Small Claims Mediation and Justice:
The Implicit Assumptions of the Dominant Small Claims Mediation Model

by:

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Submitted to the Department of Urban Studies and Planning in
Partial Fulfillment of the Requirements for the Degree of

MASTER OF CITY PLANNING

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## ABSTRACT

In the past decade the use of mediation and other forms of assisted negotiation has gone from being used in subject specific contexts to its broad application in resolving citizen and community-based disputes. An "enlightened" self-interest mediation model that attempts to meet parties needs, separates relationship from substance, focuses their attention on options that take into account both sides' interests, and develops objective standards for choosing among options has become remarkably constant in small claims settings.

Despite the growing advocacy and institutionalization of mediation processes in resolving interpersonal and citizen disputes, an opposing view has emerged that is less than enthusiastic about the use and effectiveness of mediation in addressing citizen-level disputes. These critics suggest that the model adopts a simplistic view of both conflict and people. They further argue that when essential conditions such as equity of power and proper case assessment are missing during mediation, the process often falls short of ensuring fair and just outcomes for the more disadvantaged party.

Eight case studies of small claims mediations suggest that the fears raised by critics are not unfounded.

**Thesis Supervisor:** Dr. Lawrence Susskind
*Professor of Urban and Environmental Planning*

## ACKNOWLEDGEMENT

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I am grateful to the Harvard Mediation Program who allowed me into their domain in order to produce this work. I am especially grateful to Michael Moffitt and Gabrielle Gropman who spent a significant amount of their time going over HMP procedures so that I would have a sound understanding of the context in which I was working. I would like to thank HMP mediators who contributed to this thesis by permitting me to interview them. I hope that what I have produced proves valuable to your Program.

I am eternally indebted to my mother Melba, my sisters Linda and Maritza, and Brian. I have never faltered by your side. Thank you for never letting me forget that I could accomplish many things. You are all the most important people I know and I thank God that I am blessed to have you in my life.

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# OVERVIEW

## INTRODUCTION

A great deal of enthusiasm has been generated about mediation. Most literary critiques of the process extol its multiple advantages over the adjudicatory process. This thesis will explore the varying viewpoints regarding the use of mediation to resolve community-level disputes. The thesis will highlight the assumptions embedded in Getting to Yes-- from which Harvard Small Claims Mediation Program bases its training-- and examine whether these assumptions, particularly about negotiating behavior and interdependence among parties, actually hold true across a variety of community-based conflict situations. Through a series of interviews with Harvard Mediation Program mediators, small claims disputants, dispute resolution practitioners, and opponents of the alternative dispute resolution (ADR) movement, this thesis will:

- define the mediation model and the negotiation principles ascribed to it by

  Harvard Law School in training its mediators;

- look at the assumptions that the Harvard model makes about negotiating behavior, communication, and mediator responsibility;

- highlight case study examples that illustrate where Harvard's assumptions are inconsistent with what sometimes occurs during mediation; and

- provide recommendations for the Harvard mediation program.

## METHODOLOGY

With the encouragement of the Harvard Mediation Program, I attended mediations at four of seven courts served by the Harvard Program. The mediators I observed were briefly interviewed prior to each case and interviewed in more detail after the mediation. Whenever possible, the disputants in each case were also interviewed before and after the mediation.

Although several of the courts had mediators from programs other than Harvard, I chose only Harvard Mediation Program-trained mediators to observe [in the case studies described in Chapter Three].

In addition to interviewing the mediators I observed directly, I also interviewed twenty additional Harvard Mediators extensively. My mediator interviews made it obvious that the Harvard Program has a very distinct training philosophy--"the most appropriate method for resolving small claims disputes is through integrative-bargaining." I was curious to see how that philosophy was imbued by its trainers and how effectively it worked in practice. My knowledge of the Harvard Program also comes from my having taken the mediation trianing course a year prior to writing this thesis.

In addition to my interviews, I utilized many of the scholarly literature on mediation; focusing on those from practitioners themselves. The literature from legal scholars and anthropologists also proved invaluable in addressing some of the more important social questions regarding mediation. I was also fortunate enough to utilize several pieces of research conducted by other students in the area of mediation.

Finally, I was able to directly speak with several well respected and seasoned mediators and scholars who provided their own vivid perspectives on the process.

# CHAPTER ONE

*"What does the mechanical engineer do with friction? Of course his chief job is to eliminate friction but it is true that he capitalizes friction. The transmission of power by belts depends on friction between the belt and the pulley. The friction between the driving wheel of the locomotive and the track is necessary to haul the train. All polishing is done by friction. The music of a violin we get by friction. We left savage state when we discovered fire by friction. We talk of friction mind as a good thing. We have to know when to try to eliminate friction and when to capitalize it, when to see what work we can make it do."*

Mary Parker Follet

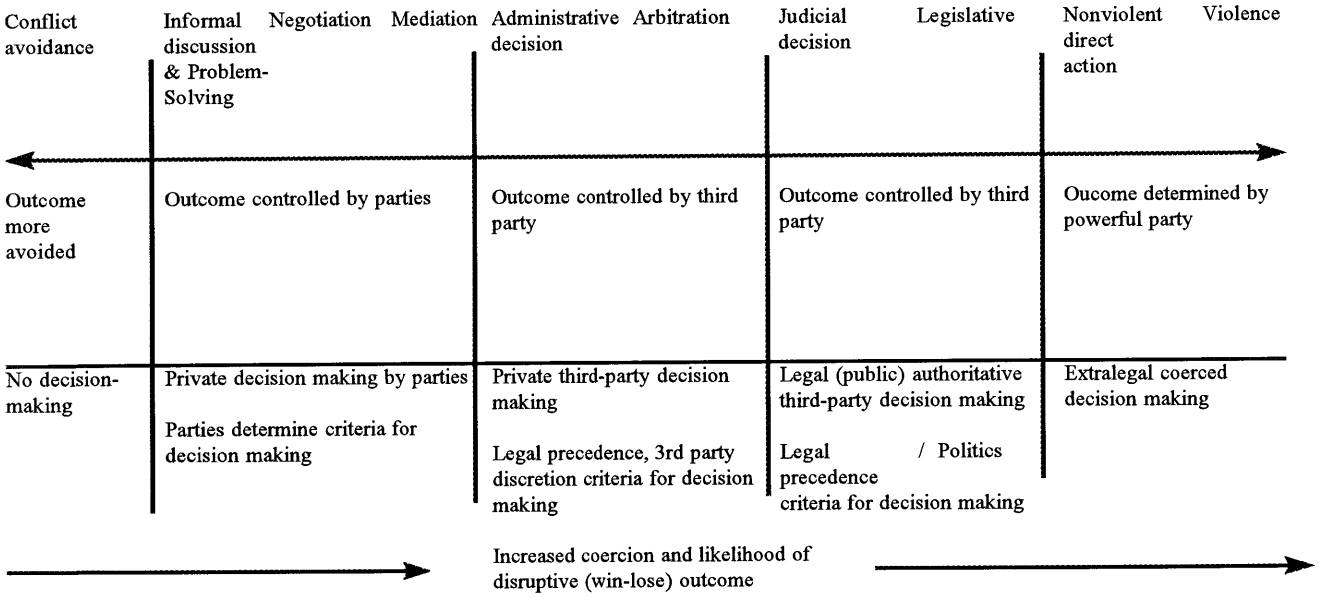
Mary Parker Follet, was one of the first Americans to develop the theory that conflict, when appropriately harnessed, can lead to positive and productive results. Drawing on this vision, the alternative dispute resolution (ADR) field emerged. Instead of condemning conflict as negative or unwarranted, the field looked for ways of resolving conflict more productively, avoiding the typical competitive, adversarial manner. Dispute resolution methods that advocate the resolution of conflict through joint problem solving strategies that satisfy the interests of both parties are now widely used to address organizational, international and legal disputes.

## CONSENSUS AMONG PRACTITIONERS

Despite differences within the field about the uses, goals, and responsibilities of ADR, practitioners in the North America generally agree on three key principles that inform what they do. First, practitioners believe in empowerment. Even among those with extreme views about the ADR practitioner's responsibilities, i.e., those who believe that mediators should play a more directive role with regard to the outcome (in contrast to focusing exclusively on process issues) there is consensus that the parties should be "the architects of their future." The second guiding principle is that human beings are generally rational and "decent" by nature; preferring non-adversarial interaction to

competitive, winner-take-all exchanges, when the former can meet their self-interest.[1] A final principle where there is consensus, assumes that disputants can reach agreement because the presence of a neutral party (i.e., a mediator) will alter the parties' behavior. This modification of behavior is predicted on the trust (which the parties lack in each other) that derives from the mediator's pledge of confidentiality and neutrality. Thus, parties are more likely to disclose important information to a "neutral." These fundamental principles are the glue that holds together a field derived from numerous disciplines and varying ideological and philosophical perspectives.

**Conflict Management and Resolution Approaches**
adapted from: The Mediation Process 1985; Christopher Moore




## NEGOTIATION STRATEGIES

Negotiation strategies, tend to fall into two categories-- positional or interest based. Positional bargaining usually occurs between at least two parties who perceive incompatible goals, scarce rewards or resources, and interference from the other party in meeting those goals or interests (Duryea, 1992). Parties engaged in positional bargaining tend to view their participants as

[1] Getting to Yes, specifically states, that key benefits about principle negotiation "shows you how to obtain what you are entitled to and still be decent.

adversaries; define their primary goal as victory; demand concessions as a condition for the relationship; make threats; try to win a contest of will; and apply pressure in addition to a variety of other competitive strategies.[2] of similar houses in the neighborhood, or an independent appraisal can be used to settle differences. While the objective is still to get what one wants; the means ought to be through improved communication, persuasion, cooperation, joint problem-solving and the use of objective criteria. Coercive, manipulative, and/or competitive tactics typically associated with positional bargaining are considered inappropriate and wasteful of time and money.

Finally, interest-based negotiation assumes that resources are not fixed--that there are almost always "joint gains" to be had. By working in a problem-solving fashion, increased gains can be found for oneself as well as for the other(s). Thus, advancing the other parties' position can lead to increased gains for oneself as well. Critical to success along these lines is the belief that parties in a negotiation are in some way interdependent.

Mediation or "assisted negotiation"[3] is an extension of the interest-based bargaining idea. Mediation or other forms of assisted negotiation may be necessary when the parties have attempted negotiation and are at an impasse. Mediation relies on a "neutral" to help the disputants adapt the interest-based approach that they failed to use effectively on their own.

Mediation:

- facilitates communication between the parties;
- helps the parties separate relationship from substance;
- clarifies and prioritize the parties' underlying interests;
- focuses attention on options that take into account both sides' interests;

[2] For more on positional bargaining behavior see, Getting to Yes by Fisher, Ury, & Patton; "Negotiating Legal Tactics for Legal Services Lawyers," By MelLsner & Schrag. 7 Clearinghouse Review 259, 1973.

[3] Susskind and Crunskank, Breaking the Impasse.

- emphasizes independent objective standards for choosing among such options; and[4]
- produces outcomes that come directly from the parties.

This thesis focuses on mediation, especially as it is used in the small claims setting.[5]

**MEDIATION AS A PROCESS FOR SOLVING CITIZEN DISPUTES**

Throughout the 1970s, the alternative dispute resolution (ADR) movement evolved from a subject-specific activity focused on business and legal disputes to a broader activity covering a wide range of conflicts among neighborhood and city residents. The attraction to ADR was precipitated by " a legal system near collapse in an urban industrial society. Courts were congested; delay was endemic; costs were high; counsel was unavailable; entire areas of the substantive law were obsolete."[6]

Consequently, the purpose for developing the alternatives movement was twofold. First, to reduce public discontent caused by court bureaucracy and congestion. Second, to address nagging social and racial tensions that had the potential of igniting and threatening social stability.[7]

Proponents of this shift, which included influential lawyers, jurists, and academics developed alternative programs to litigation to address "minor" disputes between community residents[8] which had the potential to erupt and threaten community stability. This contingent (which became known as the Pound contingent after legal reformist Roscoe Pound) was particularly interested in reestablishing the "warmer" ways of disputing

[4] Bruce Patton, Harvard Mediation Program Training Manual, Spring 1993, p. 2.

[5] Small Claims involve matters restricted to tort (liability), contract, and personal property damage suits. In Massachusetts, the maximum amount that a plaintiff can sue for in small claims court is $2,000. There are several exceptions to this limit. For example, automobile accidents and certain tenant/landlord suits, i.e., those involving treble damages under Chapter 93A of the Massachusetts General Laws, have an upper limit higher than $2,000.

[6] Jerold S. Auerbach, Justice Without Law? p. 95.

[7] Harrington, 1985; Auerbach, 1983.

[8] Goldberg, et. al: 1992

(Nader and Todd, 1977: Dangiz 1973). The goal of the group was to improve access to the judicial system for the poor; strengthen urban neighborhood ties by producing resolutions that would suit parties' needs, reduce public reliance of lawyers and courts, maintain long-term relationships, and provide relief for nonparties affected by conflict.

Mediation was considered the most effective of the alternative processes to address community-level disputes because it provided assistance to the parties while allowing them control of the outcome of the dispute. Mediation was therefore touted as the panacea that could provide the poor with access to justice while simultaneously resolidifying urban communities. Proponents of small claims mediation emphasized the advantages of mediation as: (1) more informal, efficient, and flexible than court managed processes; (2) does not pick winners and losers, but resolves differences and leaves the parties in a better position to work out problems in the future, and (3) controlled entirely by the disputants (not a higher authority) and thus more likely to generate higher rates of compliance among the parties. Thus, advocates of mediation for community-based/small claims disputes have highlighted the efficiency, informality, flexibility and empowerment, the process can provide.

Proponents suggest that mediation takes place outside the rigid confines of the legal system. Parties are more comfortable, less intimidated by court procedures. Mediation provides parties an opportunity to avoid the long administrative and procedural delays typically associated with court hearings. People choosing mediation do not wait until their case comes by on the docket. Instead, they have their case heard almost immediately. Moreover, parties that reach agreement during mediation, immediately know the outcome of their dispute. They are sparred weeks of anxiety that awaiting a verdict can generate. Finally, mediation, from a public policy perspective, is less expensive than litigation because parties do not need to hire lawyers to represent them.

Mediation also provides for flexibility in (1) the structure of the process, (2) the role of the mediator, and (3) the scope of the outcome. The mediator can help the parties

design a process that is best suited to the situation at hand. For example, if a mediator notices that the parties are hostile or anxious, s/he can suggest they open the session by addressing those feelings and allowing the parties to vent their concerns prior to moving on to substantive issues. Conversely, parties who come out to mediation exhibiting calm, rational, or non-adversarial behavior, can move more rapidly to problem-solving.

The mediator can play a variety the roles including that of "process facilitator, opener of communication channels, or agent of reality" (Moore, 1986). Once an agreement is reached, the terms developed by the parties can accommodate multiple options, schedules and contingencies. For example, a mediator can assist the parties in structuring an agreement where a sum of money is held in escrow until specific conditions of the agreement are met.

