

## Dispute Resolution Services Receives Grant From DSS

The Office of the Executive Secretary has recently received a grant for \$150,000 from the Department of Social Services, Division of Child Support Enforcement for the purpose of providing services that support custody and visitation issues. One area that these funds are being used toward is the expansion of **Dispute Resolution Coordination Services**. Over the last few years, OES has entered into contracts with certified mediators around the state to provide case screening and mediation coordination services in order to increase the use of mediation by the courts. These coordinators have been very successful in assisting the judges and clerks' offices in identifying cases appropriate for mediation, facilitating the referral of cases to mediators, and providing case management of matters referred to mediation. Coordinators have been appointed to serve Juvenile and Domestic Relations District Courts where there had not been much mediation activity.

Another area that these funds are being used toward is to support Parent Education Programs in providing parent education courses at no cost to qualifying parties referred by the courts pursuant to Virginia Code Section 16.1-278.15 or 20-103. This funding is being made available to assist those parents who could not otherwise afford to attend the parent education course. Parent Education providers that have received funding from OES to enable them to provide no-cost classes to qualifying parents are identified with an asterisk on-line at <http://www.courts.state.va.us/parented/list.html>.

The OES extended a contract to the Center for Child and Family Services to provide supervised visitation and neutral drop-off and pickup services for 200 children referred by the Hampton Juvenile and Domestic Relations District Court. The service provided includes the cost of providing a safe, neutral and supervised room for visitation and exchange services, staff to provide supervision, as well as security guards.

Finally, the DSS grant funds will be used to pilot Child Dependency Mediation programs in a few J&DR courts (Amherst, Bedford, Campbell, Culpeper, Fauquier, Hampton, Lynchburg, Nelson, and Orange). A small group of mediators and judges from these jurisdictions attended training in Washington, D.C. that was hosted by the D.C. Superior Court Multi-Door Dispute Resolution program and conducted by trainers Bernie Mayer and Mary Margaret Golten of CDR Associates. In addition, these mediators attended Court Improvement Program training provided by Lelia Hopper, Director of the Court Improvement Program. The mediators will work closely with their judges, local DSS, and GALs to implement pilot child dependency mediation programs over the next few months.

## **Child Dependency Mediation Pilots Funded**

Child dependency mediation provides a non-adversarial setting in which one or more trained mediators assist the parties in cases involving child abuse or neglect by a parent in reaching a fully informed and mutually acceptable agreement on issues involving placement, visitation, and recommended family services. Mediation focuses on the child's safety and the best interest and safety of all family members.

Child dependency mediation has been used as a successful alternative to litigation in many states across the country since its inception in the 1980s. Many studies have shown that up to 89 percent of mediated child dependency cases reach at least a partial settlement of issues and take less time than litigated cases. Removal of an abused or neglected child from the home environment can be a stressful and frightening experience for a child. This generally occurs at a time when the child is going through several vital developmental stages and needs a stable, consistent environment. Mediation, when compared to adjudication, can be less injurious to the family by decreasing the trauma to the child and utilizing the parents' motivation to seek help during a family crisis.

In the interest of exploring the benefits of child dependency mediation, the Office of the Executive Secretary of the Supreme Court of Virginia is supporting three pilot child dependency mediation projects through a grant from the Department of Social Services. These projects are being implemented in the following locations:

- City of Hampton (Mediator and Attorney Larry Martin)
- Amherst County, Bedford County, Campbell County, Lynchburg City, Nelson County (Mediator Carolyn Pritchard - Peaceful Alternatives)
- Culpeper County, Fauquier County, and Orange County (Mediator Maria Hyson - Piedmont Dispute Resolution Center)

Richmond City will also pilot a program under the auspices of the Juvenile and Domestic Relations District Court's Office of Dispute Resolution directed by Carol McCue.

Judges from these pilot jurisdictions as well as the above named mediators attended a training on Child Dependency mediation offered by the D.C. Superior Court in May. It is our goal to mediate through these pilots approximately 70 cases between July 1 and September 30, 2004 when the grant expires. Additional information regarding the success and experience of these pilots will be forthcoming.

## **2004 Virginia General Assembly Legislation Bills Essential to Mediation**

### **Child Support**

1. **Child Support.** Patron – Bradley P. Marrs: HB511 revises the child support guidelines by (1) providing that “gross income” shall not include income received by the payor parent from a second job that was taken in order to pay off child support arrearages and that cessation of the income is not the basis for a material change in circumstances; (2) replacing the provision for “extraordinary medical and dental expenses” with a requirement that the parents pay in proportion to their incomes any reasonable and necessary unreimbursed mediator or dental expenses in excess of \$250 per year per child; (3) making computation and payment of medical and dental expenses in sole and split custody arrangements identical to that for shared custody arrangements (under which expenses are allocated in accordance with the parties’ income shares and paid in addition to the basic child support obligation); (4) directing the court to consider actual tax savings a party derives from the child-care cost deductions or credits; and (5) changing the guideline review from being completed every three years to being completed every four years.
  
