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**Introduction and Acknowledgements**

*Meditiation Theory, Practice, and Skills Guide* provides basic mediation theory, practice, skills and techniques, and ethical guidelines for reference by mediators. It was produced as a resource for mediators of the Center for Alternative Dispute Resolution, located in Rostov-on-Don, Russia.

The Rostov Center for Alternative Dispute Resolution, established in 2010 with the support of ABA ROLI Russia, is the first court-annexed mediation center in Russia. It accepts cases referred to mediation by Justices of the Peace courts and provides clients with their choice from among numerous certified mediators. Initially supported by the Rule of Law Partnership Project, funded by USAID, it is administered by the local nongovernmental organization Civil Accord.

The guide was written in English by Nathan Voegeli with assistance from Ekaterina Smolyannikova, Anton Alferov, and additional ABA ROLI Russia program staff and translated into Russian by Anatoly Beresnevich. It was developed in part from publications provided by Global Majority, a nonprofit negotiation and mediation education and advocacy organization, and with resources found on the internet.
What is mediation?
Mediation is a process in which a neutral third party helps parties to a conflict reach a voluntary, negotiated agreement. The trained third party, known as a mediator, oversees the mediation process and assists parties to negotiate an agreement that satisfies their interests. The process is confidential and each party maintains ultimate decision-making authority. A mediated agreement is legally binding.

The mediator works to ensure fairness and equality in the process. This creates an atmosphere in which parties are better able to work cooperatively to negotiate an agreement.

Mediation enhances the parties’ ability to determine the resolution of their dispute. They maintain control of the outcome and are free to leave the process.

Differences between mediation, arbitration, and litigation
Arbitration and litigation are formalized processes that focus on legal outcomes and often do not provide a forum for parties to express their underlying fears and interests. Mediation is much more informal and allows parties to explore creative options and solutions that do not necessarily require compromise.

Because it is a flexible process, mediation can help strengthen relationships by giving both sides the opportunity to communicate openly and in a safe environment. Mediation can address emotional issues underlying a dispute and other non-legal issues. Mediators work to ensure that both parties are treated with respect and have an equal opportunity to express their thoughts and concerns.

Unlike a judge or arbitrator, a mediator does not have legal authority to require a settlement or resolve a conflict. The power of the mediator stems from her ability to help the parties communicate and voluntarily resolve their dispute.

The mediation process does not focus on specific legal issues, but on facilitating communication between the parties. In contrast to arbitration and litigation, a mediator does not consider evidence and does not make factual findings. Because the mediator is
a neutral third party, she can help the parties to focus on the basis of the dispute, their interests, and creative options for resolving the conflict.

A mediator does not provide legal advice. Each party is responsible for seeking outside counsel when necessary. Depending on the nature of the dispute and the sophistication of the parties, a mediator may choose whether to allow each party to be accompanied by outside counsel. A mediator may help the parties rationally consider the nature of their claim by exploring with them what they think would be the likely outcome of litigation. Also, a mediator may assist the parties in identifying realistic alternatives to arbitration, litigation, or even mediation.

Finally, mediation generally results in faster resolution and less expense than formal arbitration or litigation. Arbitration and litigation may both require retaining outside counsel to navigate formal procedures. Additionally, the parties may end up waiting a long time for their case to be heard in court due to procedural delays and the high number of cases pending before a judge. Mediation sessions can be scheduled quickly and typically last from a few hours to one or two days.

**Role of the mediator**
The mediator is responsible for helping the parties to reach voluntary agreement by guiding them through the mediation process. This requires providing a safe and supportive environment in which both sides are able to express their interests and concerns. The mediator often must deal with highly emotional issues and help parties to rationally assess alternatives and their desired outcome. Ultimately, the role of the mediator is to help parties communicate with one another in a productive manner.

**Organization**
The mediator is responsible for ensuring that she has adequate facilities for conducting a mediation and that logistical concerns have been addressed. This includes such details as scheduling and ensuring that tables and chairs are arranged appropriately. The mediator should either set basic ground rules for the mediation or help the parties to establish such rules. Prior to beginning mediation, always have the parties sign an agreement to mediate.

**Education**
Many parties going through mediation are not familiar with the process. The mediator must take the time to explain the principles of mediation, how the
Facilitation
Communication is key to mediation. The mediator is responsible for directing discussion, guiding the parties towards positive communication and negotiation, and helping the parties to deal productively with sensitive issues. At some points in the mediation, the mediator may need to take a more active role in suggesting options to the parties in order to advance the dialogue.

Trustbuilding
A mediator earns trust with the parties through her behavior. A mediator can build trust by remaining neutral, listening attentively, showing empathy, actively supporting open communication, and protecting both sides from threats or disrespectful behavior. If the parties trust the mediator, they are more likely to share information and work with her towards a mutually agreeable outcome.

Clarification and assessment
Parties may enter into mediation without realistic alternatives or a clear understanding of what they hope to achieve through mediation. The mediator should help parties identify their underlying interests, consider practical alternatives, and develop realistic options to satisfy those needs.

Convey optimism
There will be points in almost all mediations where it appears that the mediation process will not be successful. The mediator must portray optimism that an agreement can be reached and help empower the parties to continue. The mediator should note the amount of progress that the parties have already made and advantages to be gained from mediation.

Play the scapegoat
Occasionally the mediator may choose to take on responsibility for miscommunication or other issues that arise in the mediation, deflecting hostility between parties. Consider, for example, a situation in which a particular fact is highly disputed and neither side is listening to what the other has to say. The mediator can accept responsibility for the lack of communication by telling both parties that she does not have a clear understanding of the fact. She can then
ask each side to carefully explain their point of view. By doing so, the mediator now can reflect what each side says so that the other side has an opportunity to relax and listen without being defensive.

**Principles of mediation**

**Voluntary**

In most cases, parties choose to undertake mediation. A strength of mediation lies in the parties' ability to leave the mediation for any reason at all, or to choose not to reach a final agreement. Even if mediation has been ordered by a court, the mediator is not responsible for developing an agreement or forcing the parties to come to a resolution.

**Informed consent**

Prior to agreeing to mediation, all parties should be informed about the mediation process and the role of the mediator. They should also understand their legal rights and options outside of mediation. A mediator should always take the opportunity at the beginning of a mediation to explain the process.

During mediation, parties should understand the meaning and terms of any agreement. A mediator should work to ensure that a party does not sign an agreement if they are uncertain about its meaning or outcome.

**Impartiality**

Mediation requires a neutral third party. Because a good mediator engages parties and displays empathy, it is natural for a mediator during the course of a mediation to develop affinity for one side or the other. A mediator should be aware of these feelings and work to ensure that her words, actions, deeds, and management of the mediation remain neutral and that both parties are treated with respect. If the mediator cannot treat both parties fairly and equally, she should withdraw from the mediation.

If a mediator becomes aware of a conflict of interest, she should excuse herself from the mediation and request that the parties seek a different mediator. Issues that may be considered a conflict of interest include prior representation of a
party or social or business relationships with either party or the parties’ close relatives.

Self determination
Parties have ultimate responsibility for reaching agreement, not the mediator. The mediation process relies on the parties to come to a mutually acceptable agreement. They determine the scope of the agreement and decide if their interests have been met.

Fairness and equality
Mediation is an impartial process that accords each side equal treatment and respect. The mediator should seek to achieve procedural fairness, providing both sides adequate opportunity to participate in discussions and to influence the content and scope of any mediated agreement.

Cooperation
The mediation process is collaborative. Parties work together with the help of an intermediary to reach an agreement that satisfies their interests. As the mediation progresses and trust is built, a mediator may begin to step back and let the parties communicate directly.

Confidentiality
A mediator must keep confidential any information shared with the mediator by one party outside the presence of the other party. If the mediator believes the information would be beneficial to the mediation, she may ask the party to share the information in a joint session or seek the party’s approval to disclose the information.

While the parties may choose the extent to which they wish to keep the mediation confidential, the mediator should encourage them at a minimum not to disclose discussions about various alternatives and options. This allows both parties to communicate openly and reduce any fear that what they say will be used against them later. Parties may also choose to keep the contents of a mediated agreement confidential.
Ripeness

Not all conflicts are ripe for mediation. A primary concern is the parties’ willingness to participate. Mediation is a voluntary process and requires all sides to a conflict to work together to reach a mutually beneficial agreement.

A mediator should not try to force a party into mediation if they party is not ready. If a party is reluctant to attempt mediation, the mediator may try to better explain the process and address any particular concerns the party may have. Additionally, the mediator can reassure the party that it is a voluntary process and the party is free to leave at any time if he does not find it helpful. If the party chooses to proceed, the mediator may reiterate that the effectiveness of mediation relies on the good faith effort and participation of all sides.

To determine if the conflict is ripe for mediation, the mediator should also consider:

- Authority. Are the parties seeking mediation the ones able to effectively enter into an agreement? Do the representatives at the mediation have authority to bind the parties?

- Cooperation. Do the parties seem willing and able to work together to reach an agreement? Do both parties wish to resolve the dispute?

- Efficiency. Are the parties eager to reach an agreement in order to move forward? Is there a current claim in court that will not likely be decided in the near future?

- Uncertainty. Do the parties seem uncertain over what would be the likely outcome of arbitration or litigation?

- Core interests. Would a legal decision either through arbitration or litigation fail to address underlying concerns? Do the parties wish to build a stronger relationship?

- Power imbalance. Does one side appear to dominate over the other? Is one party much more informed and educated about the dispute than the other? Can the mediator provide a fair and equitable forum for both parties?

- Safety and security. Is one of the parties in an abusive relationship? Are there any concerns about violent outbursts or reactions? If the mediator has concerns for her or another party’s safety, then mediation should be attempted only upon careful consideration of safety, security, and the mediator’s ability to avoid a violent situation. If in doubt, do not mediate.
Stages of mediation

The mediation process proceeds through several stages, each of which can require different skills and attention from the mediator. Understanding these stages helps a mediator to employ the appropriate techniques and better guide the parties to a resolution of the conflict.

There is no clear point at which mediation should advance from one stage to the next. It is a matter of the mediator's best judgment. It may take a number of mediation sessions before a mediator develops a strong sense of when it is appropriate to move to the next phase. The good news is that if the mediator realizes she moved to the next stage too soon, she can always go back to an earlier stage.

Pre-mediation

Before the mediation begins, the mediator should take certain steps to ensure that the mediation proceeds smoothly. By being prepared, a mediator projects confidence to the parties and begins building trust with them both in her abilities and in the mediation process. Prior to mediation, the mediator should review basic mediation and communication techniques and reacquaint themselves with the stages of mediation. This is particularly true if it has been a significant amount of time since the mediator’s last mediation.