The decisions reached in mediation are not based on legal precedent, but primarily on standards of fairness established by the parties. Through its emphasis on mutual gains, the process enables parties to cast aside adversarial tensions for greater cooperation. This typically leads to greater compliance with agreements than with those outcomes reached through traditional adversarial means. [9]

**THE ALTERNATIVE VIEW**

While the use of mediation has rapidly become institutionalized in some settings, a revisionists view has also emerged, with harbors considerable apprehension about the use and effectiveness of mediation for resolving community-level disputes. This apprehension centers less on the procedural advantages/benefits of mediation (in contrast to the adjudicatory process), and more on substantive and social issues such as loss of power, rights, and protection of the law that mediation ostensibly represents for poor and disadvantages citizens. ADR opponents argue that small claims mediation: (1) is based on inaccurate assumptions of American behavior; (2) offers "second class justice" to

[9] McEwen., C. and Maiman, R. 1984. "Mediation in Small Claims Court: Achieving Compliance Through Consent." 18 Law & Society Review 11.

certain classes of people; (3) ignores the complex social relationships that exist between parties; and (4) has coercive tendencies.

Opponents of the use of mediation to solve interpersonal or community-based disputes argue that the fundamental problem with integrative bargaining or joint problem solving is that the model is predicated on naive assumptions of community cohesiveness that does not exist in modern urban America. This vision of society, argue legal theorists, is contradictory to the very capitalist values that embody American society-competitiveness, individualism and self-aggrandizement. "Once," argues legal historian Jerold Auerbach, "fundamental attributes of social cohesion are missing, the substance of mediation has been transformed. It is during this phase when self-preservation and aggrandizement motivates the individual, that the poor, disempowered, and isolated individuals become endangered."

Second, critics argue that mediation creates a two-tiered legal system which obstructs, rather than improves, access to justice for the poor and socially disadvantaged by consigning the rights of disadvantaged citizens to institutions with minimal power to enforce or protect them. "Thus, the weaker party, denied opportunity for legal redress, will become even further disadvantaged "as informality compounds inequality," suggest John Auerbach and Laura Nader.

Third, the alternatives process, in its attempt not to base its outcomes on past precedent, assists in stifling reform and the quest for justice within the very institutions or people that generated the offense. For example, a dishonest plumber or repair person may try to use mediation as a way of quickly settling a dispute and preventing the issue of his unfair business practices going before the court; where the possibility of greater sanctions exist. Mediation by addressing disputes on a case-by-case basis, allows widespread problems to escape identification. " Only when numerous complaints are viewed together can a pattern emerge," suggests Nader. Handling such problems in the aggregate may lead to effective preventive reforms.

The Massachusetts Lemon Law[10] would never have come about had a discernible pattern of abuse between the seller and buyer of automobiles not been established.

Fourth, the field is often characterized as being flexible and accommodating to party's interests; allowing the opportunity to make compromises not afforded in the adjudicatory process (Harrington, 1985; Merry, 1986; Sander, 1977). Individual history and circumstances supposedly shape the outcome of meditation instead of general and neutral principles at the heart of the judicial method. Opponents strongly dispute the characterization of mediation as flexible. They stress that mediation has develop its "own general principles about the process which have for the most part completely ignored some of the complex social relations (i.e., the mediators and the individuals' social circumstances and history) which exists; obscuring the importance these relationships and their history can play in shaping the process. History which includes privileges afforded to people based on their social status.[11] These relationships, argue critics, are simply played out in a process that does little to address the social inequities that exists.

Finally, many critics have pointed to the coercive elements of mediation which infringe on the rights of citizens to pursue justice. One way in which this happens is through the process' emphasis on informality, which in some situations "conveys a friendly atmosphere and give an impression that all that can be done to solve the problem is being done." Parties with complaints are then unknowingly coerced into believing that they have exhausted every alternative when quite the opposite may be true.

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[10] Brief description of The Lemon Law taken from HMP's training manual: A "Lemon" is defined as a new motor vehicle which has a defect that substantially impairs the use, market value, or safety of the vehicle and has not been repaired after reasonable attempts. Any buyer of a new car, motorcycle, van or truck for personal or family purposes is covered by the Lemon Law for one year or 15,000 miles of use from the date of original delivery, whichever comes first. "New" includes vehicles purchased after January 1, 1984, and transferred during the first year or 15,000 mile term of protection.

[11] Social class is associated with differences in diverse aspects of human thought and behavior-- family stability, reading habits, organizational memberships, friendship patterns, political attitudes and participation, among other things. Individuals who occupy the same level in a social structure, are likely to share similar constructions of reality. Conversely, where individuals occupy different status levels in the social structure, their views on a variety of issues are likely to differ.

One example is in the dicta "separate the people from the problem," or "focus on interests not positions." These strategies diffuse emotions so that parties can focus on joint problem solving and creative thinking. Nader argues that this way of "reframing" problems --"stripped of their hostile emotional content,"--may in fact coerce weaker parties into reevaluating their initial feelings and ultimately the validity of their claims.

Both sides -- the advocates and the revisionists--have received considerable attention. Proponents often note high compliance and satisfaction rates among users as concrete examples of the ADR movements' success. Opponents have been equally quick to point out that voluntary community-based alternatives have not been used as widely advocates once envisioned; arguing in addition, that high satisfaction and compliance rates are not appropriate substitutes for justice.

**SUMMARY**

ADR proponents have developed a movement founded on the assumptions of community cohesiveness, cooperation and interdependence; assumptions which have become the driving force behind the Harvard Small Claims Mediation Program. Critical to the success of this model is the assumption that the parties are interdependent. Opponents of the ADR movement assume the existence of socially organized patterns of injustice, domination, and self-interest. Critics argue that when these conditions exist, the courts are best suited to reduce the societal prejudices prevelant in American society.

# CHAPTER TWO

## INTRODUCTION

Chapter One laid out the existing debate between advocates and opponents of mediation. Subsequent chapters will reconsider the claims on both sides when the debate moves from the theoretical arena into a well established, small claims program such as The Harvard Mediation Program. Chapter Two provides general information about the Harvard program, its philosophy and its approach to training. Subsequent chapters will evaluate whether any of the fears and concerns raised by revisionists are well founded.

## THE HARVARD MEDIATION PROGRAM: AN OVERVIEW

The Harvard Mediation Program ("HMP")[12] was founded in 1981 by Harvard Law School Professor John Cratsley and several Law School. The stated mission of the program is to increase the opportunities for Law School students to get clinical practice in alternative dispute resolution.[13] The Harvard Mediation Program was a component of the Program on Negotiation until 1984 when it became a separate clinical program. It remained limited to small claims mediation in the Quincy court until 1986, when the Program expanded to provide criminal mediation services from the Malden District Court. The Program now provides mediation services to seven courts: Brookline, Cambridge, Chelsea, Dorchester, Malden, Roxbury, and Quincy. Moreover, more than 130 students and community members have mediated well over fifteen hundred small claims cases since 1981.[14]

[12] Hereinafter referred to as "HMP"or the "Program."

[13] Adapted from the Harvard Mediation Program, Training Manuals, Spring 1989-1993

[14] Data extrapolated from annual reports provided by Gabrielle Gropman of the HMP. It is highly likely that the total number of small claims cases mediated is higher because mediators do not always submit the client intake forms to the office as required. Further, the computerized record keeping system was not initiated until 1988. Records, prior to 1988 were not readily available.

The Program has a part-time staff of one Program Coordinator, a Case Coordinator, and a Court Liaison; the two latter positions are filled by Harvard Law School interns. There is a nine-member policy-making Board of Directors comprised of Harvard Law School students. An advisory board comprised of alumni, faculty and administrators exists to confer and provide advise to the Program. No community mediators serve on the board. There is no formal election process.[15] The philosophy in this approach is that "the Program has more than enough opportunities and areas in which students can help. We try not to exclude anyone because they did not get enough votes."

The Harvard Mediation Program holds one small claims mediation training session for approximately 24-28 persons at the beginning of each semester.[16] The majority of its trainees are Law School students. Several spaces in each class are reserved for non-Law School Harvard students and community members.[17] Mediators receive thirty two hours of training to ensure that mediators are protected by the Massachusetts confidentiality/ disclosure statute, MA. G.L.. c.. 233, §23c.[18]

**MEDIATOR TRAINING**

The Harvard Mediation Program explicitly commits to the use of a "principled" approach to mediation. So intrinsic are Fisher, Patton's & Ury's negotiation concepts in the Program's training, that Getting to Yes, is the only negotiation model ascribed to by the Program.

[15] 0f the mediators interviewed, including a significant number of Harvard Law School students, none were able to describe the Board selection/election process in any substantive detail. Out of six community members interviewed, only one, the Cambridge court liaison had been told in passing about a board meeting; indicating that increased outreach is needed between the Program and all of its mediators.

[16] Criminal and domestic violence mediation training are also offered at various times during the year for more experienced mediators.

[17] People not affiliated in some way with Harvard are considered "community mediators."

[18] MA General Laws Chapter 233, §23c. guarantees that any work product and or communications between the parties and the mediator shall be confidential and not subject to disclosure in any judicial or administrative proceedings. Mediators that get at least 30 hours of training, have four year of professional mediation experience, are appointed to mediate by a judicial or governmental body or are accountable to a dispute resolution organization in existence for at least three years are protected under the statute.

Modified negotiation acronyms are used throughout the training (e.g., Best Alternative To a Negotiated Agreement becomes Best Alternative To a Mediated Agreement). Moreover, negotiation concepts/strategies from Getting to Yes such as separate people from the problem, invent options for mutual gain, and use objective criteria--make up the core of the Program's training program.

The Program curriculum, taught by Harvard Graduate and Law School students, is structured to include class room instruction, role-plays and open dialogue between attendees and instructors. [19] The role plays use real small claims cases that have been adapted for the training. Harvard Mediation Program training can divided into three broad stages : (1) introduction, (2) mediation (3) closing.

The opening session and the introduction, from the mediator's perspective, is the most critical element of the process as its used by the mediator to:

- establish his/her credibility and authority
- set the tone for the discussion to follow, establish groundrules and appropriate codes of behavior
- demystify elements of the process (e.g., private and joint sessions, confidentiality)
- put people at ease
- and establish trust between the mediator(s) and disputing parties.[20]

The mediation section of the training emphasizes questioning, active listening, opening communication, exploring the parties' interest, seeking possible options or alternatives to settlement, determining acceptable criteria for settlement, and identifying the importance of the parties' relationship, and ethical delimas.[21]

At the crux of the training are effective communication and interpersonal skills are essential in mediation. A mediator who can not speak the parties' language and get "one's hands dirty," will not be effective. Consequently, Program trainers spend the

[19] The course is four days long. Spread over two weekends. Students who attend the 32 hour program are allowed to mediate as small claims mediators in the Massachusetts Small Claims Court.

[20] Taken from Breaking the Impasse, p. 217.

[21] See Appendix B . for a copy of Harvard's Mediation Programs' training checklist.

majority of the training time emphasizing the importance of clarifying interests and positions. Communication strategies taught include: narrowing the issues to bring the "discussion back to the heart of the matter;" selecting which type (e.g., interpersonal, objective, etc. ) the case is about; and making issues concrete in order to identify common interests. Active listening skills such as shaking one's head in acknowledgment of what's been said, checking body language and posture, and making eye contact with the parties are important communicative skills touched upon throughout the training.

Summarization (or "reframing") skills are also strongly emphasized as an effective means of tying major ideas together, establishing a basis for additional conversation after long periods of continuous listening and of letting parties know they have been understood. Appendix A provides examples of reframing.

The final phase of the training is to formalize the agreement, if one is reached. Program trainees are divided into small working groups where they learn: how to draft a mediation agreement; what level of specificity is needed, and to convey to parties that once an agreement is signed it becomes a legally binding document. Upon completion of the mediation, trainees are told to ask disputants if they can be called for follow-up. If no agreement is reached the mediator is instructed to return the file back to the small claims clerk.

Since there is so much to cover and insufficient time to go over all of the details, Program trainers decide what mediation components, elements, or issues to cover during training; expecting mediators will pick up additional skills "in mediation." Thus emphasis is consistently placed on developing mediator skills that focus on improving communication and clarify interests among disputing parties. Trainees' consciousness is also raised about the importance of. (a) choosing the appropriate forum and time to reality test; (b) [BATNA] testing without jeopardizing credibility for the parties; (c) assisting parties to develop their own alternatives for reaching agreement (d) establishing the momentum to generate options, (e) choosing the "right" vocabulary

during communication, (f) ensuring commitment, and (f) understanding "ethical" dilemmas.

Once the lecture component is complete, students role-play cases designed to highlight the points previously discussed. Each student gets between four and five opportunities to be "mediator" in a case. Trainees who are not "mediators" in a role play are either participants or observers and are encouraged to provide their peers with feed-back. Program trainers in each group evaluate the "mediator" based on his/her style, use of active listening, ability to reframe issues, and their overall mediation technique. This is the only performance evaluation the students received. Upon completion of the 32 hour course, every student is certified to mediate - eventhough it is sometimes painfully obvious that some of the students need more training.

The Program defines the mediators responsibility to explore the conflict and possible solutions by assisting the parties to communicate more effectively with one another; placing the mediator's focus on process rather than substance issues. This approach increases the likelihood that the mediator can inject his/her own biases or values toward the outcome (Wheeler 1982). The Program recognizes how important communication is to the mediation practice, but is not cognizant that "talk" is very culturally based and that just as professional fields (e.g., medicine and law) develop code words that only its members can understand so do racial and ethnic groups.

A good example of the issue raised above is also present in the mediation field and the Program. Throughout the training, trainees frequently use the same jargon such as "interest-based, " "reframing," and "hard bargainer," words that characterize the ADR field but are completely irrelevant in a practical sense. Consequently, several of the Community mediators had difficulty grasping simple techniques masked behind cumber-some jargon (e.g., BATMA instead of bottom line, objective criteria rather than"fair standard"). "Nobody talks like that, nobody says 'reframing', 'reality testing', or 'BATMA' in real life, " said one community mediator interviewed.