2. **Retroactive Child Support Modification.** Patron – William C. Mims: SB497 clarifies that the retroactive modification of a child support order is not dependent on the court in which the petition was originally filed. Child support orders may be modified retroactively only to the date that the petition for modification was filed. When the modification petition is originally filed in juvenile and domestic relations district court and removed to circuit court, some circuit court judges have ruled that the circuit court can order child support retroactive to the date of filing in circuit court and others have ruled that retroactivity goes back to the date of filing in juvenile court. This bill provides that the child support may be modified back to the date that the modification petition was filed in any court.  
**Capias for nonsupport.** Patron – Terry G. Kilgore: HB320 eliminates the requirement that the court act “upon petition” to issue a civil show cause summons or a capias where it finds that (i) a respondent has failed to comply with an order concerning custody, visitation, support or maintenance and (ii) personal or substitute service has been obtained.

### **Custody/Visitation**

3. **Guardian ad litem.** Patron – Gary A. Reese: HB45 eliminates the statutory \$100 cap on guardian ad litem compensation in a circuit court. This may be recovered from parents financially able to pay. The bill permits the circuit court to assess as costs against the parents the maximum amount the court awards the attorney. The

bill retains the statutory cap on compensation that may be assessed against parents in the juvenile court.

4. **Filing fee for juvenile cases.** Patron – Terry G. Kilgore: SB103 amends the 2003 filing fee of \$25 for each new petition for custody and visitation. With the passage of this bill, a special rate of \$25 is required for all custody and visitation petitions simultaneously initiated by a single petitioner. No other costs can be added to this rate. Additionally, this bill clarifies that a petition may be reissued free of additional costs and fees if service was previously unavailable.
5. **Parenting Classes.** Patron – Terrie L. Suit: Previously, parenting classes in cases involving custody, visitation or support was mandatory. H447 eliminates the requirement of these classes in uncontested cases. The Court may still order parties to these classes only if it “finds good cause.” This provides another incentive for parents pursuing mediated results.
6. **Parenting Programs.** Patron – Vivian E. Watts: H792 and S98 allow the Department of Correctional Education to create parenting programs that include parenting skills training and anger management for non-custodial parent offenders committed to the Department’s care. The Department may administer such programs directly or by contract; pre-release programs may be part of the offender’s treatment program.
7. **Risk management plans.** Patron – Kenneth R. Melvin: HB 69 allows attorneys, who provide pro bono custody and visitation legal services to eligible indigent persons according to a program approved by the Supreme Court of Virginia or the Virginia State Bar, to be covered by the Commonwealth’s risk management program for claims arising from their provision of legal services in such programs. The Supreme Court of Virginia will pay the cost of such coverage for the programs approved by the Supreme Court and the Virginia State bar.

### **Domestic Violence**

8. **Domestic Violence.** Patron – H. Morgan Griffith: H1233 requires the Department of Criminal Justice Services to establish training standards and a model policy for protocols for local and regional sexual assault response teams. Social Services will establish a minimum training requirement on family abuse and domestic violence.
9. **Family abuse.** Patron –Janet D. Howell: Developed out of a recommendation of the Family Violence Subcommittee of the Virginia State Crime Commission, SB550 changes the term “primary physical aggressor” to “predominant physical aggressor” where arrest is required when a law-enforcement officer has probable cause to believe that family assault or violation of a protective order has occurred.

This bill sets the standards for determining such a predominant physical aggressor.

10. **Distribution of protective order information.** Patron – Janet D. Howell: SB551 establishes that when a person seeks a protective order, the juvenile court intake officer must provide that person with a written explanation of the conditions, procedures and time limits applicable to the issuance of protective orders for family and household members. This will be developed and distributed to law enforcement and each court service unit by the Office of the Executive Secretary of the Supreme Court.

### **Child Welfare**

11. **Child abuse or neglect.** Patron – Vivian E. Watts: H420 and S429 enable social services departments to develop multidisciplinary consultation teams that would provide consultation during the investigation of certain child abuse/neglect cases. The range of members these teams may be comprised of are “members of the medical, mental health, legal and law-enforcement professions.”
12. **Best interests of the child.** Patron – Terrie L. Suit: HB441 states that the court may disregard the tendency of each parent to actively support the child’s contact with the other where the court finds history of family abuse.
13. **Child abuse and neglect.** Patron – Christopher B. Saxman: H1041 amends the definition of child abuse and neglect to include a child who is with his parent or other person responsible for his care either (i) during the manufacture or attempted manufacture of a Schedule I or II control (including but not limited to cocaine, crack, heroin, Ritalin) or (ii) during the unlawful sale of such substance by that child’s parents or other person responsible for his care, where such manufacture, or attempted manufacture or unlawful sale would constitute a felony violation of 18.2-248.
14. **Protection of infants.** Patron – Martin E. Williams: S114 provides an affirmative defense where civil proceedings to terminate parental rights involve child abuse, neglect or abandonment based solely on the parent having left the child at a hospital or rescue squad. This defense is created for parents who safely deliver the child to a hospital with 24-hour emergency services or to an attended rescue squad that employs emergency medical technicians, within 14 days of the child’s birth. This resembles the affirmative defense created in 2003 for parents in criminal abuse and neglect cases
15. **Child protective services.** Patron – Frank M. Ruff: S409 requires the local department of social services to notify the parent and make reasonable efforts to notify the noncustodial parent of a report of suspected abuse or neglect concerning a child who is the subject of an investigation or receiving family assessment, in those cases in which such custodial or noncustodial parent is not the subject of the investigation.