Logistics

The mediator should arrange various logistical details, such as scheduling the time and place of the mediation, and communicate this information to the parties. It is good practice to call the parties the day prior to the mediation to confirm their attendance at the mediation session.

Before the parties arrive to the place of mediation, the mediator should arrange the tables and chairs and if necessary provide flip charts, markers, pens, and
paper. The mediator should also determine if separate rooms are available to talk with the parties privately during caucusing.

Depending on the anticipated length and type of mediation, the mediator should describe to the parties when she intends to take breaks, where food and refreshments such as tea or water can be found, and where the bathrooms are located.

The mediator should familiarize herself with the facilities and determine if there are photocopiers or computers available if required. A photocopier may be helpful in order to give each party a copy of the finalized mediation agreement.

**Agreement to mediate**

Agreements to mediate can be either oral or written. The important thing is that both parties make a **voluntary choice** to attend mediation.

While a signed agreement to mediate is not always required, it helps protect the mediator from future problems and is strongly encouraged. The agreement to mediate should also explain that the mediator will not disclose information privately shared with the mediator by either party.

If possible, prior to the mediation the mediator should provide each party with a copy of the agreement to mediate. The mediator should briefly explain the agreement, ask each party to read through it on their own, and answer any preliminary questions that they may have.

Once the mediation session begins and usually during her opening statement, the mediator can again briefly go through the agreement to mediate and ask if the parties are ready to sign the agreement. The mediator and both parties should sign the agreement before the mediation proceeds. This starts to prepare the parties for signing the final mediation agreement together. It can be a useful first step in **building trust** between the parties.

If either party wishes to have an additional person attend the mediation with them, the mediator should ask the other side if they agree to that person attending the mediation. If the person is merely attending and not participating, then he or she does not necessarily have to sign the agreement to mediate. The
other party must, however, agree that the person may be present. If the person does participate, then that person should also sign the agreement to mediate.

**Confidentiality agreement**

The confidentiality agreement helps to assure parties that the information they disclose, options they consider, or offers they make in the mediation will not be shared with others or used against them in the future.

The confidentiality agreement can be either separate from or included in the agreement to mediate. It should specify that both parties agree not to share information from the mediation with people not attending the mediation.

Any additional persons attending the mediation, whether or not they are participating in the mediation, should sign the confidentiality agreement.

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**Opening Statements**

Once the mediation session begins but before addressing the substance of the dispute at issue, the mediator should take the time to explain her role, assist the parties in setting underlying procedural rules for the mediation, and encourage and coach the parties in making an opening statement.

**Mediator’s opening statement**

The mediator’s opening statement should **welcome the parties** to the mediation and congratulate them on pursuing an alternative to litigation.

Even if the parties are known to one another, the mediator should **introduce the mediator and parties**. The mediator should first introduce herself. Next, ask the parties to introduce themselves and how they would like to be referred to during the mediation. This should be very brief, not an opportunity for the parties to jump into the substance of the dispute. If they try to do so, be firm and reassure the parties that they will each be given an opportunity to address the substance in their opening statements.

If the agreement to mediate or confidentiality agreement have not already been signed, the mediator should address this in her opening statement and **seek the parties’ signatures**. The mediator may also address any outstanding concerns
either party may have before signing the agreements. If the agreements have already been signed, it is still useful to briefly review the agreements by highlighting the main points. The mediator should not proceed without both parties agreeing to the terms of the mediation.

It is important to educate the parties on the role of the mediator. The mediator has no power to make decisions for the parties, but is there to help the parties communicate with one another in order to achieve their interests. To do so, the mediator should ask the parties questions, seek clarification, and help them to assess their options.

Because many parties will never have attended a mediation session, the mediator should take time to explain the mediation process to the parties. It is a voluntary process that the parties can leave at any point. The parties maintain responsibility for reaching agreement. Neither side is favored in a mediation, which is an impartial process designed to ensure fairness and equality of the parties. The mediation process is confidential. The mediator will not share information provided in private by one party with the other side or people outside of the mediation.

In addition to mediation principles, share with the parties the typical steps of mediation. Mediation begins with opening statements and proceeds to address parties’ interests, discuss options, and build agreement, all with the goal of reaching a mutually acceptable outcome.

The opening statement is also when the mediator should convey basic logistical information to the parties and help them develop ground rules, which is discussed below. The parties should understand that the mediator will not tolerate interruptions or personal attacks because of their negative effect on the mediation process.

**Opening Statement Checklist**

- Welcome the parties
- Introduce the mediator and parties
- Sign agreement to mediate
- Sign confidentiality agreement
- Role of the mediator
- Explain the mediation process
- Provide logistical information
- Develop ground rules
- Encourage the use of basic negotiation skills
- Convey optimism in the parties and the mediation process
The mediator may take time to explain basic negotiation skills which she will be helping the parties to use during the mediation. Note-taking, “I” messages, active listening, and use of caucuses are examples of techniques to highlight.

Finally, the mediator should use the opening statement to convey optimism. Recognize the parties’ achievement in their willingness to attempt mediation and thereby assume responsibility for resolving the conflict. Reassure the parties in the mediation process and the mediator’s specialized training and experience.

During her opening statement, the mediator should avoid talking about the substance of the issues in conflict. Doing so can create perceptions of bias or favoritism towards one side or the other. It is acceptable to make generalized statements about the seriousness of the issue or the intensity of emotions involved, but avoid trying to summarize the dispute. Instead, focus on procedural issues by reviewing the information in the mediation agreement and emphasizing the mediator’s neutrality and the parties’ voluntary participation. Do not hesitate to use a checklist.

**Establishing ground rules**

Basic procedural rules based on mutual respect help to develop a safe and secure environment for the parties to communicate openly with one another. During her opening statement, the mediator may ask the parties for their suggestions on rules that they think would be helpful for the mediation process.

If the parties do not appear ready to discuss ground rules or are having a difficult time developing them, the mediator should make suggestions. The more common ground rules include:

- No personal attacks
- No interruptions
- No name calling
- No finger pointing
- Confidentiality of information shared during mediation

Because of its negative effect on mediation, destructive behavior should not be tolerated. The mediator should establish a firm stance against such behavior. Help to create an open and safe atmosphere for the parties to communicate and work collaboratively to resolve their dispute.
**Parties’ opening statements**

A party’s opening statement is its first opportunity to explain their view of the dispute. The mediator should not tolerate any interruptions from the non-speaking party during opening statements. It is critical for the mediator to establish a certain level of control at the onset of the mediation and **interruptions should be dealt with promptly**. Remind the interrupting party that they will have a full opportunity to speak as well.

The mediator should **coach the parties** on what to include in their opening statements, asking them to describe their underlying interests and what they hope to gain from mediation. To avoid perceptions of partisanship, the mediator can tell the parties that she traditionally asks the party who initially brought suit or sought mediation to give the first statement.

The mediator should **set a time limit** for the opening statements. Usually two minutes is sufficient for smaller disputes, while up to five minutes may be appropriate for larger disputes. Many parties will not use their full allotted time, while others will try to speak beyond the time limit. The mediator should gently interrupt when the limit is reached, remind the party of the time limit, and assuring them that there will be plenty of time during the course of the mediation for them to share their additional concerns. It may be appropriate to give the party an additional 30 seconds to complete any thoughts or to highlight the interest they believe to be most important.

The mediator should **listen carefully** while a party is giving its statement because the party will often identify its position or interests. Even if the mediator thinks she already understands the conflict, the mediator should approach the party’s opening statement as if it contains new information that will educate her and the other party.

The mediator should take note of the party’s level of emotional involvement in the dispute, a critical aspect of any dispute that can prevent resolution if not addressed appropriately. Oftentimes a party will use the opening statement to express their **feelings and frustrations** rather than focusing on their basic interests. This is okay. The role of the mediator in such a situation is to help the parties express themselves in a meaningful way. The mediator should provide a
safe and controlled atmosphere, preventing the party from attacking the other side. This manual provides techniques for dealing with emotions in Section 4.

It helps for the mediator to take notes of the issues identified by the parties during their opening statements. The mediator can refer to these notes in subsequent stages and revisit issues that have not been adequately addressed.

### Identifying Interests and Building Understanding

Throughout the mediation, the mediator will draw on the skills and techniques outlined in Section 4 to help a party clarify not simply its own needs and interests, but also those of the other party. The mediator assists each party to understand the concerns of the other side so that they can reach a mutually acceptable, collaborative agreement.

Once the parties have completed their opening statements, the mediator should have a basic understanding of the conflict and what each party hopes to be the result of the mediation. The mediator can then ask each party questions to clarify their interests. It also gives the mediator an opportunity to identify the controversial issues, those that already have a common understanding, and those that should be dealt with first in the mediation.

It is often useful for the mediator to **sum up** what she understands to be the parties’ primary concerns, interests, and points of agreement. The mediator should welcome each party’s feedback and input on whether she correctly understood their needs or if there are additional concerns that she did not address. The mediator can work with the parties to **set an agenda** for the mediation, identifying priority areas and the order in which they will be addressed. If parties cannot agree on an order of discussion, the mediator should reassure them that all issues will be addressed. Indeed, a mediation agreement cannot be reached unless both sides are satisfied that all of the necessary issues have been resolved.

Oftentimes a party during its opening statement will set out its position for the negotiation and not explain its interests. By **asking questions**, the mediator helps clarify the basic interests of the parties and distinguish their needs from their positions.

Common questions to ask each side include:

- What do you hope the result of this mediation to be?
- What will this provide you?
- How will this improve the situation for you?
At this stage, the parties may be quite hostile to direct communication with one another. Depending on the parties’ level of cooperation, the mediator may deter the parties from addressing questions to one another and create a temporary wall between them. The wall is used by the mediator to facilitate communication by creating a safe environment for the parties to speak openly with the mediator. As the mediation progresses and tension between the parties decreases, the mediator should break down this wall and encourage the parties to communicate directly with one another.

As a neutral third party, the mediator acts as an intermediary and can ask specific questions of each party that the other party would not be able to ask. It is helpful for the mediator to consider what information it may be important for the other side to understand when she is communicating with one party. In this way, the mediator can draw out information that it is important for the other side to hear.

This exercise is not simply for the benefit of the mediator. By taking an interactive approach, using reflective listening skills, asking open questions, and reframing a party’s response, a mediator gives the other side a chance to hear, perhaps for the first time, the other party’s concerns and hopes for resolving the conflict.