*Table 1- Distribution of Mediations per Court*

| | YEAR | | | | |
|---|---|---|---|---|---|
| **COURT** | **'88/89** | **'89/90** | **'90/91** | **'91/92** | **'92/93** |
| Brookline | 26 | 38 | 64 | 52 | 46 |
| Cambridge | 63 | 50 | 32 | 68 | 54 |
| Chelsea | N/A | N/A | N/A | N/A | 31 |
| Dorchester | N/A | 3 | 17 | 13 | 4 |
| Malden | 61 | 73 | 33 | 62 | 66 |
| Quincy | 54 | 69 | 61 | 119 | 138 |
| Roxbury | 14 | 15 | 29 | 31 | 26 |
| Total | 218 | 248 | 236 | 345 | 365 |

**COURT PROCEDURES**

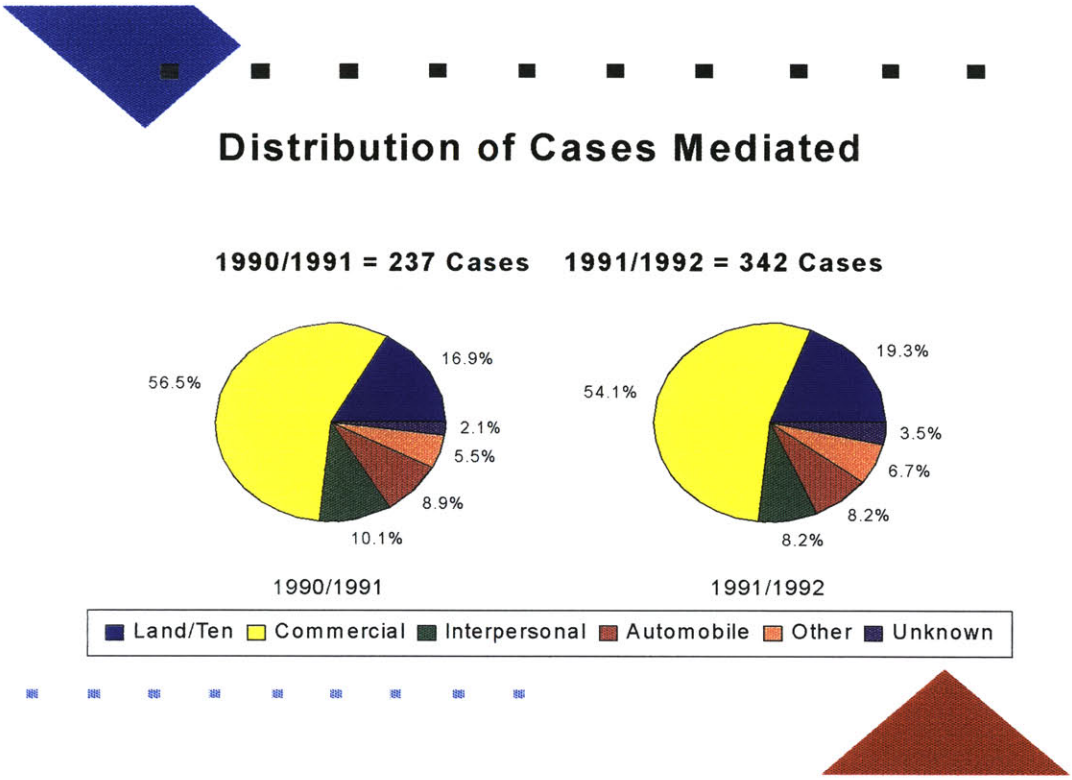
The Harvard Mediation Programs currently serves seven courts. Procedures in several of the small claims courts served by the Harvard Mediation differ slightly. Prior to calling the docket, the clerk explains briefly that mediators are available to help litigants resolve their disputes without a trial. Several of the courts (e.g., Cambridge) hand out a typed sheet titled, "What is mediation?" which explains the benefits of mediation. [22]

Courts that don't hand out the "What is mediation?" document offer brief oral explanations of the mediation process. Most explanations emphasize that mediation is voluntary, although some court magistrates routinely assign cases to mediation without first obtaining the consent of the parties.The Quincy court is an example.[23] Litigants are advised that they will lose nothing by trying mediation, and that unsuccessful mediated

[22] The most disturbing problem about the sheets handed out in Cambridge (and the other courts) is that the sheet is only produced in English, precluding a significant population who use the court but may speak a language other than English.

[23] Both of these courts provide the highest number of cases for the Program.

cases will be given priority that day in the order of trials.[24] The "What is Mediation?" document is a way to entice litigants to try mediation.




*Data provided by: Harvard Mediation Program*

[24] As a general rule , a case will only get back on the docket that same day if it is returned to the clerk with relative dispatch. HMP mediators are aware of this and always return the file to the appropriate person. Most cases that end up back in the docket are heard the same day.

## SUMMARY

All in all, the HMP training program provides an adequate introduction to mediation training. By exposing mediators to only one method of mediation, the Program limits the ability of mediators to assist parties resolve disputes requiring more complex skills than those articulated in Getting to Yes. Consequently, those who complete the program (and have had little outside exposure to the theory and practice of mediation) have a rather rigid notion of what mediation can and should do. Moreover, the court programs in which HMP works, do nothing to correct the deficiencies of the HMP training, nor do they provide evaluative feedback or any further training to HMP trained mediators in small claims courts. In essence, there is very little connection between the mediation programs and the courts.

# CHAPTER THREE

## INTRODUCTION

What follows are descriptions of eight small claims cases observed in the courts served by the Harvard Program. The cases are deep in content and cover the range of complaints that go to mediation. Moreover, as I did not want to stratify or cluster the sample in any way, the mediators observed were selected at random. They represent the typical selection of mediators available at the courts on the days I attended to observe. My analysis of each case, immediately follows each case description. The cases analysis draws upon my observations as well as pre and post interviews
conducted with both mediators and parties. The information contained in the boxes which follow, provides an overview of the concerns that each party brought to the mediation. The analysis highlights how the parties and the mediators tried to address those concerns.

**CASES**

CASE #1 - LOST LUGGAGE
CASE #2 - SECURITY DEPOSIT
CASE #3 - COLLEGE SELECTIONS
CASE #4 - CAR ACCIDENT
CASE #5 - ANTIQUE FURNITURE
CASE #6 - REAR WHEEL AXLE
CASE #7 - BACK RENT & SECURITY DEPOSIT
CASE #8 - CAR DEALERSHIP

### Case Descriptions

### Case #1 - Lost Luggage

*The Parties:*

**The plaintiff** was a lower class Boston resident originally from the Dominican Republic. She understood little English and spoke almost none.

**The defendant** was American Airlines. Representing the Airline were two female middle-managers.

**The mediators.** One mediator, a community representative, spoke fluent Spanish. She was originally from Florida and came from a middle, upper-middle class family. The co-mediator was a middle-aged, working class white male. The mediators had not worked together prior to the mediation.

*The Dispute:*

The plaintiff went to the Dominican Republic to care for her dying father. She was informed by airline personnel when she arrived at the airport, that all of her luggage had not arrived on the flight but "should be on the morning flight from Boston." The plaintiff filled out paperwork describing her three pieces of luggage and its contents, so the airline could contact her upon their arrival. Three days later, the Airline called to say they were still trying to locate the luggage. The plaintiff went to the airport and filled out some additional forms; estimating the contents of the luggage at $2,400.[25] Six months later the plaintiff returned to Boston. A year (and five Lost Luggage Claims forms later) after the plaintiff's return to Boston, she and the Airline had not reached agreement on the dollar amount for compensation despite numerous attempts. The airline refused to pay the plaintiff $2,400 for the lost luggage, because "despite us extending every deadline to accommodate her and try to locate the luggage, her chronic delays in responding to our requests, hindered our attempts to locate the luggage." The airline additionally sited that the plaintiff had provided conflicting information about the contents and value of the baggage. The case was brought to small claims court two years after the airline initially lost the luggage.[26]

OPENING

The plaintiff, did not speak English. One of the two mediators was Latina. The mediation was conducted in both Spanish and English.

"I went to the Dominican Republic and when I got to the airport, only two of my five pieces of luggage were there. I went back to the airport three days after I arrived.

[25] The plaintiff had included items on the form i.e., a VCR and a camera, that should not have been placed in a suitcase and therefore the airline would not have compensated the plaintiff for those items.

[26] Moreover, the statute of limitations has expired on the case.

I also called everyday for two weeks. Each time, they said the same thing, 'no your suitcase is not on this flight, check again tomorrow.' One of the workers finally told me that my luggage was lost. They kept sending me forms to fill out but I saw no luggage, no nothing. I really didn't have time to fill out those forms, I was taking care of my father. When I came back to Boston I was tired. I didn't have the time to follow up with them right away. Now they say they're not going to pay me for my luggage. They are the one's who lost it. Why should I not be compensated?"

After summarizing the facts in the case and reviewing copies of the Claim Forms filled out by the plaintiff, the mediator asked, "You don't speak English, how did you understand the forms?"

"I took them home and had my niece fill them out for me. She understands English."

"Who filled out the forms for you once you were back in Boston?" Asked the mediator.

"Another niece filled out the second set of papers. She read the questions to me in Spanish and I told her what to write down."

The mediators thanked the plaintiff and instructed the defendants to go next.

The defendants acknowledged that the airline lost the luggage. They refused to compensate the defendant because "on the four separate occasions the plaintiff filled the Claim Form describing her luggage and its contents, she filled out different information. In fact, the form which she claims she filled out at the airport was submitted not three days after her flight arrived in the Dominican Republic but almost a week and half later. We have the computer records showing when the paperwork, which is inputted into the system as soon as it arrives, was processed. From the beginning she made it impossible for us to locate the luggage. Moreover, the statute of limitations has expired on this case because she dragged this on for so long."

"That's a lie!"interrupted the plaintiff. "I filled out that paperwork right there at

the airport. You guys have terrible service over there. It took almost two hours before someone was able to help me figure out what to do about my luggage. I wouldn't be surprised if the airport just let the form sit around for a week. But I know that I filled out the form at the airport the day I arrived. Besides, regardless of how long, or how incomplete the forms were filled out, the fact remains that you guys lost my luggage. Of course some of the forms were filled out wrong, you kept sending me form after form after form and I just filled it out so I could get back to caring for my father. Once I came back to Boston, I was despondent that my father had died. The last thing on my mind was filling out another one of your stupid forms. I don't like what you're implying. I'm not trying to steal anything from you. I just want what you owe me,"the plaintiff said looking directly at the defendants.

When the plaintiff was done, the defendants continued. They produced copies of the paperwork filled out by the plaintiff. They showed the mediators a ticket containing a clause about carrying items such as a camera, VCR or camcorders in suitcases. They also produced a copy of the statute of limitations on the case; verifying that the time on the case had expired. They ended the session by explaining, "we're not in the position to give her $2,400."

After reviewing the materials and asking several clarifying questions, the mediators decided to meet with the defendant's first.

PRIVATE SESSION WITH DEFENDANTS

The Hispanic mediator asked the plaintiff, "you acknowledged earlier that the Airline did lose the plaintiff's luggage. Do you feel that the airline has an obligation to compensate her for its negligence? What message do you think it might send members of the Dominican community that the airline lost the luggage and refuses to make restitution?"

The airline representatives then pulled out a file that had the names of several of the plaintiff's relatives who had filed lost luggage claims in the past several years.

Although they did not question the legitimacy of the plaintiff's claim, they were not about to settle with another family member and encourage this trend to continue either within this family or within this "close knit community." " we understand your issue but its not ours." Further, we have the law on their side and all we will offer the plaintiff -- not as an admission of guilt but as a good faith gesture is a $200 travel voucher."

The other mediator then asked, "Aren't you concerned that after all these years of service, you could lose a valuable customer? Or worse yet, that if word go around in this "tight knit" community that you lost someone's luggage other Dominican customers would stop using that airline?"

"No that's not really a concern for us. Aside from a few small charter flights, we're the only major airline that flies to the Dominican Republic."

"How do you think the plaintiff is going to respond to your offer?"

"Frankly, we don't care, that's all we can offer her."

The mediators then continued exploring the possibility of the airline offering the plaintiff a free airline ticket; several of the cheaper vouchers for her grandchildren; or any combination of free travel coupons.

The defendants' response was, "Again, tell her that we're willing to give her the $200 voucher or we'll go in front of the judge. We're not about to make any other agreements. That's our final offer. "

The mediators thanked the defendants, escorted the women out the door and asked the plaintiff to come in.

PRIVATE SESSION WITH PLAINTIFF

After the plaintiff sat down and the private caucus was explained to the plaintiff, she looked at the Latina mediator and asked, "tell me dear, how does my case look? What do you think I should do? I don't want them to think they can get away with treating me like this, I deserve some respect! I am an old woman, I raised six kids and am raising five grandchildren. They lost my luggage and they are going to have to pay me for it! "

The mediator told the plaintiff that she understood her frustration. ' You took a trip to take care of your sick father and the last thing you expected or needed was for the airline to lose your luggage. The problem," explained the mediator, "is that you sent the paperwork in late and now the legal deadlines have expired on this case. If the case goes to court, there is a good chance the judge may base the decision on the law. If he does that, you may not win. If he decides to use his own discretion in determining the case, you might get some or all of the compensation for your luggage. You need to decide what's best for you given what you now know about the case and what will make you feel satisfied. I can't make that decision for you. It has to be yours."

The plaintiff explained that she would not accept the travel voucher. From her viewpoint, the airline had lost the luggage and they could afford to pay her for their incompetence. If she was going to "lose" again, she was going to let the judge tell her that. Not this rich company who's trying to "make me lose out twice." The mediators wrapped up with the plaintiff and asked the defendants back into the room.

JOINT SESSION

The Spanish speaking mediator asked the airline representatives, "Are you sure you could not offer something a little more in line with what she would be considered fair. Something that she could accept and not feel cheated twice?"

"We really can't do anymore. We're willing to give her the $200 travel voucher and nothing more." The mediators asked the plaintiff if she was willing to accept the voucher to which the plaintiff responded, "no." They asked the parties again whether they could reconsider and the defendants responded "no."

They all agreed that the case should be sent to the magistrate. Before ending the mediation, the parties agreed to fill out the mediation program follow-up sheet. The mediators thanked them both and sent the case back to court.

*CASE ANALYSIS #1 - LOST LUGGAGE*

| PLAINTIFF | DEFENDANT |
|---|---|
| • The airline lost the luggage. | • The Airline's statute of limitations on the case had expired. |
| • Conviction and pride. | • The Warsaw Pact's (the Airline's gov erning body) statute of limitations had also expired. |
| | • Airline had documentation establishing that the plaintiff filled out the forms incorrectly on several occasions. |
| | • Airline had a monopoly on the travel market to the Dominican Republic. Losing customers was not a concern. |
| | • Representatives were able to avoid direct communication with plaintiff due to language barrier. |
| | • Representatives had documentation showing history of lost luggage claims files by plaintiff s family members. |

The preceding list emphasizes the negotiating imbalance that existed between the plaintiff and defendant. The mediators in this case, unsuccessfully made numerous attempts to engage the parties in integrative-bargaining (e.g., "Is there something the airline could give the defendant that would not cost actual money but would satisfy her interests?"). But as there were little to negotiate, the mediators were left relying on the "good will" of the stronger party to prevail over strong tendencies of positional bargaining. This Case illustrates that parties are more likely to engage in interest-based bargaining when both sides have something (e.g., reputation, financial concession, relationship, etc.) that's of interest to the other as suggested by Auerback and other revisionists.