16. **Child protective services; training and investigation procedures.** Patron – Robert F. McDonnell and William Bolling: HB135 and SB 584 require the Department of Social Services Child Protective Services Unit to include standards of training regarding the legal duties of child protective services workers in order to protect the constitutional and statutory rights and safety of children and families from the initial time of contact during investigation through treatment. The bill also requires local departments of social services, at the initial time of contact with the person subject to a child abuse and neglect investigation, to advise the person of the complaints or allegations made against the person, in a manner that is consistent with laws protecting the rights of the person making the report or complaint.

### Divorce

17. **Equitable Distribution.** Patron – Brian J. Moran: H1111 and S51 add another factor when determining the division or transfer of marital property. This bill formalizes the consideration of marital property used, bought, or dissipated for non-marital purposes in anticipation of divorce, separation, or the last separation of the two parties.

### Other

18. **Landlord and tenant.** Patron – David B. Albo: H153 makes the Landlord Tenant Act consistent with the Residential Landlord Tenant Act concerning termination of month-to-month tenancies. Landlords may purchase commercial insurance for damage coverage fully or partially in place of a security deposit. Landlords may purchase renter's insurance for the tenant; further, landlords can include liquidated damage penalties, with a cap, in rental agreements. Additionally, this bill caps the amount of the security deposit and insurance premiums that can be collected from the tenant up front. Allows for liquidated damage penalties and its subsequent cap.

## **Bills Introduced in 2004 and Carried Over to the 2005 General Assembly Session**

### Child Support

1. **Retroactive application of support orders.** Patron – H. Morgan Griffith: H326 provides that upon proof that either party has committed fraud upon the court, including but not limited to giving false testimony regarding assets and income, the court may issue a new support order, nunc pro tunc to the original date of the hearing at which the fraud was committed, which shall be applied retroactively to increase or decrease the amount of support paid up to the date of the new order.

2. **Child Support Guidelines Review Panel.** Patron – H. Morgan Griffith: HB1240 establishes the Child Support Guidelines Review Panel in the legislative branch of state government. The Panel is responsible for reviewing the guidelines for child support every three years.
3. **Child support guideline.** Patron – Frank W. Wagner: SB 435 modifies the calculation of child support in shared custody by repealing the multiplier and distinguishing between variable and fixed costs. Variable costs are based on the percentage of time a parent has custody of the child.

### **Custody/Visitation**

4. **Divorce, custody and visitation.** Patron – L. Scott Lingamfelter: HB 386 provides that substance abuse, cruelty, or causing reasonable apprehension of bodily hurt are fault grounds for divorce. In a divorce suit, the defendant shall be awarded at least 120 overnights in any calendar year as well as joint or sole legal custody unless both parties, in writing, agree to a parenting plan that addresses custody or the court finds, in writing, that such an agreement is not in the best interest of the child. This does not apply where the defendant has committed adultery, sodomy or buggery outside of marriage; been convicted of a felony and sentenced to confinement for more than one year; been guilty of cruelty towards the spouse, caused the spouse reasonable apprehension of bodily hurt, willfully deserted or abandoned the spouse; or been guilty of cruelty to the parties' children or caused the children reasonable apprehension of bodily hurt; or abused drugs or alcohol. It is presumed that it is in the best interests of the child to spend a minimum of 120 overnights with each party in every calendar year in visitation arrangements, including pendente lite orders, pursuant to subdivision 6 a of § 20-91 and subsection B of § 20-124.2
5. **Uniform Child Custody Jurisdiction and Enforcement Act.** Patron – William C. Mims: SB510 modifies the continuing jurisdiction provisions of this Act. The bill clarifies that the state with initial jurisdiction does not lose jurisdiction until both (addressing the vague term “child’s parents”) parents move out of that state. The Act is a uniform act proposed by the National Conference of Commissioners on Uniform State Laws and was enacted in 2001 to replace the Uniform Child Custody Jurisdiction Act, which Virginia enacted in 1979.

### **Domestic Violence**

6. **Hearing on preliminary protective orders.** Patron – Allen L. Louderback: HB 1317 provides that the hearing following issuance of a preliminary protective order shall be held within five days of the issuance of the preliminary order rather than the current 15 days.

- 7. Enticement to violate protective order.** Patron – H. Morgan Griffith: HB1231 provides that any person, including any party protected under the protective order, who entices another to violate a protective order, is guilty of a Class 1 misdemeanor.