Throughout this stage, the mediator should be sensitive to the parties concerns about mediator neutrality and work to build trust. Be sure to spend equivalent amounts of time with both parties so that neither side feels neglected. To do this, the mediator may choose to clarify the interest of one party, and then turn to the other party to clarify one of its interests. By going back and forth, both sides are given equal opportunities to speak and be heard. If one side appears to have much more to say than the other, it is still important for the mediator to at least provide time for the other side to speak. The mediator can also try to draw out information from this party by asking open ended questions.

By the end of this stage, the parties should have a good understanding of one another’s basic interests and concerns. Tension between the parties should have dropped and the
parties may be ready to address one another directly without hostility. The parties still may not agree on what happened in the past, but both are prepared to move forward. If there are particular areas that remain in dispute or create tension, do not be afraid to revisit them.

Before moving to the next stage, the mediator should acknowledge the progress and positive efforts of both parties in understanding each other’s concerns and in taking responsibility for clarifying their own interests. The mediator can help create a cooperative atmosphere by pointing out areas of agreement and mutual interests.

**Exploring and Developing Options**

Once the mediator feels that both sides have sufficiently identified and clarified their basic needs and concerns, she may help the parties to develop options that satisfy both sides’ interests. The parties should show signs of cooperation and collaboration at this stage. Because the parties are working towards a mutually acceptable outcome, the mediator should encourage them to consider the other sides’ interests when developing options.

A particularly useful technique for developing options is **brainstorming**. During brainstorming sessions, the mediator should ask both parties to suggest possible options for reaching agreement. Encourage the parties to think creatively and allow them to express options that on their face may not even seem likely or realistic. This should be a free flow of ideas. The mediator should not allow the other party to voice judgments about the options or discourage this free flow of ideas.

Brainstorming is a time for both parties to safely explore ideas without committing to anything. Do not attempt brainstorming if tension between the parties remains high. In such a situation, the parties will be very defensive and unable to listen to creative options without making snap judgments.

Many of the options developed during brainstorming may not be adopted in the agreement, but certain aspects may plant the seeds of a negotiated resolution.
Mediators can encourage the parties to think of ways of resolving their dispute beyond compromise by helping them evaluate options in terms of **mutual gain**. Assist the parties in developing options that meet their interests, not simply their stated positions. Positions often do not allow for creative solutions because they limit a party to one particular outcome. By contrast, interests can be met in a variety of ways and both sides can gain more from the mediation than what they would get by sticking to a certain position.

During this stage of mediation, the mediator should remind parties that options being developed are only possibilities. Help the parties to consider a variety of possible options and solutions. At times it may be necessary to caucus with the parties individually in order to **explore various options** presented. There may be underlying concerns that a party does not want to share in a joint session that prevent it from adopting a certain option and a mediator should be sensitive to this.

Once parties appear satisfied with the options developed, the mediator can move the mediation to the next stage of building agreements. Before doing so, however, the mediator should again draw attention to the progress that the parties have made. Thank them for their efforts to work cooperatively through mediation in developing options that can satisfy both sides.

### Building Agreements

Once the parties create mutually acceptable options, they can move to building an agreement. At this stage of the process, the mediator may notice that the parties have different understandings of how the various options would actually be implemented. There may be ambiguities in language or the option may be too vague. The mediator should work with the parties to **overcome obstacles** using the techniques provided in Section 4.

It is very important that the mediator not try to impose her view of the desired solution on the parties. Often this can be very difficult. Even if the mediator has a good idea of what the final agreement will look like, it may take the parties much longer to reach a similar outcome. This is okay. Remember that the mediator’s role is to help the parties develop an agreement that satisfies their interests, not to tell them how to solve their conflict. The mediator is a procedural guide for the parties, but does not dictate the substance of an agreement.
Building agreements can be a particularly intensive period of the mediation. Parties are faced with the reality of their situation and are being asked to make hard decisions. They may start to reevaluate their options or return to an earlier position.

Should the parties become stuck on a particular issue, the mediator should help them to break through impasse. The mediator may find that caucuses are a useful tool. She can speak separately to the parties and ask them difficult questions that would not be appropriate in front of the other party. Use questions designed to get a party to think about the weakness of its position or the things to be gained from a mediated agreement.

Based on the trust the mediator has developed throughout the mediation, she can challenge parties in their assessments and provide a reality check on their positions. The mediator can help them consider what would happen if they did not reach agreement and test their certainty about a particular outcome. She may remind them that the alternative to mediation may be court litigation in which case the party no longer has a role in making a final decision.

The mediator may also shuttle hypothetical settlement possibilities between the parties. The mediator should not transmit any settlement offers to the other party without the explicit consent of the party making the offer. The mediator can, however, ask that party if she can present the offer to the other side as a hypothetical settlement option. Various options can be presented as “what if” questions to each side. This provides an open forum for discussion without dire consequences should the option be rejected.

Once the parties appear to have selected an option and to be in agreement on what that option entails, the mediation can move to the concluding stage.

**Concluding the Mediation**

The final stage of mediation involves putting the parties’ agreement on paper and clarifying any remaining points. If new issues come up at this stage, the mediator may need to revisit earlier stages in order to resolve the dispute.

The language of any written agreement must be agreed to by both parties. At times, the mediator may find that the final agreement may depend on one or two words that cannot
be agreed upon by the parties. Continue to work with the parties, using the various tools and techniques to break impasse.

Once the parties approve the final language of the agreement, the mediator should read through it with the parties to make certain that it encompasses their agreement. The parties should then be asked to **sign the agreement**. Once signed, both parties should be given a copy and the original retained by the mediator for her files or those of the mediation center.

Before ending the mediation session, take the time to again acknowledge the parties’ efforts in reaching agreement. **Congratulate the parties** on taking responsibility for resolving their dispute personally. Provide positive feedback on their choice to attempt mediation rather than pursue more costly, less certain alternatives.

If the parties do not come to a final mediated agreement, acknowledge that no agreement has been made. The mediator should take the time to narrow the areas of disagreement between the parties. Help them to address outstanding issues by setting up a process for resolving them. Most importantly, encourage the parties to **continue working together** to resolve their dispute and congratulate them on their efforts.
Success in mediation should not be measured only by whether the parties signed a final written agreement. A successful mediation can take many forms. Parties may not wish to have a written mediated agreement, instead favoring an oral agreement. They may only reach a partial agreement, with certain issues remaining in dispute. Mediation may help teach the parties how to communicate and negotiate directly with one another without the need for a mediator. Even if the parties choose to pursue litigation, the mediation may have assisted them in clarifying their interests or better articulating their concerns and views about the conflict to the court.

**Purpose of a written agreement**
A written agreement clarifies what the parties have agreed to and provides both sides with a record of that agreement. As the final result of mediation, the agreement should resolve the immediate dispute. If possible, it should also address foreseeable related disputes in order to minimize the chance that they will occur in the future.

**Key ingredients**
If the mediation does result in a final written agreement, a mediator should make sure that the parties address any ambiguities in the agreement. This is particularly true if the mediator notices that one party seems to have a different understanding than the other of what is required by the agreement. As in the larger mediation process, the mediator should assist the parties in reaching a common understanding on terms of the agreement.

A **clear written agreement** can help the parties to avoid future disagreements and disputes regarding its terms. The mediator and parties should consider the following ingredients for each written agreement:

- Names of the parties
- Party obligations
- Dismissal of legal action in consideration for specific payments or performance
- Date and time for required performance
- Terms of any payment, including date due, place of delivery, and form of payment
Binding only on the parties signing the agreement

Signatures of parties

Result in case of a breach of the agreement, such as returning to mediation or seeking damages

If the parties do come to an agreement but do not want to sign a formal writing, this is acceptable. The mediator should still encourage the parties to write out the terms of the agreement even if they choose not to sign. The parties can then reference the written terms rather than relying on their memory.

The mediator should retain the original of the final agreement for her files or those of the mediation institute. Both parties should be provided copies for their records.

A sample final mediated agreement form is included in the appendices.
The mediation process requires a mediator who is able to draw on a diverse range of skills and techniques to help the parties move forward in reaching an agreement. Developing these skills and techniques takes practice and experience.

This section is designed to be a resource for mediators. Mediators should review this information and re-familiarize themselves with the various techniques during the pre-mediation stage. This is particularly true if there has been a significant amount of time between the mediator’s last training or mediation and her upcoming mediation.

Mediators should also keep in mind that most if not all of these techniques can be used at all stages of the mediation. Mediators may find, however, that they rely on particular techniques more than others during certain stages. For example, clarification, ways for dealing with emotions, and “I” messages often play a prominent role when identifying interests and building understanding. Objective criteria, by contrast, help parties to develop realistic options.

### Mediation Skills and Techniques

#### Co-mediation

Co-mediation is a technique where two people work together to mediate a dispute. It can be very useful during long, emotional, or unusually complicated mediations.

Single person mediation has several disadvantages that the use of a co-mediator can help address. For example, co-mediators can help one other when they feel stuck or confused about issues. One mediator can step in if it appears that the mediation is headed down an unproductive path. A co-mediator provides an additional level of experience and knowledge to inform the mediation. The two mediators can model good behavior and communication to the parties.

Whenever possible, co-mediators should talk to one another and plan roles that each mediator will play. One mediator may take the lead in asking questions, while the other takes notes and writes down major points on a blackboard or flip chart. The non-lead
mediator provides an additional perspective and can note things that the lead mediator may have missed. The co-mediators may also work out a system whereby each mediator may take the lead as the other becomes exhausted or unable to identify a way forward.

Co-mediation can be a useful tool for creating **gender equality** in the mediation. If a dispute is between a male and a female, then a single mediator would result in either two males or two females facing a single female or male. This can create the perception of bias, whether true or not. By having two mediators, one male and one female, the mediation achieves gender equality and avoids this particular pitfall.

Keep in mind that co-mediation has its **disadvantages** as well. It may cost the clients twice as much, depending on payment plans, and be unnecessary for relatively simple mediations. The mediators may have conflicting styles or they may be deferential to one another such that the mediation has no sense of direction or control.

A great advantage of co-mediation for new or inexperienced mediators is that it provides the co-mediators an opportunity to debrief and **learn from one another**. They should take the time after each day of mediation to critique the mediation, identifying techniques that worked or did not work, difficult issues, or new strategies so that the co-mediators can work better together. After particularly emotional or difficult issues, the co-mediators can talk to one another and help relieve the stress of such mediations.

Co-mediation also gives each mediator the opportunity to observe the style and techniques of another mediator. By drawing on their knowledge of other mediation styles, mediators in turn are able to conduct better self assessments when they are the sole mediator.

**Separating interests from positions**

When parties begin mediation and give their opening statement, often they will take a position on their preferred outcome. A skilled mediator will help the parties look beyond their positions to determine their **underlying interests**. By addressing their interests rather than positions, the parties have greater room to negotiate and yet maintain a satisfying outcome.
Parties use a position as a bottom line. They can be entrenched and generally do not take into account the concerns of the other party. Many times the party has based its position on unclear or partial information.