Another factor that influenced the defendants' position was their interest in avoiding sending "this small tight-knit" community the message that --"if American loses your luggage, we'll pay big." The mediators again tried relying on the airline's good standing in the community. But because the airline dominates the Dominican travel market, the mediator's attempts to seek concessions motivated by fear of reprisals from

the Dominican community was irrelevant. Any agreement or lack of one would have had little impact on the Airline's bottom line. Moreover, the Airline also did not have to worry about it's reputation since the case was taking place in the privacy of mediation. From a purely strategic viewpoint, there was almost no incentive for the airline to negotiate with the plaintiff.

Strategically, the plaintiff appeared to have a weak bargaining position. The language differences between the parties made direct communication impossible and thus compounded the plaintiff's disadvantage as she was unable to directly address the defendants. Given the plaintiff's weak bargaining position, her BATMA-holding out for a judgment- was significantly stronger than her mediated position. The mediators however, were trying so hard to get the airline to give the plaintiff a concession, that they failed to evaluate whether, given the power differential that existed, the case should have been sent back to the magistrate. The plaintiff had nothing to lose by seeing the judge because her luggage had already been lost. By contrast, the defendants faced a greater potential for losses by going before the magistrate: losing the case before the magistrate could have meant a several thousand dollar differential between their mediation offer and what the magistrate could impose.

The mediation focused on the tangible issues of the case, the luggage and how much compensation should be given for its loss. The case, for the plaintiff, however, involved more fundamental issues than being compensated for the luggage; it involved a matter of principle, that such a big company "with so much money was taking advantage of me and trying to get out of its obligation." Given this dynamic, the plaintiff was not willing to concede another defeat to the airline. The Airline had already lost the luggage but they would not also strip her pride by offering her a $200 voucher for $2,400 worth of luggage. If she lost the case, it would not be by her own accord--the "judge" would have to make that determination.

The interaction between the plaintiff and the mediator was different than the

interaction between the other mediators and their disputants in the other eight cases. The tone of the conversation between the plaintiff and mediator in Case #1 took on an almost familiar, friendly exchange. Whereas in the other seven Cases, the mediators were also cordial and friendly but a lot more formal with the disputants than the Latina mediator in Case #1. The plaintiff responded well to this interaction. When addressing the Latina mediator, the plaintiff would speak softly and affectionately. In contrast, when she spoke directly at the defendants (even though the mediator had to translate the words), the plaintiff's disposition would become comparatively more aggressive and hostile.

Throughout the mediation, the Latina mediator seemed in tune to both the substantive and psychological/emotional aspects on the table. As Salley Merry suggests in Chapter One, the mediator because she was of a similar background as the plaintiff, understood the plaintiff's perspective and understood the cultural context in which this dispute was occurring. The Latina mediator empowered the plaintiff and lent credibility to her concerns by not "reframing" or toning down the degree of frustration the plaintiff was expressing.

Finally, given, the level of trust that had developed between the mediator and the plaintiff, it would have been easy for the mediator to convince the plaintiff to accept the voucher; believing it the best solution given the case. The mediator, however, did not try to convince the plaintiff to accept the voucher, even after the plaintiff directly asked the mediator for advice.

"I didn't think it was right for me to ask her to swallow her self-respect and pride for the voucher. I could tell the issue had become a matter of dignity for the plaintiff. I could only tell her what her options looked like but she had to make the final decision. For her own piece of mind, I think she did the right thing. For people that are always getting beat up by the system, sometimes holding your ground is more important than gaining a few dollars."

**Case #2 - Security Deposit**

*The Parties:*

**The plaintiff** was an African American woman with a college degree. She was employed as a project manager in a research foundation.

**The defendant** was a middle-aged man of Greek decent. He owned several rental properties and ran a small real estate business.

**The mediators.** One mediator was an Asian American 1st year Harvard law student. She had completed the mediation training the same semester in which she was mediating. Case No. 2 was her third mediation. The co-mediator was also a first year Harvard Law School student. She had been mediating for a semester more than her co-mediator. She had participated in approximately six mediations.

*The Dispute:*

The plaintiff, "Sharon," lived for three years on the second floor apartment of a three story building owned by the defendant, "George." Until the time of the dispute, their relationship between Sharon and George had been civil, cordial and respectful. If the plaintiff called the defendant about a problem or repair, the defendant's response was typically quick to resolve the problem.

The dispute arose over the first floor tenants who opened a silk screening shop. Sharon complained to the landlord that the fumes were emanating into her apartment and making her sick. George agreed to "do something about it" but the fumes continued to rise in the apartment for several more weeks after their conversation. Sharon then called the Board of Health, where inspectors found that George was in violation of the housing code. Sharon, at that point began withholding rent from the landlord.[27] Three months later George's attorney sent Sharon and the other tenant a letter offering her $2,000 compensation for vacating the premises prior to the expiration of their lease.

Sharon's lawyer sent George's lawyer a letter stating that his client would accept the check for vacating the apartment but that the "issue of the $700 security deposit owed to the plaintiff remained unsettled." The defendant's lawyer responded that the $2,000

[27] The rent was placed in escrow account as suggested by the plaintiff' s attorney.

settlement was it! The plaintiff cashed the check and several months later filed suit against the defendant for treble damages as the defendant had never put the security deposit in an escrow account.[28]

OPENING

The mediation began with a brief explanation of the process as an "attempt between two parties to discuss their case in order to see if some solution to the issue can be reached that satisfies both of your interests. We are not judges and the case will not be based on the law but on what you can both determine is fair. We are experienced mediators here to help you see things from the other person's point of view. Sometimes it helps to just hear what the other person has to say. Have either of you even been to mediation before?"

The defendant responds "no"; the plaintiff answers, "Yes, one other time but I've read all the books." The mediators move on to other procedural issues. They explain that the consent form does not waive a party's right to a hearing, but just assures that the parties have agreed to mediation. The form is handed to each party who then signs it. The mediator establishes the groundrule, "I want to make sure that each of you has an opportunity to talk, in order to do that, each person needs to speak at a time. After one of you is done speaking, the other will get an opportunity to speak. This is to make sure that you are both listening to what the other person is saying. If either of you disagree with what has been said, write it down and we can get back to it when it's your turn to speak. Do you each understand? Do you have any questions before we begin?" The parties answer no and the mediators ask the plaintiff to begin.

JOINT SESSION

"I am suing George because according to the Tenant/Landlord law, George failed

[28] Under Massachusetts Law, G.L. c. 187 SS 15B(9) the landlord of a property is required to put any security monies in escrow. In addition, the landlord must provide the tenant with receipt and the account number within thirty days of collected the deposit from the tenant(s). If the landlord fails to comply with the terms of the statute, the tenant(s) can sue the landlord for treble damages under M.G.L. c. 186 15B(7).

to put my security deposit in escrow. He also failed to provide me with an receipt identifying the bank location and the account number. He is in violation of law Statute 1011 and 1012; under those laws, I'm entitled to "triple damages."

The mediators seem puzzled. One of the two asks the plaintiff, "do you have a copy of that law?" The plaintiff responded, "no."

The defendant then explained that he had Sharon's money and had offered to give it back to her, "but she won't take it."

"You only want to negotiate now because we're here. Did you forget that I wanted to negotiate something prior to today. You put this note under my door saying, 'there is nothing to negotiate, I'd rather see you in court.' I brought the case to court because I knew that he would not give me back the deposit. If he had tried to negotiate with me before we came to court I might have taken something less than $2,100 but now I want what I'm legally entitled to." Interrupted the plaintiff.

"Sharon was a good tenant," continued the defendant, "she would call me and I would do repairs, fix things, she never gave me any trouble. I wanted to come to mediation to talk because I think you're a nice person and we can talk this through," he said directly to the plaintiff.

"I liked you too up until the time when this started to happen. I just felt when he did not respond to my calls that he didn't care about my health." At that point, I decided that I had to take care of myself and began to get others involved."

"I did call you back."

"You took over a month to get back to me George. There's really nothing to talk about now."

The mediator asked the parties if they had any documentation. They each produce a stack of papers and correspondence that had gone back and forth between their lawyers. The mediators while working through the numbers, talk aloud, " Now, the rent was $700, the security deposit was $700; was there any other amounts paid out?" The parties

responded, "no."

"George you paid Sharon $2,000, what do you believe it was that for?"

"For everything. My lawyer's letter said that," responded the plaintiff.

"My lawyers letter specifically said that the security deposit issue was still un-settled." Said the plaintiff as the defendant shakes his head but does not respond.

PRIVATE SESSION WITH PLAINTIFF

The mediators go through the formality of explaining the process and ensuring that the plaintiff knows that discussions held in private session are confidential. "Can you tell me again what the $2,000 dollars was for?" asks the mediator. The plaintiff explains that the money was in exchange for her vacating the apartment. She produces the letter from her lawyer which confirming her assertion that," the issue of security deposit is still outstanding. "

"So this check for $2,000 is what was paid for you to leave. Did you pay George the back rent in escrow before you left?" The plaintiff response that she did not, it we got to keep that money. My lawyer was clear in stating that the money did not cover the security deposit. If George had complied with the law, we wouldn't be here."

"How long did you live in the apartment? "Three years."

"And he never gave you a receipt with the account number of the money in escrow?"

"No he did not."

"Do you think it's fair that you've already gotten a check for $2,000, got to keep three months of rent and now also want treble damages on the security deposit?" How would you feel if you were in this situation and in George's position?"

"The issue here is not about the rent. That issue and case was settled. The case I have brought to court is about my security deposit. Under the law I am entitled to the money."

"Is there some agreement that we can reach today that you think will be fair to

you both?

"Yes, he can give me the money I'm entitled to."

"Is there nothing else, non-monetary that might also solve your interests? You suggested earlier on that you felt slighted by George. Would an apology help?"

"Look he's a real estate agent, he owns several rental properties. He had to have known that the deposit had to be put in escrow. He was just too cheap to do it; he was just trying to save a few dollars. The best apology he can give me is to give me the money I'm entitled to."

"How do you think he is going to react to your offer?"

"I don't really care at this point. I just want my money."

We are going to take a few minutes to talk with George. Thank you for speaking with us. Is there anything that we discussed that you want us to keep confidential?"

"No."

PRIVATE SESSION WITH DEFENDANT

"George did you put Sharon's security deposit in escrow?" Asked the mediator.

"I put the money in the bank."

"Did you put the money in an escrow account and give Sharon a receipt as required by law?"

"No I didn't. I put it in my account. It's in the bank. I told her I would give her the $700 but she doesn't want it. She wants more and I can't do that."

"Did you know that you were required by law to put the money in escrow?"

"I put it in the bank. I didn't want to go through all that opening another account and stuff. What does the law say, can the judge make me pay her $2,100. I have my lawyer's letter, that $2,000 was supposed to cover everything. I don't have that kinda money."

What we hear you saying is that you feel that the $2,000 dollars, you've already

given Sharon should be enough? You're also concerned that if you go before the judge, you may end up losing the case? We understand your frustration, but in mediation, we are less concerned with the law and more about what's fair. If you think it is in your best interest to try to negotiate something with Sharon, is there something you could offer that she might accept?"

"I can give her $700, plus $300 more, but nothing else. I'm a working man. I don't have the kind of money she's asking for? What should I do?"

"We can't tell you what to do but we can you decide evaluate what is in your best interest given what you've said your needs are."

"But what will the judge do? We all make mistakes. Part of mediation is to try to reach a compromise. If Sharon's not going to accept the money, I'll take my chances with the judge. That why you go to the judge, I feel I'm right, she feels she's right. And maybe I'm wrong, but the judge will decide. I can't give her that much money."

"You said earlier that you could offer Sharon $1,000, is that still an offer you're willing to make?

"Yes."

Okay, when we go back to mediation you can make your offer and we'll work from there. Before we get Sharon back in the room, is there anything else that you want to talk about?" The defendant responds no and the mediators calls Sharon back into the room.

JOINT SESSION WITH PARTIES

When the joint session resumes the mediators suggest that the parties talk to one another some more. The defendant presents the offer to the plaintiff.

"Like I was telling the ladies, I can give you $700 plus $300 but I really can't give you more than that Sharon. I don't have that kinda money."

"A thousand dollars, why should I take a $1,000 when I can get $2,100? No deal, let's go to the judge." The plaintiff and the defendant refused to negotiate further. The

mediator terminated the case, which was heard that day.[29]

*CASE ANALYSIS #2 - SECURITY DEPOSIT*

| PLAINTIFF | DEFENDANT |
|---|---|
| • Defendant did not put security deposit | • Up until mediation, had good rela tionship with in an escrow account. plaintiff. |
| • Plaintiff was well versed in mediation and negotiation strategies. | • Had letter from his lawyer that placed doubt on plaintiff's claim that the $2,000 settlement did not cover security deposit. |
| • Plaintiff knew, given her history with the defendant, that positional bargaining would be reasoning, goodwill as strategy. most effective than interest-based bargaining. | • Had history with plaintiff and could use reasoning, goodwill as strategy. |
| • Had letter from her lawyer, leaving doubt about the security deposit. | |

From the onset, the plaintiff walked into the mediation siting the housing regulations as evidence of her "entitlement." Even though the mediators explained during the opening that, "mediation is not based on law but on principles of fairness," the plaintiff held on to her legal rights to create leverage for herself and to anchor her position. The mediators did not balance the tension that often surfaces in mediation regarding what extent knowledge of rights under law should be incorporated into the mediation process. Although the mediators claimed that the agreements reached in mediation are not based on legal precedence or rights, the mediators' deviation from integrative bargaining to seeking concessions for the defendant, clearly indicated that the mediators were relying heavily on the legal aspects of this case.

Moreover, the inexperienced mediators did not reality test the plaintiff s position, even though there were issues that could have been brought into the discussion.

[29] At the hearing, the plaintiff and defendant each get about two minutes to explain their case to the magistrate. Once the magistrate hears the case, he asks the defendant whether he comply with the law, to which the defendant answers "no." The judge then looks at the plaintiff and says. If you weren't going to

Moreover, their limited knowledge of the types of decisions the judge renders, prevented the mediators from helping the plaintiff assess her position. For example, in the Cambridge court, the judge almost never grants litigants treble damages in such cases; his tendency is to use his discretion in rendering judgments. Had the mediators known this, they may have been better equipped to balance the inequities between the parties.

During my private interview with the plaintiff, I asked her about the lawyer's letter. She was frank and honest in telling me that her lawyer purposely left the security deposit loophole, "so that I could get him later."[30]

"If you had such a good case, why did you try mediation?" I asked.

"Because it looks good in front of the judge if he thinks that you've tried to negotiate and weren't able to reach an agreement."

"Would you have settled in mediation?"

"Yes."

"Then, why didn't you."

"Because I didn't feel I had to," she said gathering her papers and heading toward the court room.

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compromise why did you go to mediation? Do you understand what mediation is? It is a process where people compromise, neither party leaves with everything they wanted! If you weren't willing to compromise, why did you bother with mediation?