### **Child Welfare**

- 8. Foster care plans; reasonable efforts.** Patron – H. Morgan Griffith: HB 328 expands the requirement to make “reasonable efforts” to reunite child with parent to include parents convicted of certain offenses against any child. This bill also defines “circumstances” within “aggravated circumstances” as being certain acts committed against, or allowed to occur against, any child. “Any child” is used in this bill rather than a “child of the parent” or “a child with whom the parent resided at the time” the offense occurred.
- 9. Hearsay by child in sexual abuse or neglect proceeding.** Patron – Kathy J. Byron: HB 868 admits hearsay statements into civil abuse and neglect proceedings made by children seven years or younger. These statements must be made to either a law-enforcement officer, a mental health professional, social worker, physician or nurse or other medical professional, or foster parent. These statements are sealed in the record. They are not admissible in any other civil proceeding other than adjudication of the question of neglect or abuse.

### **Divorce**

- 10. Divorce decrees; spousal support, modification and enforcement.** Patron – R. Creigh Deeds: S680 allows the revision of agreements incorporated into divorce decrees where clear and convincing evidence shows a term or provision causes “manifest injustice” or that a changed condition makes a term or provision “unconscionable.” The court may order incarceration for contempt when convinced beyond a reasonable doubt that a divorce decree is willful, intentional, and malicious. The court may not award spousal support unless indicated by party agreement to do so. Spousal support ends upon cohabitation.

## **Mediation Center of Hampton Roads Hosts Open House**

The Mediation Center of Hampton Roads, located at 424 West 21<sup>st</sup> Street in Norfolk, Virginia, held an open house in order to celebrate “March is Mediation Month” on March 30, 2004.

The event was a smashing success with over one hundred attendees. Along with the Mediation Center Staff headed by David McDonald, President, much of the business community and a few notable public figures participated in the festivities. Sharon McDonald, co-founder of the Mediation Center and Norfolk’s Commissioner of the



Revenue, arranged catering by Norfolk's own Vie de France. Judge Randy Carlson was in attendance. Lisa Chandler, realtor of Nancy Chandler and Associates also showed her support of mediation. Marietta Blueford of the EEOC (Equal Employment Opportunity Commission) and many members of the Ghent Business Association came out to support this long-standing Ghent organization.

Many guests were interested in the Judicial Council's mediation certification process. The Mediation Center was ready to provide accurate training information to those people.

The open house succeeded in drawing attention to the endless possibilities for mediation and some suggested it become an annual event.



From left, pictured are Patrick Brogan, attorney, Davey & Brogan, P.C.; Chuck Lollar, attorney, Tanner, Muley, Gordon & Lollar, P.C.; David McDonald, President, Mediation Center of Hampton Roads; John Loeschen, attorney, The Law Offices of John Loeschen

You may also want to check out the website

<http://www.fox43tv.com/Global/story.asp?S=1862852> as The Mediation Center of Hampton Roads was recently featured in a news story for Fox News.

## **Mediators – Don't Forget Negotiation**

Mediation has been simply defined as “facilitated negotiation”. Some mediation practitioners forget that mediation is, in fact, a subset of negotiation. As such, we must never lose sight of the negotiation basics. This article reviews some of those basics – from the standpoint of how a party might prepare for a negotiation – facilitated or not.

Negotiation in its “traditional” sense has been thought of as a contest where one side wins and the other side loses. No matter how enlightened we like to think society has become, many books, articles, videos and tapes still tout “swim with the sharks”, “negotiate to win”, “guerilla negotiation” and other “I win – You lose” concepts.

The truth is that we all know that parties who come to mediation (and we) negotiate everyday with a view toward meeting needs without antagonizing or defeating others. This kind of negotiating is the very essence of our field. If parties were not able to see the positive possibilities of “collaborative” problem solving, we would all be out of business.

From our training and in our experience, and even in our hearts, we all know that “win-win” negotiation has been proven to be far more effective in getting results without costly emotional and even financial outcomes than that other approach. We know and advocate that collaboration helps to preserve relationships even in the face of resolving conflict.

Most people in the U.S. think goods and services have a fixed price and that it would be inappropriate to suggest bargaining for one which is lower. Yet three quarters of the world's population buy and sell merchandise without a fixed price. The value of goods in so many places in the world is determined through negotiation between buyer and seller.

To these bargainers, price is not the only variable in negotiation. Other considerations include: interest rate, delivery date, size, quality, quantity, color, warranty, service and the buyer's level of desire to have the item.

**THE TRUTH IS THAT ANY ASPECT OF A TRANSACTION THAT IS NOT TOTALLY SATISFACTORY TO ONE OF THE PARTIES IS WORTH NEGOTIATING.**

### **FIRST—SOME DEFINITIONS**

The dictionary defines negotiation as “*conferring with another in order to come to terms or reach an agreement*”. (*American Heritage Desk Dictionary.* )

In other words... :

( 1) Negotiation is, simply stated, formalized discussion between two parties or organizations.

