when in a disagreement with someone close to us… perhaps a friend, a spouse, parent or child.

Choosing the angry response leads us down a path where we feel we need to get even. "They can't get away with that." "She will have to pay for that action." "I must teach him a lesson." A response of retaliation is similar to punishment. When this is the chosen response, where does it lead? That depends on the strength of the relationship with the other person who offended you and also on the personality and character of the two of you. In the worst case, responding with anger and retaliation can lead to injury or damage to the relationship. If the other person feels he or she is not getting the respect they deserve, the whole scene could deteriorate quickly. Unfortunately, many of us have experienced this situation at some time and wish we could have taken back that reaction… chosen a response that was more cool, calm and collected.

Another common response to conflict or disagreement is to avoid the situation, give in, let them have their way, or refuse to talk about it. If you are like me, this may even have been taught to you by a well-meaning parent as you were growing up and struggling with siblings. "Ignore them." "You don't care about playing with them anyway." "Just walk away." "I don't want to talk about that." Where does this response leave you (and others) if you choose to ignore the situation over and over again? Probably feeling like a doormat, not taken seriously, never getting your share of what is good. These feelings of powerlessness over time render people unable or unwilling to stand up for themselves, like being passed over for the good things you deserve because you haven't learned to speak up for what is important to you.

So what is a good way to respond to conflict then? Probably the best way is to look for a win-win outcome that meets everyone's needs. As parents we may say, "I would never compromise on the rules in our home." And as employees we may say, "It wouldn't do any good to ask for what is coming to me, they would never listen." The secret to finding win-win outcomes is knowing how to collaborate, knowing what is important to you and to the other person, taking the time build trust and to preserve the relationship even while you are hammering out some hard-to-come-by changes.

The notion of conflict as transformation is a different way to think about it. Many experts in conflict resolution tell us that conflict brings opportunities for creative change. Next time you have the opportunity of conflict, why not try to change your dance steps and see if you can transform the conflict into some new way, better approach, or creative idea. Moving through a conflict can be an opportunity for personal growth. Surviving difficult interpersonal issues builds strength and can increase your confidence in yourself.

MEDIATION V. ARBITRATION: IS ONE BETTER THAN THE OTHER?

The answer depends on the objectives of the parties involved. While the two forms of alternative dispute resolution are often referred to interchangeably, there are key differences in procedure, cost, time, and legal effect that must be considered.

Mediation is a voluntary agreement by parties to participate in a non-adversarial, structured negotiation with a neutral facilitator. It is an exploration of party positions and an attempt to cut to the chase. However, for the process to work, both parties must enter with a genuine desire to compromise. Mediation usually occurs early in the litigation process, is not based on formal legal procedures, and is non-binding. Typically, no evidence or witnesses are necessary, and therefore limited preparation time is needed, which saves both time and money.

Arbitration, on the other hand, is a legal procedure similar to trial but in a less formal setting. Participation can be voluntary or required by contract, statute or even Court rule. Arbitration is often conducted like a trial with each side presenting their case to an arbitrator or panel of three attorneys, who are agreed upon by the parties. The evidentiary rules are more relaxed than if at trial, but the arbitration setting is still adversarial and the result binding upon winner and loser.

Both mediation and arbitration have their advantages, but they also have down sides. Because opting out of mediation carries little repercussion, a party can enter into mediation for the purpose of learning more about the opposition's case and legal arguments. As for the mediators themselves, they are not empowered to make decisions or binding judgments, only to facilitate a settlement. With arbitration, because it is closer to a trial than mediation, room exists for procedural abuses and cost and time delays can escalate as well. Finally, arbitrators are usually judges and lawyers that sit on panels, but they do not necessarily have expertise in the matters they are arbitrating.

If your client's case is "in mediation," it is advisable to participate. In fact, it is routine for us to successfully represent our clients. Be prepared; however, if you do participate to actively argue your case. With arbitration, you can participate as an intervening party, but not informally. Either way, both forums can be utilized to achieve cost effective results in less time than through the traditional litigation process.