"That's what I'm entitled to by law, answers the plaintiff. The judge then asks the plaintiff, "is there an amount that you are willing to take?" "I would take $1,400."

The magistrate, addressing the defendant asks, "are you willing to give her $1,400?" "No."

"Judgment in favor of the plaintiff for $2, 1 00.

"What, is it over? I have a lawyer."

"Your lawyer doesn't matter. I asked whether you were willing to give the plaintiff $1,400 you said, "no."

Since you won't, I have no choice but to rule in favor of the Plaintiff. You did not comply with the law."

"Okay, okay, I'll give her the $1,400."
"Are you willing to accept that amount?" the magistrate asks the plaintiff.

The plaintiff says yes and the magistrate works out the details of payment.

[30] I must add that I believe that some of that frankness came about because I approached my conversation with the plaintiff as if I admired her strategy, and like most people she became all too willing to gloat about her "no lose" position.

The defendant by contrast was disappointed with the mediation. He felt that his needs had not been adequately served and that no compromise came of the case. "This was a waste of time. I didn't get anything accomplished and now we still have to spend more time in front of the judge." He was definitely one person who would not try mediation again.

**Case #3 - College Selection Process**

*The Parties:*

**The plaintiff** was a middle-aged white male who was self-employed as a college referral agent.

**The defendant** was a middle-aged white woman. The defendant was also self-employed.

**The mediator** was a male community representative in his upper twenties. The mediator had mediated over fifty cases for the Program.

*The Dispute:*

The plaintiff was suing the defendant for non-payment for services. The plaintiff was countersuing for a refund of payment made for "poor" services. The plaintiff had hired the defendant to work with her son "Billy" in producing a list of potential colleges that Billy would likely be admitted to.

The defendant had conducted some preliminary work herself, identifying about seven or eight schools that met her criteria; (1) the school should have no more than 4000 students, (2) tuition at the school should be no more than $8,000-$12,000 per year; and (3) the school had to match with Billy's academic ability.[31] The defendant had done preliminary work and identified three or so small state colleges in New Hampshire and Northern Massachusetts that might work for "Billy."

[31] These criteria were very important since the defendant had a $36,000 trust fund for Billy and "knew" that it would be next to impossible for him to get financial aid. As far as Billy' academic qualifications, he had consistently placed at the bottom 20th percentile in his class and SAT"s were under 1000. "He is not particularly gifted, he won't get into Columbia, Brown, or any of those top ten schools."

The plaintiff s fee was $50 hour at a minimum of 6 hours. His services for the fee included spending time talking to Billy, exploring his interests and ideas in order to provide a customized listing of about ten schools that matched those interest in addition to the criteria identified by the defendant.

Initially the defendant had spoken to the plaintiff about reducing the number of "scouting sessions" since she had already found several schools that Billy would apply to. Her preference was that they spend only a fraction of the time scouting and the remainder of the time helping Billy write personal statements. The plaintiff told the defendant that was not his policy but he would be willing to provide that service, at $60 an hour, after they had found the "perfect" school for Billy.

Six weeks later during the last session, the defendant went to the final meeting to pick up the list. "I was astounded to see some of the schools that were on the list." Among the ten schools on the list, two were Ivy League Schools; six were several thousands dollars higher than the tuition criteria; three of the schools had well over 4000 pupils; another two were highly competitive California system schools; and the other was selected because it has a good intramural tennis program and "Billy plays tennis."[32] Only two of the schools were within the criteria they had determined. These two schools were the same one which the plaintiff had already identified.

The defendant had paid the plaintiff $200 of the $300 fee. She sent a letter to the plaintiff detailing her disappointment with the services and telling him she was not about to pay the balance. The defendant then took the plaintiff to court, for the $100 balance and the $14 filing fee. The defendant countersued for $200. The amount she had already paid the defendant.

## JOINT SESSION

The joint session was overwhelmed by hostility of the plaintiff toward the defendant. The plaintiff walked into he room and sat at the opposite side of the table. When

[32] Tennis was an irrelevant criteria, because Billy's tennis ability was "mediocre at best."

the mediation began the mediator was unaware that the defendant had filed a counterclaim asked the plaintiff if he had seen a copy. When he said yes, the defendant asked if she could see it because she had left her copy at home, she was told, "none of our business," by the plaintiff.

The plaintiff repeated that from the onset the defendant had been concerned about money. I provided the service and the Susan is just trying to get out of paying her bill. She's cheap. She did not pay me in October, November and then sends me a check for $200 in December. In January she came to pick up the list and left. Susan never mentioned that she was dissatisfied then."

"Why would you put a school like M.I.T. on the list, he doesn't even want to do engineering? Even if he did, we couldn't afford to send him there. Then you put Brown and Columbia, Billy doesn't have the grades to get into those programs," asked the defendant.

"You're cheap, controlling and obsessive. That's the problem, you tried to sabotage the process and you weren't even at the meetings with Billy and I. You didn't talk to him, you didn't' hear what he wants to do. I did!"

"But why Columbia when the tuition is almost $20k a year. I specifically said nothing over $10,000 per year."

"You're just obsessed with money. Of course, I shoot for Brown, for Columbia. With demographics declining I shoot for the moon! I don't base my list on tuition, you just apply for financial aid. You're just a controlling, obsessive woman."

"You're sick."

The plaintiff completely blew up into a frenzy, "Sick! Sick! I'm telling the judge! You call me sick?" He was screaming out of control. The mediator asked both parties to calm down and suggested they take a break and would go into private session once they returned. Upon returning from a two minute break, the mediator met with the defendant first, because the plaintiff has to feed his meter.

PRIVATE SESSION WITH DEFENDANT

The private session with defendant started out with Susan venting about "Terry's incendiary and irrational behavior." She explained that she attacked his character out of frustration but that he case was not about money, it was the quality of service. She could not understand how, as a businessman, the plaintiff could value $100 more than his reputation, especially since the majority of his business came from referrals. She had decided not to pay him because, "after sending Terry the letter, rather than call me and talk things out, he sent me another bill. I also don't want to give in because its a matter of pride and he's a con artist. He should be taken to task on the services he renders; they vary from person to person. He should be held accountable for his professional job just like everyone else."

"What I hear you saying is that you want Terry to view your issues as legitimate. This is not solely about money but also about work, quality, service, and professionalism."

"Absolutely. He doesn't seem to get it."

"When both parties feel threatened, its hard to put emotions and bad feelings aside," the mediator explained.

The plaintiff was adamant that she did not want to cave in this time. She had been in a mediation in Somerville over some poor plumbing work and "gave in." "The weak person in mediation is the one who always settles. I gave in just to get it over with. I'm not going to do that again."

"You don't have to agree to anything you don't feel comfortable with."

The private session ended with the mediator summarizing the defendant's interests:

- plaintiff's anger is focused on cash when other issues are fact more pertinent; defendant's issues are legitimate, money is not the real issues;
- defendant wants some accountability from person whose professional services

aren't up to par; and

- defendant was also upset that the defendant sent her a second bill even though he knew at that time that he had an unsatisfied customer.

Before ending the private session, the mediator asked if there was something she could do to move the negotiation forward. The plaintiff decided that she had not meant to call Terry "sick, and would apologize."

PRIVATE SESSION WITH THE PLAINTIFF

The private session with her plaintiff began with him discussing the defendant's obsession with money. "She has a $36,000 trust fund and she's worried about $100? You see what I mean?

"What do you want out of this mediation?" the mediator asked the plaintiff.

"My hundred dollars. But she's not going to give it to me she's too cheap. She's controlling, arrogant, overbearing."

"Terry, mediation is supposed be a compromise between two parties. You are supposed to convince the other party that your issues are legitimate. The things you are saying to Susan is not going to do it. How are you going to convince her that you are deserved your money?"

"I don't know, you're the mediator. You have the skills?"

"No this is your job. You have to do the work." The problem that we have here is that the service you offer is not like a stereo where if you don't like it or it doesn't work you can take it back. You've put out services and effort that you can't reclaim. When we go back into mediation, I want you to remember that you both had good intentions but that things got mixed up in the communication."

They talked for a bit longer about the confidentiality of the private session. When the joint session began, the plaintiff was the calmest he had been throughout the mediation.

THE JOINT SESSION

The mediator began the joint session by establishing some groundrules in addition to the existing one:

- no talking out of turn
- set hard feelings aside for a minute
- avoid accusations
- focus on possible solutions

"The problem that we have here is that both of you went into this agreement with good intentions. Susan you wanted to provide Billy with the best schools for his needs. Terry you wanted to provide Billy with schools that fit his needs also. The problem comes about in the different expectations each had about not only the services to be rendered but who the client was. It seems from what Terry has said, that Billy may had a different criteria for schools than you did Susan. Some of the confusion lies there. And since there was no written contract and so each of you had to rely on your own interpretation of what was being offered.

"He's right Terry, I know that you meant well, I want to apologize for calling you "sick" I shouldn't have said it, because I didn't mean it."

At hearing the word, "sick," the defendant erupts again.

"I just can't believe you called me that! Well, let me just tell you, if you ever repeat that outside of this room, I will sue you for slander! Do you understand? You're both my witnesses," he said looking at the mediator and myself.

The defendant crosses her arms in defeat.

"At the heart of the dispute is that each party had different expectations and interpretations of what the services were. Now both of you are upset and its hard to put your hard feeling aside. But if you're interested in resolving this dispute, you will have to. It seems that you're looking for vindication, but is the judge the person to give you that vindication? What's done is done and now the issue before the table is whether you can both resolve this issue hear or whether you want to go before the judge and have him

do it for you," the mediator explains.

The parties calm down and begin to talk a little more calmly. The plaintiff acknowledges, "Billy was a great kid."

"Billy liked you Terry, he said you helped him a lot. But I don't feel I got the services I expected. It's not about whether Billy liked you or not, it's about what you were hired to do."

"Susan, there you go again, I delivered a service. I was there on time, I met with Billy, I provided you a list of ten schools. I earned my fee."

Okay, this is getting us no where. What we have is a $114 dollars. Could one of suggest a possible offer to see if we that's anywhere near what we should be, " interjects the mediator.

"I have an offer, why doesn't Susan give me a $100 and we can settle this now."

"I have a better offer, let's split the difference. Your fee was $300, 1 paid you $200, the balance left is $100. You can give me back $50 and it will be a $150 loss to both of us."

"I can't believe you, me pay you $50 dollars?"

"I can see we're not going to resolve this case. I am going to put your file back in the docket and the judge will call you. Before you go, I'd like to ask if you would sign this form agreeing to have the mediation program call for feedback. If you'd like to be contacted please fill out the form and include a daytime phone number. Thank you both for trying mediation. You should back to the court room, so that when the judge calls your case, you're down there." The parties get up and head toward the hearing room.

*CASE ANALYSIS #3 - CASE OF COLLEGE SELECTION*

| PLAINTIFF | DEFENDANT |
|---|---|
| • Had not received full fee for his service. | • Was dissatisfied customer. |
| • Provided all six consultations to plaintiff's son. | • List produced did not match criteria established. |
| • Defendant's son was pleased with the services rendered. | • Plaintiff had no contract. |
| | • Had prior negative experience with mediation. |

The plaintiff was what Getting to Yes' would describe as the "positional" bargainer. He did not argue on the merits of his case; preventing the real issue--was the quality of the service he provided the defendant adequate and consistent with their discussion-from surfacing. From the onset of the mediation, the plaintiff used abusive and obstructionist behavior to avoid addressing the substantive issues of the dispute. In comparison, the plaintiff was the "principled" negotiator. She remained relatively calm and refused to get into a shouting match with the plaintiff. She held on to her composure while the plaintiff ranted, raved and attempted to belittle her.

The defendant was also not about to make a concessions, because she felt she had already paid too much for a service she was not pleased with. Motivating her position was a previous experience with mediation. In the that case, the defendant had been the more conciliatory party and obviously held deep seeded regrets about trading her principle to "just get the case over with." She was certain that the "weaker person always ends up giving in" and she did not want to be the weak one again. Thus being able to walk away from a mediation , knowing that you were not taken, is an important element to party satisfaction with the process. The mediator, cognizant of the defendant's interest that she not be "taken" again, addressed the defendant's concerns by assuring her that, "you don't have to agree to anything you're not comfortable with."

Moreover, the mediator accurately assessed that the dispute involved (1) resources

that were distributional, and (2) that the product in question, the consultation and the list, could not be returned. He further: (1) fleshed out tangible and non-tangible interests during the private sessions, (2) tamed inappropriate behavior with reasoning (while not jeopardizing the defendant's dignity), (3) minimized any negative impact of the plaintiff s comments by explaining to the defendant the basis of the behavior, and (4) provided an opportunity for both parties to vent their frustration during private sessions.

Although this case did not settle, it was one of those where the strategies advocated by Getting to Yes were effective principle of being decent and holding on to one's dignity worked remarkably well.

**Case #4 - Car Accident**

*The Parties:*

**The plaintiff** was a white male in his upper twenties, early thirties. He is employed as an auto mechanic.

**The defendant** was a middle-working class, African American woman in her early forties.

**The mediators** were both white males in their mid-to late twenties. One is a Harvard Law School student with extensive (four years) mediation experience. The other is a lawyer, trying to be mediator. He has participated in approximately six cases.

*The Dispute:*

The plaintiff, "Robert" was suing the defendant "Evelyn" for a collision that occurred between his car and a car registered in plaintiff's name. The woman had not been at the scene of the accident. The plaintiff had been under the impression that the person that hit his car was the defendant's son. But when the plaintiff saw the woman he was puzzled because the person that hit his car was a white male.[33]

[33] From the discussions between the two parties, it appears that the woman's son ( and co-owner of the car ) was in the car but was not driving it. The defendant's son let his friend drive the car.

The plaintiff recounted being hit on the left back side. He produced pictures of the car and had an estimate by a local auto body shop for $2,000 in damage to the car.

The defendant who at first had no idea why she was being taken to court, and had never been to court before, acknowledged that she did see a scratch on the car and asked her son what had happened but he had told her he did not know. She was very doubtful that given the scratch on her, "that much damage could of happened to yours."

The defendant was caught between a rock and a hard place because her son, had been driving an unregistered, uninsured car. Further his license had been recently suspended for not paying parking tickets. The defendant was frustrated for being dragged into court, especially considering that she was nowhere near the scene of the accident, Moreover she was frustrated and "fed up" with her son, for who she had just finished paying over $700 in parking tickets for that stupid car that I can't drive anyway." " She viewed the whole case as another lesson to her, "because I should have never agreed to co-sign for that car, he's been irresponsible with it and has caused me so much trouble over that stupid car." [34]

PRIVATE SESSIONS WITH PLAINTIFF

During the private session the mediators were able to discern that the estimate produced by the defendant, was inflated. "Bob" was a mechanic in a shop, "but had another place down the street do the estimate." One of the mediators who had exceptional probing skills asked, "can you tell me more about the receipt? What does the $2,000 estimate cover? Is labor and parts included in that estimate? Can you tell me more about the type of insurance you have?"