(2) Negotiation refers to the process we use when we are seeking to satisfy our needs when someone else controls what we are seeking. Negotiation can also be understood by using other words such as: bargaining, exchanging, and haggling.

(3) Negotiation has traditionally been thought of as the process of attempting to satisfy your wants by giving up something you now have in exchange for something new it is you want.

(4) Negotiation and conflict are closely related. Sometimes we negotiate to avoid conflict. Other times, we use negotiation to resolve conflict.

(5) Negotiation applies to everyday exchanges in business or personal life where agreement is reached over buying and selling, exchanging services or property, resolving differences, or engaging in mutually desirable projects. Examples are many and include such simple tasks as deciding with colleagues where to have lunch or such complex issues as discussing with a builder the cost of constructing a new home.

ONE THING IS CERTAIN ABOUT NEGOTIATION -WE EACH DO IT EVERY DAY! SOME OF US ARE BETTER AT IT, BY GETTING MORE OF WHAT WE SEEK, THAN OTHERS. SOMETIMES WE CAN BE NEGOTIATING WITHOUT EVEN KNOWING IT; HOWEVER, NEGOTIATION RESULTS ARE BETTER WHEN WE KNOW THAT IS WHAT WE ARE DOING. THUS, UNDERSTANDING WHAT NEGOTIATION IS, HOW IT WORKS AND BEING PREPARED TO NEGOTIATE SHOULD LEAD TO A BETTER RESULT.

Interestingly enough, many people miss the opportunity to make a more favorable exchange because they fail to recognize the opportunity to negotiate.

Conflict and negotiation often go hand in hand. As mediators, we see often the conflict element. For the parties (and for us in our own lives and work), sometimes, the negotiation happens first and the conflict arises out of an unsuccessful negotiation. On the other hand, sometimes the conflict leads to negotiation to resolve the differences and eliminate the conflict.

One thing we can see from our work is: the most successful negotiators have a positive attitude. They are able to view conflict as normal and constructive. Understanding negotiation skills will not only help us in our work as mediators but will sustain us individually when others challenge us.

" A basic fact about negotiation. . . is that you are dealing not with abstract representatives of the other side, but with human beings."

Fisher, Ury and Patton, Getting To Yes

Negotiation can only happen when there is time to do it and when there is a purpose or something you can accomplish. Thus, there will be occasions where there is either no time or no purpose achieved by engaging in the process of negotiation. Often the result of such a situation is quick action – which may or may not result in positive benefit.

In my upcoming book, I delineate five types of negotiation. In an effort to simplify discussion of types of negotiation, you can also look at the environment, the urgency or need for the negotiation, as well as looking at the personal approach or style of the negotiators.

It occurs to me that we can divide negotiation into five principle types:

- EVERYDAY (OR CASUAL) NEGOTIATIONS
- INFORMAL NEGOTIATIONS
- FORMAL NEGOTIATIONS
- FACILITATED NEGOTIATIONS
- CRITICAL NEGOTIATIONS

**EVERYDAY NEGOTIATIONS.** We already know that every day in our communications about our wants and needs and when we are engaged in minor problem solving, we are conducting EVERYDAY NEGOTIATION.

**INFORMAL NEGOTIATIONS.** Sometimes, we make it clear to the other party that we expect to engage in a more serious conversation toward resolving some problem or obtaining something we want from him or her. Most of these conversations take place in an informal environment.

**FORMAL NEGOTIATIONS.** On occasion, it is necessary to discuss issues and plan for an interaction on a more formalized basis. These negotiations are usually planned in advance. They follow set agendas and may even require representatives, such as a lawyer or union rep, to be present to assist in the discussions. Also, more formal negotiations may take place in a neutral location and be of longer duration. These discussions can continue over periods of days or weeks – even months or longer. An example of this kind of negotiation would be negotiations between two lawyers with clients negotiating the terms of a separation agreement.

**FACILITATED NEGOTIATIONS:** As we all know, sometimes, the assistance of a neutral or impartial third party is necessary to help parties negotiate to agreement. Without considering the “schools of mediation , I think we can all agree that the third party’s efforts are limited to facilitating agreement between the parties themselves. The third party mediator acts to empower the negotiating parties to reach their own resolution. While our assistance may be called upon as a facilitator only the mediator does not have a vote in the outcome.

CRITICAL NEGOTIATIONS. Rarely, discussions take place on an emergency basis with serious possible consequences for failure. These kinds of CRITICAL NEGOTIATIONS often involve outside interveners such as a pastor, police officer or mental health worker. Negotiations undertaken during war, national emergency or crisis are, by virtue of the situation under which the negotiations take place, critical. It is important to note that, even in such situations, negotiations can occur. As you read this, negotiations are probably taking place all over Iraq, Afghanistan and in other dangerous places in the world.

Fortunately, critical negotiations are the rarest. In fact, most negotiations in people's lives will be of the EVERYDAY or INFORMAL types. When negotiating a major purchase, employment agreement or bank loan, the negotiation becomes more formalized. Notwithstanding, the type of negotiation, they will all have similar characteristics, common steps in the process and potential for success or failure depending on how effectively the negotiation is undertaken.