Positions may be based on feelings, needs, concerns, fears, values, and beliefs. Parties may not have a strong understanding of these underlying interests that motivate them to take a particular position. The mediator should work with parties to help them identify and prioritize the interests that have led them to take a particular position.

Once a party understands its basic interests and those of the other party, the two sides can achieve a mediated agreement that meets these interests. In part, this is because both sides may give greater priority to different interests, which creates room for negotiation. This is called principled negotiation, or collaborative bargaining, and can result in both sides getting more out of an agreement than their positions would otherwise have allowed.

Positional or distributive bargaining, by contrast, is rigid and inflexible. It leaves little room for creative problem solving. A side may feel like it wins or loses based on the extent to which it achieves the stated position. Generally, the two sides each make concession after concession and they end up each settling for less than what they hoped to achieve.

Though positional bargaining may come into play in any negotiation, particularly monetary disputes, the mediator should help each side understand its underlying interests and explore ways that both sides can be satisfied. Based on their interests, the parties may develop trade offs of things that are less important to one side than the other. The mediator can:
- Encourage parties to talk about what they need, not what they want
- Ask the parties to explain what is important to them about a particular topic
- Question the parties on why the issue has become so contested
- Help the parties understand the dispute from the other side
- Ask the parties to develop a list of things that concern them most and have them explain why
- Explore with the parties their view of worst case scenarios for a particular topic
Reassure parties that they are not being asked to compromise their values or beliefs, but to identify ways to meet their needs and concerns.

Remind the parties that a mediated agreement must be reasonable to both sides.

**Separating people from the problem**

One of the mediator’s challenges is to help the parties communicate with one another so that they reach a mutually acceptable outcome. This can be particularly challenging when the parties have a long history of distrust or when their personalities clash. The mediator should try to direct the parties’ attention so that they are creating options that address the nature or substance of the conflict between them rather than focusing on what they dislike about the other person or reasons why that person might be wrong.

In numerous mediations one party will have a certain perception of the other or there may be strong emotions involved. The mediator should help the parties **recognize and acknowledge their perceptions and emotions**. Take the time to deal with emotional issues when they arise to allow the parties to move beyond them and rationally work together to meet their interests. If a party feels that its emotional needs have been understood, it will be more willing to develop options that address the substance of the dispute at issue.

**Best alternative outside of mediation**

To help the parties stay focused on developing realistic options, the mediator should work with parties to understand their best alternative outside of mediation. This is the strongest option for the party to meet its interest without mediation. It is oftentimes called a BATNA, or Best Alternative To a Negotiated Agreement. However it is called, the point is to get parties to think about what the likely outcome would be if they did not reach a mediated agreement. In many cases, it may be pursuing a court-based remedy or maintaining the status quo.

Parties will often be hesitant to share this type of information in front of the other side. If the mediator feels that a party is being unrealistic or is focusing on a certain position rather than its interests, the mediator can **meet separately** with the parties to discuss and explore their BATNA.

A party may have an unrealistic idea of what it can achieve outside of mediation, which in turn affects its negotiation position during mediation. Question the party about what it
thinks it would be able to gain away from mediation. Ask about the downsides of such an alternative. Provide a neutral assessment of the party’s likelihood of achieving this option.

The mediator’s role is to **explore any uncertainty** in a party’s understanding of its BATNA and the BATNA of the other party in order to open up negotiating space. Even if a party has a realistic view of its own BATNA, it may not have thought about the other side’s walk-away alternative. The mediator may need to help the party consider the strength of the other side’s BATNA in order to encourage the party to be more flexible in its negotiations.

If a party has a very strong alternative outside of mediation, there may be little incentive for it to negotiate. Remember that mediation is a voluntary process and that the party may ultimately choose to pursue this alternative outside of mediation.

**Objective criteria**

Outside information may be used to help parties develop a fair negotiated agreement. Both parties may have their own idea of what would be a fair outcome—usually greatly favoring their own side. Encourage the parties to seek objective criteria that can help them understand what other people have considered fair in similar circumstances.

This information comes in a variety of forms. In the negotiation over the price of a car, it may be what other people have paid for a similar car. It may be the flip of a coin to determine who will sign an agreement first. It could also be the opinion of an expert about what is the normal course of dealing in such a situation. Another possibility is a prior court decision. All of these provide an alternative that is not based on the subjective perceptions of either party.

Objective criteria can be used to help motivate a party who is reluctant to budge from its unrealistic position. It becomes harder for that party to maintain that its position is fair when it is referred to information provided by an outside source.

An important point to remember is that using objective criteria is a negotiation technique, not the ultimate solution for a mediated agreement. Do not let parties establish a position based on the objective criteria. Rather, encourage them to keep an open mind and consider the information as it pertains to meeting their underlying interests.
Note-taking

Mediators should get into the habit of taking notes when they are conducting a mediation session. It is easy to become overloaded with issues from the parties and forget particular points or concerns. Rather than relying on memory, the mediator can use references notes to identify areas that have already been addressed and those that still need attention. Any notes taken should be destroyed once the mediation is concluded.

The parties may show discomfort with the idea of notes being taken of what they said. They may be concerned that what they said will be used against them in the future. The mediator should inform the parties, usually in the mediator’s opening statement, that she will be taking notes. Stress to the parties that the mediator’s notes are destroyed at the end of the mediation session.

Notes can also provide a helpful reference for the mediator when she is not sure where to go with the mediation. The mediator can refer to her notes and give a brief summary of the issues covered. In addition to providing a bridge to a new topic, this reiterates to the parties how far the mediation has progressed and what is left to be covered.

The mediator should also inform the parties that they can take notes as well. This can be helpful in deterring the parties from interrupting one another. Rather than interrupting, ask the parties to write down what they would like to say. That way they can be certain that they will not forget their point and it can be returned to during the mediation session. The mediator should have extra notepads and pens available for the parties.

In addition to individuals taking notes, the group can take notes together using a flip chart and markers. This can be particularly useful when parties are identifying interests and developing options. It also helps keep the parties and mediation on track by providing something to focus them on the main concerns.

The mediator should be responsible for jotting down notes (this is one area when a co-mediator is very helpful), but needs to continue showing the parties that she is listening. Remember to make eye contact and keep the notes short. Here are a few tips for taking group notes:

- When a party states its position, work with the party to identify and write down its interests
- Use bullet points rather than numbers when making a list because numbers can suggest priorities
Try to blend interests and options onto one page rather than listing them by party in separate columns or separate pages

Balance the number of notes so that there is a roughly equal number from both sides

Mediators should also **exercise caution** when taking their own notes. Keep them where the parties cannot see them. Be certain that the parties cannot see any notes that may prove divisive or suggest bias. The mediator should take any notes with her when she leaves the room. Failure to do so may compromise the confidentiality of the mediation session. This is all the more important when the mediator takes notes during a separate caucus with a party since this information is not to be shared with the other side except with the caucusing party’s permission.

**Caucus session**
A caucus is a **private meeting** between the mediator and one of the parties or a co-mediator. It may be used when emotions are high, when the parties appear to be at an impasse, or if the mediator perceives that there is important information that one party does not wish to share with the other party.

A caucus can be held with the parties at any point in the mediation process. The mediator can use the caucus to gather information that a party would not otherwise share and to probe a party’s understanding of various options. In order to maintain neutrality, the mediator should alternate caucus sessions with each party. Try to maintain an equivalent amount of time. One way to do this is to inform the parties that you will meet with each of them for a set number of minutes.

During each caucus session, the mediator should take the opportunity to remind the party that information shared during the private meeting is **confidential**. The mediator cannot share any information privately conveyed to her unless she has the explicit authorization of the caucusing party. At the end of the caucus session, take the time to briefly summarize the information that the mediator can or cannot share with the other side.

If the mediation has become overly emotional and heated, the mediator may ask to caucus with each party. Take this time to **explore emotions** and feelings involved. Show empathy, but do not take sides. Let the parties know that you understand their feelings and concerns. A party is more likely to be ready to move onto identifying
underlying interests and developing options after they feel like they have been heard. Once the party has vented its frustrations and feelings, help the party to focus on their interests.

If the parties seem to be at an impasse, the mediator should consider using caucusing to help the parties move forward. By meeting privately, the mediator can question each party about underlying assumptions and identify misperceptions. The mediator can help clarify misunderstandings or explore new options with the party that they are not yet ready to talk about with the other side. The mediator may also test the reality of each party’s BATNA and challenge them to consider the various options from the perspective of the other side.

If a party is behaving inappropriately during the mediation, a private caucus is the appropriate place to bring this to their attention. Do not embarrass the party or scold them. Instead, build up the party’s self confidence so that they are encouraged to work productively to meet their interests.

A common mediation technique is to use a caucus to explore a particular option with the party. The mediator then shares this option with the other side as a hypothetical, presenting it as her own idea. Before doing so, be sure to get the caucusing party’s approval to do this. Having the mediator present the option creates an emotional buffer for the other side. Often they will be more receptive to an option if it comes from a neutral third party. Even if the option is not accepted, it may generate discussion of new options that the mediator can then take back to the original party.

Co-mediators may caucus to develop strategies for moving the mediation forward. They can share information, generate insights, and clarify roles. It is also a useful time for venting frustrations regarding the mediation. It is better to talk about this frustration with another mediator than allow it to taint the mediation process or the mediator’s neutrality.
Communication Skills and Techniques

Forming questions

Questions are one of the mediator’s most important tools when facilitating a mediation between parties. The mediator uses questions to draw out information, understand the parties’ assumptions, help them clarify issues, test the reality of various options, and consider the other side’s point of view.

Questions should be employed at all stages of the mediation, when meeting as a group, and when speaking separately in a caucus session. A general rule of thumb for mediators is that questions should be very broad at the beginning of the mediation allowing the parties to share the maximum amount of information. Questions often narrow as the mediation progresses to help the parties focus on particular issues and become more solution oriented.

Questions can be phrased in numerous different ways. The more common types of questions and examples are provided below. Keep in mind, however, that there are no clear lines between these types of questions and they often overlap the various categories.

Opening questions

Opening questions are primarily used by the mediator following the parties opening statement. They help the mediator identify a party’s interests and understand what they hope to gain from a mediated agreement. They give the party an opportunity to provide information that the mediator may not have thought to ask about. They give the party immense leeway in the type and content of their response.

- What do you hope to gain from mediation?
- What are your basic concerns?
- How do you perceive the current situation?