The mediator was able to get the plaintiff to swagger on his story, to the point, where he pulled out a piece of paper, did some quick calculations and arrived at a $600

[34] The woman was unable to drive the car because it was a standard and she did not know how to drive it.

settlement. "I can do/have the work done for about $600. If she's willing to agree to that, I'll take it."

PRIVATE SESSION WITH DEFENDANT

During private caucus the mediators asked the plaintiff, who by this time, seemed very disengaged, the plaintiff had agreed to settle at $600.[35] "Is that reasonable to you?"

The plaintiff expressed disappointment that she had been brought to court when, "I wasn't even there. The thing is that I know that car could not have done that much damage to his car. My car has only a scratch on it, but I'm going to pay the money so that I can get out of here but, this is totally not fair." The mediators validated her feelings "we understand your frustration having to be here in court when it's your son that should be here..." and moved toward ensuring that the $600 payment would be manageable; failing to address the defendant's real issue-- could she have legally been brought to court for this case?[36] She had agreed to compensate the plaintiff.

JOINT SESSION

In joint caucus it was agreed the parties would settle for $600. As they were discussing the terms of the agreement and a possible payment schedule, the plaintiff who looked completely disgusted. She suggested that the plaintiff pick up the check at her house, gave him the address and described the house. Then she said, "you'll see the car, parked in the driveway, just sitting there, "all this trouble for that stupid car." "I'm going to pay the money, but I still don't think I should be here. This is a lesson for me, I'll never do anything like that again." One of the mediators then asked, "is there any other agreement that you could come up with that could satisfy both your interests and still

[35] She was siting with her hand resting on her chin and slumping toward the table.

[36] In fact, during my interview with the defendant after the case, she emphasized how cheated she felt about the process because she expected, 'them to tell me at last if I should really be here."

settle this dispute? Is there something that could be worked out that would address this case and possibly the issue involving the car?" The mediation instantly shifted from a $600 potential settlement back to $2,000.

The plaintiff asked if he could speak with the defendant alone. Throughout the mediation, the disputant's participation had been mutually respectful and non confrontational. The defendant agreed and went out into the hallway with the plaintiff.

Two minutes later the parties decided the defendant would settle the case by signing over the title of the car to the plaintiff. One mediator just sat back with a disturbed look on his face, the other seemed really pleased that the parties "had engaged in interest based bargaining."[37] After private caucus with each party, the mediators drafted an agreement, even though it was unclear at the time how the defendant would get her son, as co-owner of the car, to consent to sign over the title to the plaintiff. [38]

The parties signed the mediation agreement and the case was settled.

Two weeks later as I was in court to observe another mediation, the same two parties were back in court. Their agreement had obviously fallen apart.

*CASE ANALYSIS #4 - CASE OF CAR ACCIDENT*

| PLAINTIFF | DEFENDANT |
|---|---|
| • Car was unregistered & uninsured. | • No knowledge of the incident in question. |
| • Had estimate & pictures of damage. | • She was not directly involved in accident. |
| • Defendant was co-owner of car. | • Was not sole owner of car. |
| • Defendant's son was driving an unregistered, uninsured car. | |

[37] At this point I couldn't take anymore as a silent observer and asked to caucus with the mediators to suggest that they private with each party to make sure this was in fact a mutually beneficial agreement.

[38] Further, when this came up during the mediation, the plaintiff again asked to meet with the defendant outside of the room. I suspect he suggested she forge it, if her son was unwilling to sign the title. When they returned to the room, they said everything was all set.

Case #4 is a clear case of the second class justice issues raised by the revisionists. First, although the defendant was co-owner of the vehicle with her son, it was unclear whether she held any legal responsibility for the accident. From the minute the defendant walked into the mediation, she asked whether the case was valid. The mediators misread her concerns and thus validated her feelings ("we understand why you're upset, you feel that you shouldn't even be the one here but..... ?") when a more appropriate response would have been to address the question on a substantive level—could the plaintiff actually sue the defendant who had nothing to do with the accident and was co-owner of the car in question? This issue was never addressed during mediation - even though one mediator was a lawyer and the other a second year law student. Each had the capacity and ability to find out.

The second problem, one also articulated by the revisionists, was that the mediators in their effort to remain neutral, often allow the parties to reach agreements that are not in the best interest of the defendant. The disputants are assumed to be rational and the best judges of their positions. Case #4 however, illustrates well what happens when these assumptions are inaccurate. The agreement reached in Case #4 was not based on justice, fairness or any other objective standard. In fact, from an observer's perspective, it was clear that the mediation was occurring around the defendant; she went along with whatever proposal was on the table at the time. Even of more concern, the mediators overlooked that the defendant's "detachment" could have been her way of expressing her disempowerment with the process. To compound matters, the mediators were both aware: (1) that the plaintiff's story was laden with inconsistencies; (2) that it was very likely the estimate produced by the plaintiff was greatly inflated; (3) that the pictures he produced of the car may not have been the car involved in the accident; [39] and (4) that the plaintiff had been willing to settle at $600 but now was more than happy to walk out with a $5500 (the value of the car) agreement, even though, his original claim had been for $2,000.

[39] There was damage to that car in places where the plaintiffs car could d not have hit, i.e., on the roof, the front side of the car was dented in addition to the side the plaintiff claimed had been hit by the defendants son. The mediators never asked to see the title of the car to ensure that they were in fact the same vehicle.

Only at my insistence did they private caucus prior to the signing of the agreement ask the defendant if she was sure about her choice. The defendant said she was going to "do it just to get that stupid car behind me, once and for all." The mediators accepted the explanation and drafted the agreement.

This is particularly troubling as an observer because one of the mediators was exceptionally well equipped to recognize and address the imbalances that arose. He had four years of mediation training and is protege of Roger Fisher. This mediator, however, fundamentally believes that the model works best when the mediators are non-interventionist and therefore served a purely process management role. The other mediator was focused on getting the parties to reach an agreement, and thus influenced all of the issues in this direction.

During my interview with both mediators, each expressed being uncomfortable with the agreement because, "she gave away more than what the case was worth." Neither mediator connected his discomfort with the unfairness or illegal aspects of the agreement. They rationalized their discomfort as a personal issue each was having "because I would have done things differently. But that's not my role here. It's not important how I feel about the outcome because she may have had other reasons (e.g., "like solving the problem with her son, once and for all') why this is a good outcome that I may not be aware of." Thus they were able to rationalize a blatantly unfair agreement.

**Case #5 - Antique Furniture**

*The Parties:*

**The plaintiff** was a lower-middle class working Italian Woman her late fifties.

**The defendant** was a poor, working class Puerto Rican woman in her mid-twenties.

**The mediators.** One mediator was a mid-twenties 2nd year Harvard Law School Student. The co- mediator was 1st Year Harvard Law School Female Student.

*The Disputes:*

Two parties were in court over a dispute involving some "antique" furniture that the plaintiff " Angela" had lent her son and his girlfriend, "Rosa," when they moved in together. When the plaintiff's son, Niccki and Rosa broke up, the defendant refused to give back the furniture. The plaintiff had made numerous attempts to get the furniture back and each time had been unsuccessful. The last time Angela went to pick up the furniture, she got to the apartment only to find no one home. Rosa does not recall any conversation in which Angela said the furniture was just a loan. In fact, Rosa, the furniture is so old, that it "may fall apart if it's moved again."

OPENING

The mediators began the session by introducing themselves, and then asking each party had participated in mediation before. Both respond "no." The explain the mediation process, "we are experienced mediators, here to help you see if there is something tat we can do to help you resolve your dispute." We're not judges, we're not hear to render a judgment for you. We are hear to listen to what each of you has to say and see if there are areas where a compromise can be reached. Before we begin , we have a form for you to fill out. The form explains that you do not give up your right to a hearing if the case is not settled. Will each of you please sign the form on the line provided for you.

The plaintiff is then asked to begin the mediation.

She explains, "when Niccki moved in with Rosa. They don't have nothing. No chairs, no bed, no nothing. I lend them some furniture so they won't live like that. I make sure I tell them that as soon as they get on their feet, I want my furniture back. I have that furniture for over fifty years. My mother left it for me. Now Niccki..."

The mediator interrupts, "I'm sorry, who is Niccki?"

"Niccki, he my son. He live with Rosa until last month when they break up. They no get along. She fight too much. Niccki move back home and now I don't get furniture

back. I call Rosa and ask to pick up. First she say no. Then she say yes, then no one there when I go to pick up. I just want what belong to me. Nothing more."

The mediators thank Angela, and instruct Rosa to tell her side of the story.

"When Niccki and I moved in she came over all happy with all this furniture. She wanted us to have it so that we could set up the apartment and live "like people." I remember at the time that I didn't want to take the furniture because Angela, she sticks stuff in your face. She give you something and never let you forget it. That's just how she is. Niccki thought we should take the furniture. Angela never mentioned that the furniture was a loan. In fact, every time she came over to the apartment she couldn't help mentioning something about "the furniture I give you."' Now she remembers saying it was just a gift because Niccki is gone. If the furniture was a gift, why didn't Niccki take it with him? He took everything else that was his when he left. She don't want the furniture, she now wants to give it to Niccki and that tramp Nicole. Well, that's just too bad, I need furniture just as much as they do. "

The mediators thank both parties and recommend that they go into private session. The mediator points to the bathroom and the coffee shop while he escorts the defendant out the door.

PRIVATE SESSION WITH PLAINTIFF

The private caucus began with a brief explanation of the caucus, "nothing that is said here will be repeated, unless you say otherwise. Now how much is the furniture worth?

"I don't know because my mother left it to me. It's not replaceable. I don't want money, I want the furniture back. I don't want nothing to do with her! Niccki don't want nothing to do with her! He find nice girl, now. Niccki happy. I send Niccki to Rosa house to talk to her but she no let him in. I also send my daughter Tania who Rosa talk to but no give her furniture."

"I can see you're upset. You have some good furniture, that means a lot to you and now you're concerned that you will not get it back. How many pieces of furniture are we talking about?"

"I give her two beautiful Victorian chairs, the matching couch, two mahogany end tables and a brass lamp. I was going to give them the matching curtains, but Tania told me no yet, to wait. I just want my furniture."

"Why do you think Rosa believes that you gave her the furniture?"

"She know me no give. Me tell her, Use until you get your own," says Angela.

"You mentioned that your daughter Tania is still friends with Rosa, can she help you get the furniture back?" Asks the mediator.

"Yes, the judge. That's why me here today."

"Okay, well we're going to see what we can work out that meets your interest of getting your furniture back. Before we go talk to Rosa, is there anything else that you would like to ask or discuss?"

"No, you nice people. See if you can talk to Rosa."

PRIVATE SESSION WITH DEFENDANT

"Rosa, before we begin, we want to remind you that everything we say in this room is confidential unless you tell us otherwise." Now the issue that we have is that there was some misunderstanding about the furniture. You believe that Angela gave you that furniture and she claims to have lent it to you and her son. The furniture cannot be divided, so we have to come up with a way of deciding who should get the furniture that's fair to you both."

"I don't think Angela should get the furniture back just because she now wants it back. That woman is a B----. You see her looking all sweet and kind, she'll stick the knife in your back just as quick. This isn't about furniture. How do you think Lisa and Niccki get together? When Niccki and live together she gave him the furniture. When he

left, he didn't want it. He took everything he wanted. Considering everything they put me through, the least I deserve is the furniture."

"So what I'm hearing is that you understood that the furniture was not a loan but a gift?" Is there a possibility that you could have misunderstood the loan for a gifts"

"No, she never said anything about us returning the furniture."

"Angela mentioned earlier that the furniture was given to her by her mother; it's been in her family for along time? Do you think that the furniture may have some value other the monetary? Like sentimental value?"

"The only value she get out of the furniture is rubbing it in or face. Every time she come over she had to say something about the furniture. "Oh look, another scratch on the table. Oh look there's a string pulling at the seams. Oh look, now you almost look like somebody with all this nice furniture. I got so sick of hearing it that's how I know she gave us the furniture. She never let us forget it."

'I don't want to put words in your mouth, but aside form the furniture, there's also another problem. You're feeling resentful because she did not show a lot of respect for you while you were with her son. She often tried to make you feel inferior?" Asked the mediator.

"Not inferior, I'm not inferior to anyone. She just makes me mad. Rubbing something in your face all the time."

"Is there something that she can offer or say that will make you feel better?"

"No, and I don't want anything to do with her or her son."

Okay. Before we call Angela back into the room, is there anything that we discussed that you would like us to share with Angela?"

"No."

JOINT SESSION

"Thank you both for agreeing to meet with us. We have to decide what is the best thing to do about the furniture. It's obvious that both of you can't keep it. Do either of

you have any suggestions?"

"Rosa, why don't you give me the furniture. You know that I don't give it to you. Don't you have some pride girl? Why you no give the furniture back?"

"You mean, old B----!!! You talk about pride, but you let your son sleep in your house with his girlfriend. Now you want to take my furniture so that you can give it to them. You're a dirty, mean, ugly woman! Always looking your nose down at people. You can have the furniture! I don't want any one saying that I owe them anything. The last thing I need is for this hag to really think she has a reason to talk about me! "

The mediators, who until this time had not said a word, interrupt. "Rosa, calm down, getting angry is not going to get us anywhere. Are you really willing to give Angela the furniture?"

"Yeah, she can have it. She better get it out of my house by Saturday , or I'm going to throw it out."

"Angela, can you arrange to have it picked up by Saturday?" Asks one of the mediators.

"And it better not be that Niccki," shouts Rosa.

The mediators draft the terms of the agreement. Rosa will put the furniture outside of her apartment door at 6:30 on Friday night. Angela will have someone pick it up by 7:00 that night. The parties sign the agreement; the mediators thank the parties for trying mediation as they walk out the door.

*CASE ANALYSIS #5 - ANTIQUE FURNITURE*

| PLAINTIFF | DEFENDANT |
|---|---|
| • Was rightful owner of furniture. | • Had furniture in her possession. |
| • Wanted vindication. | • Wanted vindication. |

Case # 5 was complicated because the parties did not even have a minimal level of trust or respect for one another; there were no long term gains or future a relationship between the parties to explore. They had completely incompatible interests, which were being driven by vindication and animosity for one another. There was no doubt that the furniture belonged to Angela, and Rosa knew it. She was trying to hold onto the furniture to get back at Angela who looked down at her. The mediators tried to address the hostility and disdain the two parties had for one another when their objective in this case, give the hostility and resentment that existed between the parties, should have been to determine how the furniture could exchange hands with the parties having the least amount of contact with each other.

The mediators let the parties argue and insult one another until the mediation became unproductive. The plaintiff s form of abuse was subtle, psychological abuse aimed at producing an inferiority complex in the defendant. The plaintiff chipped away at the defendant's self esteem until she could take it no more and became more outwardly abusive toward the plaintiff. The mediators attempted to address this issue by exploring feelings and allowing some venting of emotion during the private session. They did not however, make sure that these feelings had sufficiently run their course prior to bringing the parties together again. In fact, the venting process only brought up more resentment among the disputants without a clear method/way to resolve those hard feelings. The mediator's primary concern should have been the dissolution of this relationship so that both parties could move on with their lives.