"Preparing for a negotiation is a year-round function, as is negotiating."  
Nierenberg, *Fundamentals of Negotiating*

Negotiation preparation includes consideration of the following:

1. Establishing objectives or goals. What is wanted or needed?
2. Determining who will conduct the negotiation: you or someone else representing you?
3. What are the positions vs. interests? What is it you would like to see happen vs. what is it you need to see happen?
4. Where and when will you meet?
5. Who sets the agenda?
6. What ground rules, if any, might be needed?
7. What homework is required (before the actual negotiation begins)?

As with almost everything else in life and work, the extent and completeness of advance planning has a direct correlation to positive outcome

If all this sounds like work, it is.

When it comes to negotiation . . .

“Preparation does take time, but it probably saves more time than it takes. A well-prepared negotiator can narrow the issues for agreement . . . far more quickly and wisely than a negotiator who does not know the terrain.”

Fisher and Ertel  
*Getting Ready to Negotiate*

The following checklist is offered to help parties (yes, even you) plan for your negotiation:

## **NEGOTIATOR’S GUIDE TO PREPARATION**

### **DEFINE GOALS AND OBJECTIVES**

- Exactly what do I want from this negotiation?
- What do I have to get to meet my needs?
- What am I willing to give up to get what I want?
- What are my time and economic requirements for this negotiation?
- What resources will it take to successfully proceed?

### **CLARIFY THE ISSUES**

- What are the issues as I see them?
- What is the supporting framework for my position?
- How will I present it to the other party?
- What are the issues as seen by the other party?
- How will they support their position?
- What appear to be the significant differences in the way the parties view the issues?
- Where might the common ground lie?

### **GATHER INFORMATION**

- With whom will I be negotiating and what do I know about them? How do they approach a negotiation? What are their ego needs?
- When and where will the negotiation take place? What advantages or disadvantages do the time and place alternatives have for me?... for the other party?
- What are the economic, political and human implications of the issues?
- What personal power do I have that can be used constructively in this negotiation?
- What power issues must I watch for from the other side?
- What have the past negotiation results been, if known, on issues such as these?

#### HUMANIZE AND SET THE CLIMATE

- How can I best establish rapport with the other party and win his/her trust?
- How can I establish a win/win climate?

#### PREPARE FOR CONFLICT- *JUST IN CASE*

- What might be the major points of conflict?
- How will I deal with conflict if it occurs?
- How might I determine what the other party needs as compared to what they want?
- Can I handle the negotiation myself or do I need assistance, before, after or during the negotiation?

#### RESOLUTION OF THE ISSUES/NEGOTIATION SUCCESS

- How will I attempt to resolve conflict? How will I respond to the other parties' attempts to resolve conflict?
- What concessions am I prepared to make? Under what conditions?
- What do I expect in return for my concessions?
- Which are my “needs” and which are my “wants”?

## AGREEMENT AND CONFIRMATION

- How formal must it be?
- What approval process will be required? How long will it take?
- What implementation steps will be needed?
- Can we assure peaceful resolution of future issues arising out of this agreement?

**For potential negotiating parties, the following simple points ought to be always kept in mind:**

- Think before you speak
- Look before you leap
- Plan before you negotiate.

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*Charles P. “Chips” Lickson is a former trial attorney turned mediator. He has been certified by the Judicial Council of Virginia since the program began. He is the Founder of Mediate-Tech, Inc, which has been succeeded by Conflict Management Consortium, Inc. Front Royal, Virginia. Chips is also a Founding Member and Fellow of the International Academy of Mediators, an Adjunct Associate Professor at Shenandoah University and author of seven books including the popular Ironing It Out: Seven Simple Steps to Resolving Conflict which is in its fourth printing and has been translated into Russian and Italian and the upcoming Effective Negotiation from which this article has been adapted. Effective Negotiation is being published by Thomson Learning and is due later this year or early next year. Chips can be reached at: [clickson@cmc-resolution.com](mailto:clickson@cmc-resolution.com).*



## **An Excellent Book Review!**

### **Moving Through Conflict to Resolution**

*“Peacemakers are rare because peacemaking is hard work.”*

- *Rick Warren*

The Dynamics of Conflict Resolution: A Practitioner’s Guide (263 p., Jossey Bass, 2000), written by Bernard Mayer, is an excellent book for mediators and other conflict resolution practitioners who are eager to improve their effectiveness. Mayer offers us a wide variety of approaches, strategies, tools, case examples, guidelines and practical advice. From a mediator’s point of view, some of his best advice is found in:

- (1) the wheel of conflict,
- (2) techniques to facilitate constructive dialogue, and
- (3) guidelines to help parties move through impasse.