Informational questions

Informational questions are broad questions that are designed to give the parties an opportunity to elaborate, explain, or provide background to a situation. They allow the mediator to gather information. Similar to opening questions, they are phrased broadly. Informational questions differ from opening questions, however, in that they focus on a particular area or topic. Avoid asking “why” questions
when gathering information because they can make a party defensive. Instead, ask questions that encourage the party to provide more details.

- Can you elaborate on what you just said?
- Can you tell me more about that?
- What were some of the circumstances?
- Where did that happen?

**Clarifying questions**

These types of questions are used to clear up ambiguities about information that a party has provided. They can also help resolve misunderstandings, clear up misperceptions, or draw out information that can build empathy between the parties. Clarifying questions are generally more specific than informational questions.

- What do you mean by that term?
- Could you be more specific?
- Would you be able to explain what you just said a little more to help us understand?
- How would that change things for you?
- Who are you referring to in that statement?
- Can you help me understand better how that relates to our discussion?
- If both sides agreed to this, how would things work?
- What would be the cost of your proposal?

**Problem solving questions**

The mediator can use problem solving questions to encourage the parties to develop options or consider options hypothetically. They draw the parties into a dialogue about the way they hope or think the situation could be like going forward.

- What might be a possible solution to this conflict?
- How would this option work for the other party?
- What would happen if…?
- What option do you envision for resolving this?
- How could both sides resolve this?
- Are there ways this option could be refined to address your concerns?
**Questions testing options**

Once parties develop options, they may become attached to them and not understand why the other party will not agree. Alternatively, they may overestimate the strength of their position in the mediation. The mediator can phrase questions in such a way that they help the party to think more realistically about the options and possible solutions.

- If you were on the other side, would you accept this option?
- Assuming that the other party does not agree to this, would you feel comfortable relying on your BATNA?
- How do you think the other side would react to this suggestion?
- How does this option help meet the needs of the other side?
- Are there aspects of your proposal that might not work?

**Questions to avoid**

Mediators should try to phrase their questions simply. Do not try to cover several issues in a single question. Instead, take the time to explore each issue individually. Avoid leading questions. These types of questions direct the party to a specific answer and can make them feel trapped or obligated to answer in a certain way.

Mediators should generally favor asking questions that can be answered in a variety of ways and give the parties room to explain or clarify their answers. An exception to this is if a party tends to volunteer a large amount of information and ends up dominating the mediation. At certain points with these types of parties, the mediator may choose to ask closed questions calling for “yes” or “no” responses.

**Active listening**

Active listening requires the listener to focus her attention on what the speaker is saying, restate important content, and reflect emotions. It gives a mediator the opportunity to show the speaker that she understands both the content of the statement and the speaker’s feelings and to clarify misunderstandings. This technique is useful in situations when one party expresses strong emotions, when there are strong differences of opinion, or when there are issues that need clarification.

During active listening, show the party that the mediator is paying attention. If the mediator did not understand or did not capture the content or emotion when reflecting
back what was said, the party will generally take the opportunity to clarify or correct the mediator. This is part of the clarification process. If the mediator did not understand completely what was expressed, there is a good chance the other party did not either. Take the time to clarify important points, even if it is a difficult issue.

Active listening also helps the non-speaking party to hear what the other side has to say. The party gets to hear the same information from a neutral third party when the mediator reflects back the content and emotions. This can reduce tension between the parties and make them more open to direct communication.

**Give full attention**

It is easy for a mediator to become distracted or to begin formulating a response while a person is speaking. When actively listening, the mediator should focus her complete, physical and mental attention on the speaker and really try to listen to what is being said. Do not just assume that the speaker has already shared the information. The mediator should try to give her full attention by making eye contact and using body language to show that she is listening.

**Restate content**

Once the speaker has finished, the mediator should restate in her own words what she heard the party say. The speaking party may use judgment words, such as describing the other side as greedy. It is not the role of the mediator to agree, disagree, judge, or correct the party, but to restate the information in a neutral manner. The mediator’s restatement should be simple and to the point. Do not try to capture all of the details. Instead, highlight the main point or points.

The goal of actively listening is to show the speaker that he has been understood. It is not important whether or not the mediator agrees with what is said. The mediator should, however, try to be aware of her own opinions in order to avoid injecting judgment in her restatement.

**Reflect feelings**

When restating the content of the statement, the mediator should also try to capture the speaker’s feelings or emotions. While a party may include such information in their statement, such as saying “I was upset when…”, the mediator should also pay attention to body language and the tone of the speaker’s voice. Watch for clues in how the parties speak and act, not just what they say explicitly
Try to identify the emotion involved and reflect this information back to the party when restating what was said. Take care to acknowledge and appreciate the emotions involved. Show the party that their feelings are understood.

“I” messages
A mediator can encourage each party to use “I” messages as a way of describing the impact of the other party’s actions. They encourage the speaker to take responsibility for his own thoughts and feelings. It allows the parties to continue to dialog by focusing on the behavior that affects them rather than the character of the other party. By softening a statement, it makes the other party less defensive and more willing to listen, even if that party does not agree with what is being said.

There are three parts to an “I” message: feeling, action, and effect. An “I” statement expresses the feeling or emotion the speaker experiences when affected by a certain behavior or action. It also includes the effect on the speaker, or the reason the behavior causes such a feeling.

By contrast, a “you” statement is directed towards the other person and can place them on the defensive. “You” statements often include orders, commands, blame, if-then statements, or telling the other side how to change their behavior. “You” statements can put the other side on the defensive and make them resistant to change.

<table>
<thead>
<tr>
<th>“I” Statements</th>
<th>“You” Statements</th>
</tr>
</thead>
<tbody>
<tr>
<td>I get frustrated when loud noise prevents me from sleeping at night because I have a hard time at work the next day</td>
<td>Your loud music keeps me up at night and it is driving me crazy</td>
</tr>
<tr>
<td>It upsets me when I am accused of not making payments because it affects my reputation</td>
<td>You should stop telling people that I never paid you</td>
</tr>
</tbody>
</table>

“I” messages are useful when there are strong emotions involved that prevent the other party from hearing the effect that their actions have on the other person. They help the other side understand the reason that the speaker would like to see a change of
behavior or resolution to the issue. This can build empathy between the two sides and reduce tension.

**Reframing**

Mediators use reframing to make a party’s subjective statement, which may have a negative connotation, more **objective**. The mediator softens the party’s statement so that the other side can hear and understand what is being said. Without reframing, the other side may have a defensive reaction and be unable to listen to what is being said.

The mediator should try to reframe statements by a party that are accusatory, judgmental, or biased, ones that blame or attack the other party, or ones that are emotionally charged. By taking out the negative aspects, the mediator can transform the statement into a neutral or positive contribution to the mediation. This helps separate the people from the problem by focusing attention on the parties’ interests, not personal animosities.

**Examples**

<table>
<thead>
<tr>
<th>Party A’s Statement</th>
<th>Reframed Statement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party B lied to me when he said he would call me if there was a problem with my payment</td>
<td>You are confused about why you did not hear from Party B about this payment</td>
</tr>
<tr>
<td>Party B always harasses me about paying the rent when...</td>
<td>When Party B asks you about the rent...</td>
</tr>
<tr>
<td>I hate having to hear about this same problem over and over</td>
<td>You are frustrated that this issue arises frequently</td>
</tr>
</tbody>
</table>

Reframing can be used throughout the mediation. It can be very useful after opening statements when the mediator is assisting the parties to understand each other and identify interests. Reframing helps to maintain a **positive atmosphere** during this stage, which can be emotionally charged. The mediator should take care to ensure that she still captures the essence of what the party is saying. The mediator can always ask the party if she correctly restated what the party was trying to say. Even if the mediator does not ask, the party should be allowed to clarify. Do not be afraid to reframe the party’s clarification if the statement requires it.
Validation and empathy

An important aspect of mediation is validating the parties’ concerns and showing empathy. Unfortunately, this can often be overlooked by mediators in their quest to maintain neutrality. A good mediator understands that she can be empathetic while remaining impartial.

Validation occurs when the mediator verbally recognizes a party’s feelings and emotions. Even if a mediator precisely summarizes all of the main points of what the party said, that party still may not feel like they have been heard until their feelings have been validated. Validation reasserts the self-worth of the individual and lets that person know that their views are valid. It helps a party move forward by releasing them from unacknowledged emotions that may be holding them back. It also creates a more open, collaborative atmosphere by reducing tension.

A mediator should be careful not to take sides when validating. Use validation for both parties. Let them know that their points of view and feelings are equally legitimate and respected. Examples of validating comments include:
- You have tried hard to be a good renter
- You feel frustrated that you have not been able to resolve this earlier
- From your point of view…

Empathy is closely linked with validation. The mediator lets a party know that she understands how they feel when she shows empathy. Validation can be used to show empathy.

Empathy is not the same as sympathy, which may make a mediator appear to favor one side. Empathy portrays awareness of how an individual feels. In contrast, sympathy tends to show support for a person’s feelings or suggest that the mediator feels similarly. The following types of phrases may be used to show empathy:
- It sounds like this has been difficult for you
- I can see that you are upset about this
- It is difficult for you deal with this conflict when so many other things are going on in your life right now

Clarification

Clarification helps the mediator to understand a party’s underlying interests and develop options. It is used throughout the mediation process and can assist the parties in
understanding one another better. By giving a party the chance to clarify, the party can clear up misperceptions, statements, and interpretations. It can help the parties to see an issue from the other party’s point of view. Clarification is often done through the use of questions as discussed above. It can also be accomplished by giving a party the ability to complete statements without interruption.

**Saving face**

If a party is concerned about how a final agreement might appear to friends, family, or others outside of the mediation, the mediator should work with the parties to develop ways that the party can save face. It helps a party come to an agreement and be satisfied with a mediated solution by addressing that party’s psychological needs.

Saving face can be accomplished by building points into the agreement that bolster the party’s character or reduces humiliation. A common example is when a party seeks a public, or even private, apology from the other side. The parties can work out the specific wording of the apology and include it in the agreement.

**Balancing power**

Power comes in many forms. In mediation, the parties must be able to make the decisions and choices that meet their interests. With that in mind, mediators should be sensitive to power imbalance at the mediation that may lead a party to go against its interests or fail to have its needs met. Recall that self determination is one of the principles of mediation and if this is not present, then it is not a true mediation.

One of the most common examples of power imbalance is when one party tries to dominate the mediation, either by constantly interrupting or by talking for an extended period of time. In these situations, the mediator needs to assert control over the mediation process. Enforce the ground rules set at the beginning of the mediation. Give equal time to both parties. If one party is hesitant to speak, ask open ended questions that draw out information or consider having a caucus session to give that party a chance to speak openly.