**Case #6 - Faulty Auto Repair**

*The Parties:*

**The plaintiff** was a working class Haitian man in his late thirties.

**The defendant** was a working class Haitian man in his mid-forties.

**The mediator** was white male in his late twenties. He had mediated over fifty cases.

*The Disputes:*

The plaintiff "Willio" was suing the defendant "Morri" for $400 dollars for poorly done work. The plaintiff had taken his car to Morri to have the two back wheel cylinders replaced. The cost of the work was $110—$50 for the labor and $60 in parts. Three days later, Willio was on the highway when the car began shifting to the right. He got off at the nearest exit and found a auto shop. The shop mechanic informed that the bearings on the car were damaged because the cylinders had been improperly installed. The mechanic fixed the car at a cost of $403, including parts and labor.

The next day the plaintiff went to see Morri and request that he be paid. The defendant refused to compensate Willio, stating that he had not been given an opportunity to fix the car. Since Willio had taken the car elsewhere to be fixed, he could not pay him for that. Willio explained that he had been thirty miles away from Cambridge when the car began shifting. His first inclination at the time was to get the car off the road. After several weeks with nothing resolved, the plaintiff filed a suit against the defendant.

JOINT SESSION

The mediation began with the mediator introducing himself and explaining the mediation process." This isn't a court of law and I am not a judge. I am here to see if I can help you each communicate your point of view to the other in hopes of reaching an agreement that will settle your dispute. If the case does not settle, you can go back to the judge." After asking the parties if they have any questions, the mediator read the consent form and handed it to each person to sign.

"Now before we start I want to set one rule. Only one person should speak at a time. I'm going to ask that you both be as brief as possible. If one of you does not agree with what the other has said, write it down so you'll remember it when it's your turn to speak. We're going to start with the plaintiff, since he filed the case."

I took my car to Morri to have the two back break cylinders replaced. Everything

was fine. Three days later, I'm driving down the highway when the car suddenly moves to the right lane. I got scarred and pulled off the next exit. The mechanic at the shop said the bearings on car went because the cylinders had not been installed the right way. He picked up the part in the junk yard, installed it a few hours later.

The next day I called Morri and told him what happen. He said, 'too bad you should have brought the car to me.' I say, 'how could I,' I was thirty miles away? Morri refused to refund my money even though I went to talk to him three times after that. My sister she called Morri. She said to Morri, "Why you two fight? You know each other too long to fight over money. Work this out. But still Morri does not want to cover the cost of the repairs."

Once Willio is done the defendant begins speaking in a heavy Haitian accent. "He did not bring the car to me, so I have no idea what was wrong. My mechanic could make mistake but I don't know if the price he pay was good. He don't bring the car back to me, everyone has a problem bring the car back, because I fix good. The bearings get stuck he say, that because other mechanic did not know how to take them off. Everybody know, Morri good mechanic. I take off cylinders with no problem. His uncle a mechanic, have same problem. Couldn't get cylinder off. He come to my shop. I take off no problem. Other mechanic charge him too much. That work don't cost $400. 1 even would have paid for towing."

"Morri, did you really expect me to bring the car back to you, thirty miles away? That was the last thing I was thinking. I didn't know what was wrong with car. All I know is that I was driving and the car starts to shift lanes by itself But I wouldn't have to pay nothing, if your mechanic would have put the cylinders on right to begin with," interrupted Willio.

"Maybe he make mistake," said Morri. "But I check those cylinders myself and they were on right. They were not lose. But okay maybe he make mistake, but you no bring the car back to me so I can't fix."

The mediator interrupts. "Okay let's go back to cost. Morri you said you would have paid for towing, how much would that of cost?" Asks the mediator as he writes down the numbers given to him. Between $80 ad $100 for towing, $24 for the bearings, and $30 and hour for labor. That comes out to $134 to $154. Why don't we go into private session now."

PRIVATE SESSION WITH PLAINTIFF

After explaining the mediation formalities, the plaintiff began, "Morri's upset because I didn't bring the car to him. I would have, he's a good mechanic. It wasn't him but his worker that fixed my car. I couldn't bring the car to him because I was thirty miles away. I just wanted the car fixed so I could get home."

"I think I hear you saying that you respect Morri's work," asked the mediator. "That under normal circumstances you would have taken the car back to him, but the car started to act up and you just wanted to resolve your problem. It appears that part of Morri's frustration comes from the fact that he's very proud of his work and is taking this personal. Is there anything you can do to let him know that this is not a personal issue?

"Yes, Morri, know me, He know I think he's a good mechanic. I just don't think I should have to pay so much money because the bearings were put on wrong. This money came out of my own pocket. I talk to Morri."

"Okay, but how do you think we can resolve this case?"

"I will settle for splitting the cost."

PRIVATE SESSION WITH DEFENDANT

After the formalities the defendant begins talking, "Me good mechanic. I can't pay for work someone else do because they charged him too much. If he bring the car to me, I fix."

"Can you understand what Morri felt like? He was driving on the expressway, the

car suddenly begins to swerve, he gets nervous and wants to get the problem fixed. What would you have done under similar circumstances?" Asks the mediator.

"I maybe do the same. But $400 too much. Fixing car doesn't cost that much. But look, I do what you say. Do I pay him?" responds the plaintiff.

"You have got to do what you think is fair. Now earlier you said you would have paid for towing, parts and labor. That was almost $160 dollars."

"I pay him $160 dollars? No too much. The car don't cost that much to fix."

"What you're saying is that the other place took his money. I think you're right but from Willio's view the $400 came out of his pocket. I want you to think about that when Willio comes back into the room."

JOINT SESSION

During the joint session the mediator took out a piece of paper and jotted down numbers.

| | |
|---|---|
| | $30 labor |
| $50 labor | $100 towing |
| $60 parts | $24 bearings |
| --- | --- |
| $110 | $154 |

"If Morri had towed and fixed the car, the cost would have been close to $154. That's only a forty six dollars difference from the middle," says the mediator. "What can you both work out. You're not that far a part that you can't reach a compromise. Based on this figure what do you both think is a fair solution?"

"It cost me $400 to fix. I think $200 is fair. Let's split it down the middle," the plaintiff responds.

"That's not fair, what about the cheap price I give you when I fix your car? I lose money then, the work was worth more than $110 dollars. If you bring the car to me, I fix it for you. Everybody know I do a good job. Your uncle still got his car in my shop. If I don't do a good job, he take his car. I can't give you $200 out my pocket. That's cost to me."

"Morri, I think this is fair. I spent $100 the first time. $400 the second, $19 to file this case, and now I lose more money by having to miss work today," Willio responds.

"I lose money from not working too. I can add that money too, Willio. You don't think my time cost money? You don't give me a chance to fix car. I don't know what wrong with it. I don't know if you get bad price from other place."

"Morri this is wrong. You know that we know each other too long. My car had problems because of the work your mechanic do. I think down the middle is fair. "

"Is that what you want, Money! Money! Here, I'm not going to fight over money," he says pulling out a bank check from his pocket. Who do I make this out to?"

"Make it out to Willio, " responds the mediator.

"How much $200?"

"Yes," responds Willio.

The defendant makes out the check, throws it on the table and walks out of the room. Willio picks up the check and puts it in his pocket. The defendant walks back into the room, signs the mediation agreement form. The mediator thanks both parties before leaving.

*CASE #6 - FAULTY AUTO REPAIR*

| PLAINTIFF | DEFENDANT |
|---|---|
| • Knew defendant well. Had taken his car to defendant on several occasions. | • Knew plaintiff well. Had worked on plaintiff's car on several separate occasions. |
| • Had attempted to negotiate with defendant prior to bringing case to court. | • Had also attempted to negotiate with plaintiff and sister prior to case going to court. |
| • Belonged to same community as defendant. | • Belonged to same "community" as plaintiff. |
| • Had outside circle of influence. | • Had reputation to consider. |

The list above shows that several factors were present that would have facilitated interest-based negotiation in this case. First, there existed a mutual level of respect and trust between the two; at no time did the plaintiff believe that "Morri" had maliciously damaged the car. The parties knew each other well. Moreover, Morri was willing to take some responsibility by acknowledging that human error could have caused the problem. Second, they belonged to the same Haitian community in Cambridge Massachusetts. Many of their mutual friends knew about the incident and viewed it as embarrassing that Morri and Willio were "fighting." In fact, several members of this community including the plaintiff's sister had admonished both men for "fighting." This same sister had tried to negotiate an agreement between the two prior to the plaintiff filing the suit. In fact, the plaintiff had also gone to speak to Morri several times and was brushed off. The suit, had then been filed partially as an attempt to create some leverage in getting Morri to take responsibility for his role in creating the it problem." "He didn't think I was going to take him court, " said Willio during our interview.

In retrospect, the defendant was not that upset by the outcome because he stayed around long enough for me interview him; remaining pleasant and courteous throughout - a slight indication that the defendant had be posturing during mediation. These two would have settled regardless. There were enough cultural and social ties between the two to warrant them making peace. The defendant just needed to feel that he had put up

his best fight. He came to mediation with a blank check. He was planning on reaching an agreement that day, and furthermore, knew it would cost him some money.

**Case #7 - Back Rent & Security Deposit**

*The Parties:*

**The plaintiff** was a professional African American woman in her mid-twenties.

**The defendant** was the attorney representative for the Harbor's Edge Development.

**The mediators.** One mediator was a 1st year Law School student in her early twenties. She had previously mediated approximately six other cases. The co-mediator was a male community representative in his mid-late thirties. He had mediated approximately twenty mediations prior to the one which follows.

*The Dispute:*

The plaintiff "Jackie" was suing the defendant for $700 security deposit back. The defendant was countersuing the plaintiff for $2,000 in back rent. The tenant lived in an apartment owned by Harbor Edge with a roommate when she was informed by her company that she would be transferred out of state on November 1, 1993. Jackie met with the management office around September 15th, to inform them that: (1) she would be vacating the premises on November 1st of that year, and (2) her company would pay her half ($500) of the final two months rent remaining on the lease. The plaintiff followed up the meeting with a letter and, six weeks later, moved out of state. Two months after leaving town, she called the leasing office in her former building to inquire about her security deposit.

The management office informed her that she would not be getting her security deposit because there were several months due in back rent. The plaintiff was consistently asked to submit documentation, which she provided, to no avail. Each time she would get the same response, "you owe us $2,000 in back rent." Six months later, the plaintiff took the leasing office to court.

OPENING

The mediation began with the mediator explaining the mediation process. When asked if either party had been to mediation before, the management company's attorney responded "yes"; the plaintiff, "no." After explaining the mediation process, the mediator, reads the consent form, asks if each party understands it, and asks each to sign it. Both mediators also sign the form.

Before we begin, " I would like to establish one groundrule. We ask that only one person speak at a time and that the other listen carefully. Each person will get the same opportunity to explain the case from his perspective one the other is done. If you disagree with something the other person is saying, write it down so that you don't forget it. You will have an opportunity to speak again. Before we begin, do you have any questions?" The mediator asks the plaintiff to began.

"I informed Harbor Edge Apartment that I would be vacating the apartment on November 1st, 1993. My lease was set to expire on January 31st of this year; my company paid the remaining two months on the rent and I left. Two months after leaving town, I called the management office, asking about my security deposit. They said they would check on the status and get back to me. They called me almost three weeks later saying I owed $2,000 in back rent. At first I thought it was just a mix up so I sent them copies of my receipts hoping that would clear things up. They said they would check and get back to me a week later they called to say they had made a mistake, instead of $2,000, I actually owed $2,500. One week later, they send me a bill for $1,800. Till this day, I'm sure they have really know how much is owed on the apartment, and frankly, I don't care.

The mediators then instructed the defendant to go next.

"The tenant lived at 54 Crest View Road for a period of two years. On September 15th she informed us that she would be vacating the premises on November 1st. The premises was not vacated until March 31st of this year. During that time we did not receive rent from the tenant in the apartment. The other tenant, Carla Samson, is also being

sued for back rent as both their names were on the lease. We are not about to give Jackie $1,000 given the circumstances. We are however, willing to accept $1,000 from the party in order to settle today. Otherwise, we'll go before the judge and it will cost you a lot more.

"I am not about to settle this case. My obligation was terminated once I completed the terms of my lease and moved out. I am not responsible for anything that took place after that."

The mediator then summarizes the key points, "Jackie, you lived in the apartment from January 1991 through October 1993. On November 1, 1993, you moved out of the apartment. You informed the management office in writing. Do you have a copy of the letter? Of the receipts showing payment of rent?" The mediators review a large stack of papers and receipts produced by the plaintiff. And ask the defendant if he has his records. The defendant produces a printout and the mediators check off Jackie's receipts with the printout. The problem is that your records Steve do not tell us which tenant paid the rent; it only shows that a portion of the rent was paid. But according to Jackie's records, she has all of her receipts. Could you have made a mistake?" They ask the plaintiff.

"Absolutely not. She owes the back rent. She was on the lease for two of the four months that the rent was not paid in its entirety, so she's liable."

"Well, why don't we break into private session. Jackie, we'll talk with you for about ten minutes, then Steve, we will come find you."

PRIVATE SESSION WITH THE PLAINTIFF

"Let's begin by going over your receipts again." The mediators and the plaintiff go over the receipts and reach the same conclusion, the rent was paid by the plaintiff.

"If you have been able to provide them with this documentation, why do you think you're hear today? What's going on?"

"The problem is that they are trying to stick me with rent because they don't ever think they'll get it from her. They figure, 'maybe we can recoup some of our losses by

taking the other one to court.' Why they would let her stay in the apartment for another four more months without a lease doesn't make sense--but that's their problem not mine."

"You've already said that your company paid the last two months, so we know that's not the problem. Okay. So you're interested in getting your security deposit back and you'd like them to acknowledge that they may have mixed up the paperwork. How do you think we can resolve this issue?"

"There is nothing to work out--they owe me $1,000. They're just trying to get their money anyway they can. I'm sorry but I'm not the one. Maybe they can do this to their other tenants, but they're going to give me back my security deposit!"

PRIVATE SESSION WITH THE DEFENDANT

"This is a good opportunity for you to say something that you may not have felt appropriate to say in the presence of the other person. Whatever you say in this room will be held in the strictest confidence unless you indicate otherwise. Can you give us the exact break down of the $2,000; what months does the amount cover?"

"The $2,000 covers $500 in November; $500 in January; and $500 in both February and March."

"But these receipts produced show that rent was recorded on those dates. How can Jackie owe the money if she has receipts. There's something I'm not getting."

"Those receipts are irrelevant. We give tenants their receipts within two days of them paying the rent. It's possible that she bounced a check after the receipts were given out. "

"How likely is that?"