#### What is the Wheel of Conflict?

The wheel of conflict is an “analytical tool” or “construct” that Mayer uses to explain and reinforce our understanding of five basic sources of conflict. The sources of conflict are: communication, emotions, values, history and structure. To visualize the wheel of conflict during mediation (as Mayer suggests), imagine a wagon wheel or large circle with spokes. At the center or core of the wheel is a smaller circle. The center circle or core is labeled needs and the space between each of the five spokes is labeled one of the five sources of conflict. A brief discussion of facts related to each source of conflict is provided below:

- (1) Communication –“ Human beings are imperfect communicators”, even under the best of circumstances. When the issues are complex, it gets even more difficult to communicate effectively. Participants in the mediation process (including mediators) have a tendency to try to resolve disputes “before” they really understand the issues or needs of the parties. Effective mediators are very attentive to the parties’ verbal and non-verbal communications. They rarely miss opportunities to break down barriers to effective communication. Interventions include reframing, caucus, and maximizing critical moments.
- (2) Emotions - Feelings or emotions create the “energy” needed to trigger, sustain and resolve conflict. Effective mediators are quick to recognize the existence of helpful versus destructive emotions and take appropriate actions. Approaches include encouraging the parties to discuss feelings openly, letting the parties vent within reasonable limits, ignoring the emotions, and caucus.
- (3) Values – These are beliefs human beings have about good and bad and what’s right and wrong. People resist compromise and resolution when they believe their

values or integrity are being attacked, ignored or minimized. Effective mediators strive to help the parties find common ground or shared values by assisting the parties to affirm what they “believe in” (are for) rather than focusing on their differences.

- (4) Structure – This refers to “the external framework” in which conflict develops. The components of a structure include: the organization where the dispute occurs, decision-making procedures, political pressures, time constraints, access to information, and adjudication, litigation and mediation processes. Effective mediators are very skillful at both explaining and gaining acceptance of the structural benefits and limitations of the mediation process.
- (5) History – The parties approach to conflict is in many ways linked to their historical experiences with conflict (e.g., Holocaust, slavery in America, and the Middle East conflict) Our “historical roots” have a powerful influence on our “values, communication styles and emotional reactions”. Effective mediators know that some conflicts cannot be understood without first acknowledging its historical context, both past and present.

Our human needs are located at the center of the wheel of conflict. Mayer believes our needs and interests are part of a “continuum of human needs”. He explains that our human needs range from our basic concerns for survival on one end of the continuum (i.e., food, shelter, health and security), to our interests (i.e., concerns for tangible benefits, the structure where conflict exists, and concerns for respect and equality) in the middle, to our identity-based needs (i.e., meaning, community, intimacy and autonomy) at the other end of the continuum.

Gaining a deeper understanding of the sources of conflict and our human needs is essential to improving our effectiveness as mediators. By consciously using the wheel of conflict as a tool to increase our awareness and sensitivity to the sources of conflict when helping the parties identify needs and interests, mediators are better prepared to: figure out where and why people may differ, provide valuable and timely “insights” when needed, help the parties address their needs and interests in a meaningful manner and find more “opportunities” to move through the conflict to resolution.

### **Facilitating Constructive Dialogue**

Mayer explains that, by helping the parties communicate in a “powerful”, “respectful” and “constructive” manner, we can often avoid ineffective or destructive communication. Mayer also offers mediators several strategies to assist parties make this transition. Two approaches are discussed below:

#1: A mediator’s communication with the parties during the orientation stage is one of our best chances to have a positive impact on communications. At this stage, it is incumbent upon us to educate the parties on the type of communication that will be most effective during the session. To be more effective, mediators must: be attentive to verbal

and non-verbal communications when welcoming the parties, cover the benefits and limitations when discussing the goals of mediation, discuss the importance of effective communications when clarifying our roles, offer constructive guidance related to communications when describing the mediation process, and explain the challenges and benefits to be gained by the parties when explaining ground rules.

During the remaining stages of the mediation process, Mayer adds that mediators must make special efforts to inform or remind the parties that:

- they each have a right to express their “own opinions, needs, concerns and wishes”;
- they each have “a right to be heard”;
- being in conflict with another party does not mean that there is “something wrong” with the other party;
- they each have the right to an “initial reaction” (good or bad) to the other party’s communication;
- it is important to communicate in a way that helps the other party understand what’s being communicated;
- “new information”, when it is clearly understood, often has a way of casting the matter at issue in a new and different light;
- to enhance communications, it is important to separate the discussion of concerns and issues from persuasive arguments meant for the adjudicator; and
- using “metaphors” or language that incite another party can block effective communication.

#2: Mayer also explains that reframing is an “iterative and interactive process” that focuses on getting the parties to look at their dispute in a “more constructive, hopeful and flexible” way. It may occur naturally but, more often than not, it involves intentional effort by all participants to change the words that are used to describe the matter at issue or proposal for resolution.

Mayer describes four (4) levels of reframing. They are: detoxification reframing, definitional reframing, metaphoric reframing, and shifting the conflict paradigm through reframing. Mayer’s discussion of each level of reframing is summarized below:

- **Detoxification Reframing** – This is the simplest level and it focuses on changing the “unproductive” or destructive language that disputants use to describe a concern, interest or proposal. Our job as mediators is to help the parties get past their emotional response to the way ideas and

positions are presented. One tactic is to replace non-productive or emotion-laden words with “interest-based” language.