Mediators should be particularly attentive to power imbalance in cases where there has been past emotional or physical abuse. In these situations, mediation may not be appropriate if one party is unable to assert its interests due to intimidation or fear. If mediation is possible, the mediator may choose to conduct the majority of the mediation through caucus sessions and thereby minimize any perceived threats. Ask the party if
they feel intimidated or if they are making concessions out of fear. Help build up that party’s self esteem by complimenting the efforts they are making and reiterate their ability to make a decision that meets their interests. If the party is ultimately unable to make self determined decisions, then the mediator retains the ability to end the mediation.

Building consensus
Mediation is designed to help parties work together to reach a mutually acceptable final agreement. To accomplish this, the mediator should work to build consensus among the parties by identifying common ground. This can be done at all stages in the mediation process. During the mediator’s opening statement, for example, she may point out that the parties have taken the first step by mutually agreeing to mediation.

Noting areas of agreement between the parties helps build understanding. However, parties may have a difficult time seeing that they are in agreement on certain issues because of emotions involved. The mediator should not try to force the parties to acknowledge that they have common ground. They may not be emotionally ready to accept this. Be sensitive to the party’s feelings and emotions and use validation. Parties are more willing to see common areas once they feel validated.

As the mediation progresses, the mediator should continually build upon areas of agreement and narrow areas of disagreement. The mediator should challenge parties’ assumptions if she knows information that would suggest greater consensus than the parties currently believe exists.

Breaks and silence
Mediators can use breaks in a variety of ways. If the mediation atmosphere is emotionally intense or a party is losing composure, the mediator may suggest a short break. This gives both sides an opportunity to step back, regroup, and return to the mediation with a clearer mindset.

Alternatively, the mediator may decide not to take a planned break if the parties appear to be working very well together. Taking a break at that point may interrupt the flow of their collaboration, which can be hard to reestablish.

Parties may also request breaks during the mediation. The mediator should use her best judgment as to whether to agree to the break. If final details are being worked out on a
particular area, the mediator may ask the parties to delay taking a break. Alternatively, if the parties appear to be at an impasse, the mediator may use the time during a break to review her notes and develop a strategy for moving the parties forward.

Silence can also be used by the mediator. The mediator should be comfortable with silence. Because silence can be awkward, a party may start speaking and *volunteer information* that they would not have otherwise shared. The party may try to fill the silence by elaborating or clarifying what was just said.

During moments of silence, the mediator may wish to review and organize what the parties have already said or look over her notes. If the parties appear to be uncomfortable and do not fill the void, the mediator should begin speaking to put them at ease.

**Summarizing**

Summarizing should be done in *neutral language*. The mediator can use it to restate what a party has just said. This gives that party the chance to make any corrections or clarifications. It also gives the other side another opportunity to hear that party by presenting what they said in a neutral, impartial manner that removes any charged statements.

The mediator can summarize when she feels uncertain about what step to take next. Summarizing gives the mediator a chance to review what has already been accomplished, areas that have not been addressed, and issues that require attention. This can help the mediator *identify the way forward*. Once the mediator is done summarizing, she can ask the parties if she has captured everything correctly. If the mediator has not, the mediation can turn to addressing those issues. Even if the mediator has summarized correctly, the parties often will want to talk about the next important concern for them. The mediator can then direct the mediation towards that issue.

**Addressing perceived mediator bias**

Especially at the beginning of mediation, both parties are very sensitive to any perceived mediator bias or favoritism for or against one of the parties. A difficult, yet not uncommon, situation occurs when a party directly challenges the mediator’s neutrality. The party may even threaten to quit the mediation. This should not be taken as a
personal attack on the mediator. Often the party is simply uncertain and **apprehensive about the process**.

The mediator should be careful not to become defensive if her neutrality is challenged. Instead, try to understand the concern of the party. If the party appears apprehensive, let them know you understand that they have concerns about the process. Validate and reframe their concerns. Ask them to take a few minutes before leaving to discuss why they are considering ending the mediation. Reiterate that they are free to leave, but also highlight the benefits of mediation. Help them choose to stay in the mediation.

Even if the party is actually concerned about the mediation process and not the mediator’s neutrality, it is good for the mediator to **self assess** her behavior. Be sure to give both sides equivalent time to speak. Listen to what each side has to say. Return to issues raised by one party early in the process that were never addressed. Avoid making assumptions about the parties, expressing opinions, or telling them what to do. Phrase questions or statements in a neutral manner. Above all, the mediator should do her best using the mediation and communication skills she has to help the parties reach a voluntary agreement that meets their interests.
Mediation Ethics

This section includes ethics guidelines and codes of conduct for mediators developed by various international organizations. Mediators should be familiar with the various aspects of the codes and ensure that they conduct themselves in a matter that befits the process.

European Code of Conduct for Mediators

The European Code of Conduct was developed with the European Commission’s assistance and sets forth principles for mediators of civil and commercial disputes. Individuals may commit to these principles voluntarily. Organizations may also adopt the code in whole or in part and ask mediators acting under them to respect its principles.

The code can be found in multiple languages in pdf form at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm.

1. Competence and Appointment of Mediators

1.1 Competence
Mediators shall be competent and knowledgeable in the process of mediation. Relevant factors shall include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

1.2 Appointment
The mediator will confer with the parties regarding suitable dates on which the mediation may take place. The mediator shall satisfy him/herself as to his/her background and competence to conduct the mediation before accepting the appointment and, upon request, disclose information concerning his/her background and experience to the parties.

1.3 Advertising/promotion of the mediator’s services
Mediators may promote their practice, in a professional, truthful and dignified way.
2. Independence and Impartiality

2.1 Independence and Neutrality
The mediator must not act, or, having started to do so, continue to act, before having disclosed any circumstances that may, or may be seen to, affect his or her independence or conflict of interests. The duty to disclose is a continuing obligation throughout the process.

Such circumstances shall include
- any personal or business relationship with one of the parties,
- any financial or other interest, direct or indirect, in the outcome of the mediation, or
- the mediator, or a member of his or her firm, having acted in any capacity other than mediator for one of the parties.

In such cases the mediator may only accept or continue the mediation provided that he/she is certain of being able to carry out the mediation with full independence and neutrality in order to guarantee full impartiality and that the parties explicitly consent.

2.2 Impartiality
The mediator shall at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation.

3. The Mediation Agreement, Process, Settlement and Fees

3.1 Procedure
The mediator shall satisfy himself/herself that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it.

The mediator shall in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including in particular any applicable
provisions relating to obligations of confidentiality on the mediator and on the parties.

The mediation agreement shall, upon request of the parties, be drawn up in writing.

The mediator shall conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible power imbalances and the rule of law, any wishes the parties may express and the need for a prompt settlement of the dispute. The parties shall be free to agree with the mediator, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

The mediator, if he/she deems it useful, may hear the parties separately.

3.2 Fairness of the process
The mediator shall ensure that all parties have adequate opportunities to be involved in the process.

The mediator if appropriate shall inform the parties, and may terminate the mediation, if:

- a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment, or
- the mediator considers that continuing the mediation is unlikely to result in a settlement.

3.3 The end of the process
The mediator shall take all appropriate measures to ensure that any understanding is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement.

The parties may withdraw from the mediation at any time without giving any justification.
The mediator may, upon request of the parties and within the limits of his or her competence, inform the parties as to how they may formalise the agreement and as to the possibilities for making the agreement enforceable.

3.4 Fees
Where not already provided, the mediator must always supply the parties with complete information on the mode of remuneration which he intends to apply. He/she shall not accept a mediation before the principles of his/her remuneration have been accepted by all parties concerned.

4. Confidentiality
The mediator shall keep confidential all information, arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or public policy grounds. Any information disclosed in confidence to mediators by one of the parties shall not be disclosed to the other parties without permission or unless compelled by law.
Model Standards of Conduct for Mediators

The Model Standards of Conduct for Mediators were revised in 2005 and approved by the American Bar Association, the Association of Conflict Resolution, and the American Arbitration Association. They cover all types of mediation practice and provide basic ethical guidelines for mediators.


Standard I. Self-determination

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

Standard II. Impartiality.

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
   1. A mediator should not act with partiality or prejudice based on any participant’s personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
   2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator’s actual or perceived impartiality.
   3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator’s actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

**Standard III. Conflicts of interest.**

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator’s impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator’s actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator’s impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.
D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator’s service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator’s conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

**Standard IV. Competence**

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator’s competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator’s knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator’s training, education, experience and approach to conducting a mediation.
B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator’s ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

**Standard V. Confidentiality**

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.
D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

**Standard VI. Quality of the process**

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.
7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party’s capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

Standard VII. Advertising and solicitation

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator’s qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.
2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

Standard VIII. Fees and other charges

A. A mediator shall provide each party or each party’s representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator’s fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator’s impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator’s ability to conduct a mediation in an impartial manner.
Standard IX. Advancement of mediation practice

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.
2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.
JAMS International ADR Center
Mediators Ethics Guidelines

JAMS is the largest private alternative dispute resolution provider in the world and specializes in mediating complex, multi-party business and commercial disputes. The Mediators Ethics Guidelines provide guidance to JAMS mediators for ethical issues that arise during the mediation process. JAMS also encourages its mediators to address any ethical issues that arise as soon as they become apparent.

These Guidelines can be found on the JAMS website at http://www.jamsadr.com/mediators-ethics/.

I. A mediator should ensure that all parties are informed about the mediator’s role and nature of the mediation process, and that all parties understand the terms of settlement.

A mediator should ensure that all parties understand and agree to mediation as a process, the mediator's role in that process and all parties' relationship to the mediator. The parties should also understand the particular procedures the mediator intends to employ, including whether and in what manner the mediator may help the parties evaluate the likely outcome of the dispute in court or arbitration if they cannot reach settlement through mediation. In addition, a mediator should be satisfied that the parties have considered and understood the terms of any settlement, and should, if appropriate, advise the parties to seek legal or other specialized advice.

If the mediator perceives that a party is unable to give informed consent to participation in the process or to the terms of settlement due to, for example, the impact of a physical or mental impairment, the process should not continue until the mediator is satisfied that such informed consent has been obtained from the party or the party's duly authorized representative.

In the event that, prior to or during a mediation session, it becomes appropriate to discuss the possibility of combining mediation with binding arbitration, the mediator should explain how a mediator's role and relationship to the parties may be altered, as well as the impact such a shift may have on the disclosure of information to the mediator. The parties should be given the opportunity to select another neutral to conduct the arbitration procedure.
II. A mediator should protect the voluntary participation of each party.
The right of the parties to reach a voluntary agreement is central to the mediation process. Consequently, a mediator should act and conduct the process in ways that maximize its voluntariness.