- **Definitional Reframing** – This level of reframing focuses on “redefining the issue” or dispute framed by the parties so that the resolution process can move forward. The challenge is to reframe the issue as a “mutual problem to be mutually solved” by the parties. The mediator’s goal is to assist the parties to develop a common problem statement or proposal that also fully incorporates their individual needs and concerns.
- **Metaphoric Reframing** – This level of reframing attempts to find appropriate metaphors or replace confusing or inappropriate metaphors the parties use to describe the dispute. This level requires a very good understanding of the sensitivity that surrounds the use of metaphors, proverbs, and analogies. Metaphors are very subjective and they can open or close the lines of communication. Mediators must be very careful in their use of metaphors.
- **Shifting the Conflict Paradigm Through Reframing** – This is the most difficult level of reframing. It involves helping the parties work together to create a “different story”, one that incorporates the main elements of each disputant’s “story line”. This paradigm shift is successful when there is a fundamental change in the way disputants view, analyze or make sense of the conflict. One strategy is for the mediator to facilitate a process that allows the parties to first tell their stories in “a powerful manner and then work to create a new story”.

The author also states that we have to “gradually work our way to deeper levels if we are to be truly effective”. It’s clear to me that a mediator’s expertise in the area of reframing comes at a price. According to Mayer, we have to keep practicing the technique in order to get really good at it and:

- remember that reframing “has to be done with the parties, not to them”;
- accept that reframing issues and ideas is a real challenge when the issues are complex, people are angry and time constraints are a factor;
- be attentive to opportunities to achieve “clarity” and truth through reframing despite the “challenges”; and
- be “genuine” (not manipulative) in our approach to reframing by ensuring that the needs of the parties and their emotional attachments to the issue are clearly communicated.

## Moving Through Impasse

An impasse occurs when disputants refuse to proceed with conflict resolution efforts. The author provides mediators with a wide variety of guidelines for helping the parties at impasse but cautions that “moving through impasse is usually more a matter of attitude than tool or technique”. Rather than thinking of impasse as “being stuck”, a negative “metaphor”, mediators need to view it as another “useful part of the conflict resolution process”. To be more effective in this area, mediators must take the attitude that “impasse is okay”. When impasse occurs, we need to ask and answer a series of key questions. Some of Mayer’s questions are summarized below:

- (1) Who else “needs to be involved” in the process to move through impasse?
- (2) Has the “potential for joint gain” been adequately considered or brainstormed?
- (3) Is there a productive way to help the parties discuss “a reasonable distribution of benefits”, if joint gain is not possible?
- (4) Is it better for “the parties to remain at impasse” because agreement is unlikely?
- (5) What are the parties “accomplishing and risking by remaining in the impasse?”
- (6) Are there “other ways” in which the parties can get their needs met?

### **Pick One**

**“The Dynamics of Conflict Resolution: A Practitioner’s Guide” is a useful guide for mediators and other conflict resolution practitioners to gain a deeper understanding of the dynamics of conflict resolution. The wheel of conflict, techniques to facilitate constructive dialogue, and guidelines for moving through impasse to resolution are just a few of the strategies you will find in this just-in-time resource guide. Pick one, practice, and increase your effectiveness in helping the parties move through conflict to resolution.**

*Book Review submitted by Diane Weaver. Diane is a Virginia Certified Mediator and Mentor. She is employed as the Director for the Office of Equal Employment Opportunity with the U.S. Immigration and Customs Enforcement and U.S. Citizenship and Immigration Services at the U.S. Department of Homeland Security.*

## **Manual for Legal Services and Pro Bono Mediation Programs**

A great new resource is available to you and your colleagues through the ABA Section of Dispute Resolution.

The '[Manual for Legal Services and Pro Bono Mediation Programs](#)' is designed to assist legal services and pro bono agencies in developing mediation programs. The manual provides governing boards, chief executives and mediation program administrators the tools to start new programs or to strengthen existing programs within pro bono community mediation and legal services agencies. It covers the benefits of mediation, the financial resources needed and where to find them, staffing the program, the recruitment of appropriate volunteer mediator service providers, the screening and processing of cases, sample forms and training tools, and ways to handle problems as they arise. It also lists books and other external resources that may be helpful in learning more about how to design a new program.

Authored by Joan F. Tobin and produced with the generous support of the JAMS Foundation, the '[Manual for Legal Services and Pro Bono Mediation Programs](#)' is available at no cost on the ABA Section of Dispute Resolution's website at [http://www.abanet.org/dispute/credits\\_toc.html](http://www.abanet.org/dispute/credits_toc.html). Hard copies are available for \$25 and can be ordered by contacting the Section at (202) 662-1680 or by email at [dispute@abanet.org](mailto:dispute@abanet.org).