In most cases that are not court-ordered, parties to the mediation process arrive willing and able to engage in assisted negotiation. On infrequent occasions, however, a mediator may perceive that a party is being forced into and/or through the process, for example, by a family member or representative. In that event, a mediator should explore carefully with that party and the other parties, within the bounds of discretion and confidentiality, whether the mediation process should proceed, and, in any case, strive to ensure that the concerns of the reluctant party regarding the process are fully addressed.

Court-ordered mediation often carries an aspect of involuntariness into the process. A mediator should be sensitive to this dynamic and assure the parties that although they have been ordered to attend the mediation, a settlement can be reached only if it is to their mutual satisfaction.

III. A mediator should be competent to mediate the particular matter.
A mediator should have sufficient knowledge of relevant procedural and substantive issues to be effective. It is the mediator's responsibility to prepare before the mediation session by reviewing any statements or documents submitted by the parties. A mediator should refuse to serve or withdraw from the mediation if the mediator becomes physically or mentally unable to meet the reasonable expectations of the parties.

IV. A mediator should maintain the confidentiality of the process.
It is crucial that the mediator and all parties have a clear understanding as to confidentiality before the mediation begins. Before a mediation session begins, a mediator should explain to all parties (a) any applicable laws, rules or agreements prohibiting disclosure in subsequent legal proceedings of offers and statements made and documents produced during the session, and (b) the mediator's role in maintaining confidences within the mediation and as to third parties.

A mediator should not disclose confidential information without permission of all parties or unless required by law, court rule or other legal authority. A mediator must not use confidential information acquired during the mediation to gain personal advantage or
advantage for others, or to affect adversely the interests of others. If the mediation is being conducted under rules or laws that require disclosure of certain information, a mediator should so notify the parties prior to beginning the mediation session. In addition, a mediator's notes, the parties' submissions and other documents containing confidential or otherwise sensitive information should be stored in a reasonably secure location and may be destroyed 90 days after the mediation has been completed or sooner if all parties so request or consent.

V. A mediator should conduct the process impartially.
A mediator should remain impartial throughout the course of the mediation. A mediator should be aware of and avoid the potential for bias based on the parties' backgrounds, personal attributes, or conduct during the session, or based on any pre-existing knowledge of or opinion about the merits of the dispute being mediated. A mediator should endeavor to provide a procedurally fair process in which each party is given an adequate opportunity to participate. If a mediator becomes incapable of maintaining impartiality, the mediator should withdraw promptly.

A mediator should disclose any information that reasonably could lead a party to question the mediator's impartiality. A mediator may proceed with the process unless a party objects to continuing service. A mediator should withdraw if a conflict of interest exists that casts serious doubt on the integrity of the process.

After a mediation is completed, a mediator should refrain from any conduct involving a party, insurer or counsel to the mediation that reasonably would cast doubt on the integrity of the mediation process, absent disclosure to and consent by all parties to the mediation. This does not preclude the mediator from serving as a mediator or in another dispute resolution capacity with a party, insurer or counsel involved in the prior mediation.

A mediator should exercise caution in accepting items of value, including gifts or payments for meals, from a party, insurer or counsel to a mediation during or after a mediation, particularly if the items are accepted at such a time and in such a manner as to cast doubt on the integrity of the mediation process.

A mediator should also avoid conflicts of interest in recommending the services of other professionals. If a mediator is unable to make a personal recommendation without
Creating a potential or actual conflict of interest, the mediator should so advise the parties and refer them to a professional referral service or association.

The JAMS Conflict of Interest Policy provides additional information regarding restricted conduct and should be adhered to by a JAMS mediator.

VI. A mediator should refrain from providing legal advice.
A mediator should ensure that the parties understand that the mediator's role is that of neutral intermediary, not that of representative of or advocate for any party. A mediator should not offer legal advice to a party. If a mediator offers an evaluation of a party's position or of the likely outcome in court or arbitration, or offers a recommendation with regard to settlement, the mediator should ensure that the parties understand that the mediator is not acting as an attorney for any party and is not providing legal advice.

A mediator should be particularly sensitive to role differences if any party is unrepresented by counsel at the mediation, and should explain carefully the limitations of the mediator's role and obtain a written waiver of representation from each unrepresented party. If a mediator assists in the preparation of a settlement agreement and if counsel for any party is not present, the mediator should advise each unrepresented party to have the agreement independently reviewed by counsel prior to executing it.

A mediator should make an effort to keep abreast of developments within the mediator's jurisdiction concerning what constitutes the practice of law. Different bar associations have issued conflicting opinions about whether and when a mediator engages in the practice of law, and certain states or courts have rules regarding how and in what manner a mediator may evaluate the merits of a dispute.

VII. A mediator should withdraw under certain circumstances.
A mediator should withdraw from the process if the mediation is being used to further illegal conduct, or for any of the reasons set forth above: lack of informed consent, a conflict of interest that has not or cannot be waived, a mediator's inability to remain impartial, or a mediator's physical or mental disability. In addition, a mediator should be aware of the potential need to withdraw from the case if procedural or substantive unfairness appears to have undermined the integrity of the mediation process.
VIII. A mediator should avoid marketing that is misleading and should not guarantee results.

A mediator should ensure that any advertising or other marketing conducted on the mediator's behalf is truthful. A mediator should not guarantee results, especially if such guarantee could be perceived as favoring one type of disputant or industry over another.
The following glossary of mediation terms has been developed, compiled, and adapted from *Black’s Law Dictionary* (8th ed. 2004) and the groundbreaking book on negotiation by Roger Fisher, William Ury, and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (2nd ed. 1991).

### Glossary of Mediation Terms

**Agreement**
A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances.

**Alternative dispute resolution**
A procedure for settling a dispute by means other than litigation, such as arbitration or mediation.

**Arbitration**
A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.

**Authority**
The right or permission to act legally on another's behalf, especially the power of one person to affect another's legal rights or duties by acts with the other person's assent.

**BATNA**
Acronym for Best Alternative To a Negotiated Agreement, or the most favorable, realistic outcome to a dispute that a party expects to achieve outside of a negotiation or mediation process.

**Caucus**
A confidential session that a mediator holds with an individual party to elicit settlement offers and demands, or with a co-mediator to develop mediation strategy.
**Conciliation**
A less formal, unstructured method of dispute resolution compared to mediation in which a third party meets with the parties to a dispute, explores how the dispute might be resolved, and facilitates communication between parties in an attempt to help them settle their differences.

**Confidentiality**
Secrecy, or restricted dissemination of certain information.

**Confidentiality agreement**
A contract or contractual provision containing a person’s promise not to disclose any information shared or discovered during mediation.

**Consideration**
Something that motivates a party to engage in a legal act based on an act or return promise bargained for with another party.

**Contract**
An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law, including negotiated or mediated agreements.

**Impasse**
A temporary or permanent point in mediation or negotiation at which agreement cannot be reached.

**Interests**
Needs, desires, and concerns that lie behind a stated position and motivate a party to decide upon a specific position. Interests may be unexpressed, intangible, and inconsistent.

**Intermediary**
A mediator or go-between; a third-party negotiator.

**Litigation**
The process of carrying on a lawsuit, or the lawsuit itself.
**Mediated agreement**
A settlement that disputing parties reach between themselves as a result of mediation with the help of a mediator.

**Mediation**
A method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.

**Mediator**
A neutral person who tries to help disputing parties reach an agreement.

**Negotiated agreement**
A settlement that disputing parties reach between themselves, usually with the help of their attorneys and without the benefit of formal mediation. Negotiated agreement may be used interchangeably with mediated agreement.

**Objective criteria**
Fair standards and procedures independent of the will of each negotiating party. Objective criteria include market value, course of dealing in business, or traditional practices.

**Option**
One choice among numerous possible ideas, answers, or solutions for a given dispute, issue, or problem.

**Position**
One possible alternative for satisfying a party’s interests that is usually a concrete and specific proposal.

**Principled negotiation**
A specific method of negotiation that seeks to resolve a dispute based on its merits by 1) separating the people from the problem, 2) focusing on interests, not positions, 3) inventing options for mutual gain, and 4) insisting on objective criteria.

**Representative**
One who stands for or acts on behalf of a party.
An agreement to mediate should be signed by the parties and the mediator prior to beginning any mediation. It protects the mediator in case of future litigation, forms a contract for payment of mediation fees, and assures a level of commitment to the process by the parties.

Agreement to Mediate

This agreement is among [NAME OF MEDIATOR] as Mediator, and [NAME OF PARTY A] and [NAME OF PARTY B] as Parties, to submit to mediation for settlement of Parties’ dispute.

All parties to this agreement agree and understand that mediation is a voluntary process and state their intention to make good faith efforts to reach a mediated agreement. Parties may terminate their participation in this mediation at any time upon notice to the Mediator and may pursue other legally available remedies.

The objective of mediation is to reach an agreement that is fair to the Parties. Parties jointly retain Mediator as a neutral third party. Parties agree and understand that Mediator does not act as counsel or advocate for any Party. Mediator has no authority to make any decision binding on the Parties. Mediator may not compel the Parties to make any agreement or grant any concession.

Parties agree that Mediator maintains discretion to terminate the mediation at any time if Mediator determines based on the professional judgment of the Mediator that the dispute is inappropriate for mediation or that the Parties have reached an impasse.

Any agreement reached by the Parties during mediation is legally binding. Parties understand that they are free to seek independent legal advice and that mediation is not a substitute for such advice. Parties may obtain independent legal review of any mediated agreement prior to signing that agreement.
The fee of Mediator is ________ for the first day of mediation and ________ for each subsequent day of this mediation. The administrative fee is ________ for each day of mediation. The fee of Mediator and administrative fee are to be divided equally between the Parties, unless the Parties agree otherwise. The fee of Mediator and the administrative fee for each day of mediation shall be paid in full to [CENTER FOR ALTERNATIVE DISPUTE RESOLUTION] prior to the start of each mediation session.

Mediator may meet separately (caucus) with an individual Party. In order to promote communication between the Parties and Mediator, information shared with Mediator during such a caucus shall not be revealed by Mediator to other Parties without the consent of the caucusing Party.

Parties agree that Mediator shall not be compelled to disclose any confidential information provided in preparation for or during the course of mediation. Mediator shall not testify voluntarily on behalf of the Parties or be compelled to testify or disclose information or submit any type of report to any court in connection with this dispute.

Any Party breaching this agreement shall be liable for and shall indemnify the non-breaching Parties and Mediator for all costs, expenses, liabilities, and fees which may be incurred as a result of such breach.

__________________________________________  ______________________________
Party                                      Party

__________________________________________  ______________________________
Party                                      Party

__________________________________________  ______________________________
Party Representative                       Party Representative

__________________________________________  ______________________________
Mediator                                   Date
A mediation confidentiality agreement can be a separate agreement among the parties or it can be integrated into the agreement to mediate. The mediator and each person present at the mediation should sign the confidentiality agreement. The following is a sample intended to supplement the agreement to mediate found in Appendix B.

**Mediation Confidentiality Agreement**

In order to promote full and open communication among the parties and the mediator and to facilitate resolution of this dispute, each signatory to this agreement as a condition of being present or participating in this mediation agrees that all statements made during the course of this mediation are privileged settlement discussions, are made without prejudice to any party’s legal position, and are undiscoverable and inadmissible for any legal, court, administrative, or contested proceeding.

This agreement does not restrict a signatory’s freedom to disclose and discuss the course of proceedings and exchanges during this mediation with the party on whose behalf or at whose request the signatory is present at the mediation, provided always that any such disclosures and discussions will only be on the same basis of confidentiality.

Dated: ______________________

______________________________  ______________________________
Name       Signature

______________________________  ______________________________
Name       Signature

______________________________  ______________________________
Name       Signature

______________________________  ______________________________
Name       Signature
Parties are more likely to fulfill the agreement terms in a mediated case than a non-mediated case because the mediated agreement is developed voluntarily by the parties based on their interests. Nevertheless, parties do not always abide by the agreement. Mediators should help parties address in their agreement the possibility that it may not be followed by one or both parties. For example, the parties may maintain the right to bring suit for the original amount of damages, or they may choose to pursue litigation on the basis of the mediated agreement.

Based on the fundamental mediation principle of self determination, the parties should decide the appropriate level of formality for their agreement. In order to assist the parties in doing this, a mediator should be familiar with three types of agreement that vary in their formality: an informal understanding between the parties, a legal contract, and an amicable court settlement.

**Informal mediated agreement**

An informal mediated agreement is used to capture what the parties agree to at the end of mediation and specifies that it is not legally binding. The mediator should work with the parties to memorialize in writing the duties of each party regardless of whether they wish to pursue a legally binding agreement. This helps reduce the risk of confusion arising from particular terms and the possibility that over time the parties may forget certain aspects of the agreement. A simple model form for an informal mediated agreement is provided below.
Informal Mediated Agreement

We, the undersigned, having participated in a voluntary mediation and being satisfied that the provisions of the resolution of our dispute are fair and reasonable, have come to the following understanding:

[NAME OF PARTY A] shall __________________________________________
________________________________________________________________
________________________________________________________________
________________________________________________________________
________________________________________________________________
________________________________________________________________

[NAME OF PARTY B] shall __________________________________________
________________________________________________________________
________________________________________________________________
________________________________________________________________
________________________________________________________________

Should any dispute arise as to the terms of this Informal Agreement, it is the parties’ desire to return to mediation before exercising any legal options available to them.

This Informal Agreement does not constitute a legal contract between the parties. It is meant only to memorialize the progress made by the parties to resolve their dispute in a mutually acceptable manner. Parties should consult with legal counsel should they wish to develop a legally enforceable contract or settlement.

________________________________________  ___________________________
Party                                      Party

________________________________________  ___________________________
Party                                      Party

________________________________________  ___________________________
Mediator                                   Date
Legal contract
In contrast to an informal understanding, the terms of a legal contract may be enforced by a party through litigation. The court deciding the case will independently review the terms of the agreement to determine if the terms can and should be enforced.

If the parties wish to have a formal contract, the mediator should encourage the parties to develop an informal understanding that will form the basis of the contract. Each party would then work with its legal counsel to develop a legally enforceable contract that incorporates the terms captured in the informal understanding. The parties should consult legal counsel prior to signing any legal contract.

Amicable court settlement
An additional option for the parties is to enter into an amicable settlement. Unlike a legal contract in which a court determines if the terms are enforceable, a court can directly enforce terms of a settlement.

While the parties can develop the basic terms in mediation, the precise content of an amicable settlement is determined by the court. One advantage to such a settlement is that it is likely to be enforced on its own terms. As with a legal contract, the parties may choose first to sign an informal understanding. They can then seek legal counsel prior to signing an amicable settlement agreement.

A sample amicable settlement of a suit for damages arising from unsatisfactory work is provided below merely to illustrate what this type of agreement looks like. It should not be used as the basis of a mediated agreement.
Sample Justice of the Peace Court Settlement

Case No. __________________________

Plaintiff: ____________________________________________
___________________________________
(last name, first name, patronymic, address)

Defendant: ____________________________________________
___________________________________
(official title, address)

City: __________________________       ____/____/20____

____________________, hereafter Plaintiff (if settlement is signed by a
representative, then the representative has maintained power of attorney from
____/____/20____), on one side, and ________________, hereafter Defendant,
on the other side, representing parties of Case No. ________________
considered in ________________ rayon court, conclude the present Justice of
the Peace Court Settlement regarding the following:

1. Suit was brought by Plaintiff against Defendant arising from insufficiency
of work for monetary damages allowing for the work’s fulfillment by Plaintiff, cost
of materials necessary to rectify the insufficiency, compensation for moral harm,
and also for __________________________.

2. The parties are concluding this Settlement in accord with Articles 39 and
173 of the Civil Procedure Code of the Russian Federation, and also in accord
with Article 101 of the Civil Procedure Code of the Russian Federation with the
aim of eliminating through mutual agreement the existing conflict, which is the
basis of the suit mentioned above.

3. With this Settlement, Defendant commits to payment to Plaintiff on
account of the aforementioned claim for monetary damages arising from the
insufficiency of the work allowing for the work’s fulfillment by Plaintiff, cost of
materials necessary to rectify the insufficiency, compensation for moral harm,
and also for ________________, the commensurable requested monetary
amount of ________________ rubles.

4. With this Settlement, Plaintiff waives his right to seek additionally
monetary damages arising from claims stated in Case No. ________________
that exceed the sum stated in paragraph 3 of the present Settlement.

5. The parties agree that the current status of the amount stated in
paragraph 3 of the present Settlement is: paid / not paid.

We ask the court to assert this Settlement, and that the present suit be
dismissed. We clearly understand that dismissal of proceedings for this suit upon
reaching a Settlement is provided for in Article 221 of the Civil Procedure Code of
the Russian Federation.

Signatures of the parties:

Plaintiff (Plaintiff’s representative): _________________________________________
(last name, first name, patronymic, signature)

Defendant: ______________________________________________________
(official title)

Official (Agent): _________________________________________________
(last name, first name, patronymic, signature)
A mediator should conduct a self assessment following each mediation session. The goal of such an assessment is to identify practices and skills that the mediator can improve and to learn from past experiences. This appendix containing assessment questions is provided as just one of many ways that a mediator can evaluate her performance in order to learn from each mediation session. The questions may also be used as a kind of checklist to help the mediator prepare for a mediation by identifying skills that need to be refreshed.

**Mediator’s Self Assessment**

**Mediation Practice**

Were you able to conduct the mediation process in an impartial manner?

Did you have the parties sign an agreement to mediate and confidentiality form prior to beginning the mediation?

Did you use a checklist, explain the principles of mediation and role of the mediator, and establish ground rules during your opening statement?

Were the parties given equal opportunity to give an opening statement?

Did you help the parties identify their interests and develop understanding?

Were the parties given time to brainstorm options?

Did you maintain the confidentiality of information shared separately by one party?

Did you congratulate the parties on their efforts to reach agreement?

Was the final agreement clearly written and detail the obligations of all parties?
**Mediation Skills and Techniques**

Did you encourage the parties to consider and help them to identify their interests rather than positions?

Did you focus the parties on the dispute rather than the individuals involved?

Were the parties able to realistically understand their alternatives outside of mediation?

Was the mediation aided by objective criteria?

Did you take notes and encourage the parties to do so as well? Did you refer to your notes later in the mediation process?

Did you use caucus sessions to meet with the parties individually?

**Communication Skills and Techniques**

Did you use open ended questions that gave the parties opportunity to explain and clarify the issues?

Were your questions designed to focus the parties on solving their dispute?

Did you use active listening skills by giving a party your full attention, restating statement content, and reflecting feelings and emotions?

Were the parties encourage to avoid use “I” statements?

Did you reframe negative party statements to make them more objective and productive?

Were you able to validate and empathize with a party without appearing to favor any particular side?

Did the mediation require techniques to balance power, to help a party save face, or addressed perceived bias? Did you use these techniques effectively?

Were you comfortable with silence and able to use it to draw out information?
**Co-mediation**

Did you meet with your co-mediator prior to the mediation to plan strategy and roles?

Did you and your co-mediator model constructive behavior and communication? If so, in what way?

If not, how can you improve this for future co-mediations?

Did your co-mediator use techniques or skills that you found particularly helpful? What were they?

Do you use these techniques regularly?
Participants may be asked to conduct a voluntary, confidential assessment of their mediation experience. This can help assess the impact of mediation on the court system, to provide feedback for mediators, and to track the quality of mediations. The form may be provided to participants at the end of mediation. The specific assessment of each participant should be kept confidential and not shared with court justices or staff. For research and impact analysis, however, the information may be aggregated in order to inform mediation program procedures. Detailed below is a sample participant’s assessment form.

Participant’s Assessment

The mediator and mediation center use this information to assess performance and quality of mediation. This assessment is confidential. The general results and information may be used for statistical purposes, such as reports on the number, type, and quality of mediation, but detailed information on each form will not be shared with individual judges or court staff.

Name of Mediator: ______________________  Date of session: ______________

Type of case (please circle one of the following):
Contract dispute  Property damage  Personal Injury  Family
Other (please describe): __________________________________________________

Was your case resolved fully?  Yes  No

Please select the box that most closely fits your assessment of the following statements:

<table>
<thead>
<tr>
<th></th>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Neutral</th>
<th>Agree</th>
<th>Strongly agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>The mediation process was fair</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I felt safe and secure during the mediation</td>
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<td></td>
</tr>
<tr>
<td>The mediator treated all parties equally</td>
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<tr>
<td>I was able to be heard</td>
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<tr>
<td>Communication with the other party was improved</td>
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<tr>
<td>I understood the issues better after mediation</td>
<td></td>
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<tr>
<td>We clarified or resolved all or part of the issues</td>
<td></td>
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</tr>
<tr>
<td>Mediation was appropriate for this dispute</td>
<td></td>
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</tr>
<tr>
<td>I am satisfied with the outcome of mediation</td>
<td></td>
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<td></td>
<td></td>
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</tr>
<tr>
<td>I would use mediation again</td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>I would recommend mediation to others</td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

Please share any additional comments: ______________________________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________
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