"Very. It happens all the time."

"And how do you account for the canceled checks from the bank?"

"Look, I'm here trying to collect the back rent owed on that apartment. She lived there some of time that the rent was not fully paid. As the primary lease holder she is

required by law to pay any outstanding balance."

"Lets talk about the fairness of it all. Do you think it' s fair for the management company to ask that Jackie pay for back rent that she obviously doesn't owe?"

"That's not my issue. In fact, we haven't established that she doesn't owe the back rent. She can still be held accountable for a portion of that money."

"Correct me if I'm wrong, but isn't she responsible for her portion of the rent? Can she really be expected to pay for another lease holding tenant? How do you think that's going to sound to the judge?"

"You're right, that's way I'm not asking that she pay the full amount. I'll settle at $1,000."

"How do you think she'll respond to your offer?"

"I don't know but we can't go around letting people stay in our apartments for free. You sign the lease and you pay the price. She can sue her former roommate later if she feels Ms. Samson owes the money. We just want our money."

"Before we go back to the mediation session, let me make sure I've understood your interests. You want to get the money that's owed to your client. You do not to give out any money. And you're not particularly concerned about being fair to Jackie?"

"Yeah, that pretty much sums it up. Make her my offer. If she accepts, we can draw up the agreement and all go home. Otherwise I'm prepared to fight it out in front of the judge."

JOINT SESSION

"Thank you both for meeting with us privately. From our discussions, it's obvious that the person that could possibly clear up this issue--Carla is not here. Jackie you feel taken advantage of by being asked to pay for something that your records show you have already paid. And, Stephen, you want to make sure your client gets it's money.

"Yeah."

Yanni, explains, "When I first realized that he might be a con, I went the Better Business Bureau and found out that Eric had been reported at least a dozen times. Then I traced the original owner of the car to ask her some questions about who she sold the car to. She was shocked to hear that the car was on the road because, 'that thing was on its last limb. It had almost 200,000 miles on it when I sold it to a junk yard for parts.' I was shocked to hear that because it meant that Eric bought the car, patch it up and sold it to me!"

"Look I didn't buy that car from a junk yard. I bought it at an auction. I have no idea where the car came from. My mechanic and I checked it out. It was a good car, so I bought it. Yanni, You knew there were questions about the mileage. We talked about it."

"Yeah, we did, you told me that the mileage was probably off by ten or twenty thousand miles. The car had 120,000 miles taken off it. -that's a huge difference, Eric!!"

PRIVATE SESSION WITH PLAINTIFF

After the mediators are done explaining the private session formalities, Yanni begins to speak.

"Eric's a con artist. He was trying to hold onto to the car long enough for the Lemon Law to expire. I've since to several other dealerships and mechanics who know him well. He has a long history of doing this. He needs to be stopped. I want my money back."

"So what I hear you saying is that you have two interests. One, you want to get your money back. Second, you want to make sure that Eric does not continue to con people? Did I hear you correctly?"

"Yeah."

PRIVATE SESSION WITH DEFENDANT

After the formalities the mediator begins, "Eric, we have a situation where a person purchased a car and the car does not work. There were a lot of issue surrounding the car that neither one of you were aware of."

"Yeah. That's too bad. I usually don't have this much trouble with the cars I buy. A big piece of the problem is that he wants a Cadillac with Hundai money. He got what he paid for."

"What do you think his needs were for the car?

"He wanted something to get him from point A to point B."

"Given that how do you think he feels that he purchased a car to get around and he's been almost unable to use it?" How would you feel under the same circumstances."

"I guess I would feel bad but the car just needs some minor work and it should be back on the road."

"But for how long? Look I know that if I bought a car, I would want it to run. This doesn't look too good for your business if you have a customer who is this dissatisfied with the car you sold him?"

"I have lots of other customers who buy cars from me and I never hear from them again."

"We understand, but the issue here is not how many satisfied customers you have. Yanni is not one of those. How can we solve his dissatisfaction?"

"Well, I have no money. My business is in trouble. Tell him I'll give him $200. Twenty dollars a month for 10 months. That's the best I can do."

"Eric, how do you think he will react when he hears that you're willing to give him $200."

"Oh, he'll take it. Tell him that if he doesn't he might never see his money. I'll drag this through court. I'll ask the judge for a six month stay until I can get my paper work. Then I'll get an extension and it will be at least a year before this case comes back up. His hands are tied, there's really nothing else he can do but take the money."

"Are you sure? It appears to me that Yanni has enough information to claim that you broke the law. He's done his research. Who knows if he does a little more he may find enough to really cause you some problems?"

"Why, did he say he would do that? What did he tell you? What did he say?" "Yanni said no such thing, I was just giving you something to think about. A hypothetical situation," said the mediator.

"He can't prove anything. Besides I've done nothing illegal. Tell him it's $200 or we go to court."

"So what you're saying is that you want us to offer him your settlement? You're obviously given this a lot of thought, and no one knows or could advocate your financial situation better than you do. It's best if you tell him."

"No I can't. He'll think that I'm trying to get over on him. Besides, he's so upset that anything I say won't be considered seriously."

"Okay we'll talk with him before we call you both in the room together.

MEDIATOR CAUCUS

The mediators have a private caucus before asking Yanni to come back in the room. There's is general disagreement over what should be said. The male mediators suggest that they convince Yanni to take the settlement because, he could end up with nothing. The Female mediator is not comfortable suggesting that Yanni take the money. "He's likely to go ahead with what we suggest and I'm not comfortable with letting that rat go scott free."

"Are you saying that you rather have him leave here with a bad car and no money. At least he can put the $200 into fixing the car."

"Eric's offering $20 a month for ten months. That's like adding insult to injury. If you're okay suggesting Yanni take the money, go ahead and tell him. This whole case stinks and I want no part of it." The mediators agree before joining the parties, that the

male will lead the discussion.

PRIVATE SESSION WITH PLAINTIFF

Look we've talked with Eric. You're pretty much right. He's a crook but a smart one. He's going to offer you $200—$20 a month for ten months.

"You're kidding right?"

"I wish we were, but he's pretty slick. If you don't take the money he's planning to stall the case for several months. When it does go to court, he thinks he can get the judge to agree to the same terms. It may not be a bad idea to cut your losses and take the money. Prolonging things could mean more wasted time and you could end up right were you started.

Yanni looks at the female mediator and asks, "What do you think I should do?"

"I really don't know what to make about this case because Eric's a slime. You could take the money, call it a day and move on. You have other, more constructive things to occupy your time than spending it in court. Or you could do what you can to make sure he doesn't do this again. You have to decide.

"What would do if you where in this position?" Yanni asks the female mediator.

"That's hard to answer because I'm not in the position."

"I know but that's not what I asked. If you were, what would you do?"

"Personally, and I'm not saying this is what you should do, but I would find another way of making sure he doesn't do this again. I would call the Attorney generals' office and file a report against him. Maybe they can begin investigating his business practices. That's going to take time too. You need to decide what's more important to you. I can't make that decision for you."

"No you can't, but you've helped a lot. Thanks."

JOINT SESSION

Before the joint session begins the female mediator removing herself from the case; stating that she is having trouble with her neutrality and in the interests of fairness to both parties, she will need to leave. The co-mediator decides not to continue the case. The case was terminated and put back in the docket for the next session. They had missed the small claims court today.

In the hallway the plaintiff caught up to the mediator as she headed toward the door. After a brief discussion, he walked away smiling as he put the piece of paper with the Attorney General's phone number in his pocket.

*CASE #8 - CAR DEALERSHIP*

| PLAINTIFF | DEFENDANT |
|---|---|
| • Had receipts for repairs done to car. | • Had experience with small claims process. |
| • Had receipts showing car had not passed inspection. | • Had experience in manipulating court inspection. proceedings (willing to stall case for several months). |
| • Lemon law applied to the sale. | • Was not concerned about preserving his reputation. |
| • Found out that the defendant had tampered with the mileage on the odometer. | • Lemon Law period had expired for the car. |

Case #8 is an example of a case that should not have been mediated. The defendant was a crafty, dishonest car salesman, who knew every trick in the book. When he sold the defendant the car, he suggested where it should be taken for inspection; knowing that a friend would allow the car to pass inspection regardless of the it's condition. The defendant had also tampered with the odometer on the car (100,000 miles had been taken off the car); fixing the paperwork in such a way that left doubts as to who had tampered with the odometer. The defendant's business was selling bad cars. The plaintiff had not been his first dissatisfied customer.

Moreover, the defendant was keenly aware that if the case went to court, he could stall it for at least another eight months. He was not ashamed to acknowledge this and had learned, from being taken to court so often, how to "work things around here." The defendant was so conniving that he tried to get the mediators to coerce the plaintiff into taking this agreement or "risk never seeing a penny." A ploy that almost worked and led to the coercive elements Nader describes.

The mediators were completely unable to deal with the defendant. They both realized early on that not only were there no shared interests between the parties, and that the parties held completely different value system; making negotiating nearly impossible. Consequently, reasoning with the defendant on the merits, ethics or fairness of the case was completely ineffective as those qualities were not important elements in the defendant's value system. To complicate matters, there was a significant difference between the mediators as to what their responsibility should be. One mediator thought that the plaintiff should take the offer and avoid the hassle of being dragged back and forth to court. The other mediator seriously disagreed. She was uncomfortable that her co-mediator would suggest the party take the agreement as if no other alternatives for restitution existed. The defendant had broken several laws, was involved in unethical business dealings with several other businesses i.e., inspection centers, and was ripping off many unsuspecting people. The female mediator, could not in good conscious recommend that the plaintiff accept the offer. She took herself off the case; explaining to the parties that she could no longer maintain her neutrality. Although she did not disclose why both parties knew. The case was terminated and put back in the docket for the next session.

# CHAPTER FOUR

## INTRODUCTION

In ascribing to the principles set forth in Getting to Yes, the Harvard Mediation Program has also ascribed to the ideologies inherent in the model described by Fisher, Ury and Patton. Chapter Four examines how the ideologies (about people and conflict) embodied in Getting to Yes[41] lead to many of the concerns raised by critics of the mediation process. Chapter Four also raises questions of mediator responsibility in light of significant inequities among the parties. Chapter Five concludes with some training recommendations for the Harvard Mediation Program.

## PROCESS COMPARISON

The structure of the process and the mediation techniques used were markedly consistent in each case study. There was almost no deviation from the interest-based bargaining model (which seeks to satisfy the interests of both parties) used by the Harvard Mediation Program in training its mediators.[42] Each observation began with was a brief introduction, where the mediator took the opportunity to introduce him/herself and the parties to each other, if they had not previously met.[43] The mediators established his/her credibility by identifying themselves as "experienced mediators." Moreover,

[41] It is important to note, that Getting to Yes, in essence describes a negotiation and not a mediation model. The HMP model is a hybrid of the negotiation process that relies heavily on (and makes) many of the same assumptions that principled negotiation" makes about negotiation, people and power.

[42] Variations in the use of problem solving techniques synonymous with interest-based bargaining ( i.e., reframing, reflecting, and focusing on substance issues) were due almost exclusively to differences in experience between mediators.

[43] I was also introduced to the parties during which I asked the parries for permission to observe the mediation. Since no records, except the formal agreement if one is reached, are allowed to be kept on conclusion of the mediation, I had to ask special permission from the parties to take notes and in some instances, to record the mediation; assuring them that real names would not be used and that the data gathered would be used solely for research purposes. All of the parses agreed to let me observe the mediations.

mediators distanced themselves from the adjudicatory process by explaining that they were not judges, that agreements were not based on legal precedents but on fairness. The mediators then provided a brief explanation of the mediation process. In general, parties were told that:

(1) Each would have an opportunity to present the case as they saw it;

(2) Each should be courteous and not interrupt while the other party was speaking. In most cases, the parties were offered paper to write down points of disagreement brought up by the other party; and, (3) During the process, the mediators may want to have a private conference with one or both of the parties; explaining that caucus discussion were private and nothing discussed in the caucus would be discussed in open forum without consent of the caucusing party.

Once the process had been explained and the groundrules established, the parties were given the Mediation Consent Form to sign. Disputants were told that the Form did not waive their right to a hearing, but was validation of their commitment to try mediation. In each Case Study, parties were explicitly told that they had the option to go back to the judge. The entire introduction and the explanation of the mediation process took less than five minutes. I found it ironic that given the importance the introduction bears on the entire mediation process that HMP advises its mediators to keep their introductions brief. Introductions that takes longer then 3-5 minutes are considered long by Harvard Mediation Program's standards. Consequently, during observed mediations, this rule was adhered to without much deviation; every mediation observed included short, straight to the point openings. Although this emphasis on brevity is consistent with the North American penchant for efficiency (Lederach, 1986), the approach raises the issue of developing mediator trust. The problem with the succinct introduction is that often it provides little opportunity for the mediator to develop anything more than an superficial level of trust between him/herself and the parties.

Trust (as mentioned in Chapter One) that is so essential to getting parties to recognize the value in viewing the dispute as a joint problem that both parties can work on solving through collaboration. Even in situations where interest based bargaining is inappropriate (i.e., when one party is clearly giving up their rights as we saw in Case # 4), trust is necessary if the mediator is to understand underlying interests or external factors influencing certain behavior. Because the HMP process is so rushed, the parties get few opportunities to "feel out" the mediator and develop some level of comfort before proceeding to the case.

There is also some cultural concerns with the short introduction approach. Timing and length of time needed to provide an introduction often vary across cultures and can send conflicting messages to parties. *"Since its short, it must not be important,* was one of the messages an HMP mediator (in Albuquerque New Mexico to establish a mediation program) realized he was sending by the brevity of his introduction. "Paradoxically, it sometimes makes sense to go slow to go fast." [44] In sum, the introduction, if rushed through could intensify misgivings and misperceptions that parties may already harbor about the process. When unsure about how the parties feel about what's going on, the mediator should provide a relaxed, well-paced opening.

Once the procedural issues were conducted and the litigants had acknowledged their understanding of the process, the mediation moved directly, to the substantive matters involving the case. The plaintiff always began with their explanation of the problem; with the defendant given equal time to give his or her perspective of the dispute. During the initial expositions of the claims, the mediators asked clarifying questions designed: first, to help the mediators make sense of the dispute and second, to establish between the parties the common statements of facts about the dispute. Figures, dates, amounts were confirmed, and all paperwork was reviewed under the guise of ignorance on the part of the mediator.

The amount of clarifying and reality-checking that took place in the private sessions greatly differed with the level of experience mediator(s) possessed. Cases #1, 2, 6, 7, and 8,

[44] Mediator # 3 was alone. Group #8 met not because each was interested in the other but because there was a fundamental difference in the way each viewed the dispute.

involved relatively new or inexperienced mediators. The use of the private session varied from informational purposes, to reality testing, to identifying possible concessions for the weaker party. Some private sessions were also used for problem solving, verifying figures, while others were used primarily to defuse anger. In each case, the private session provided the disputants with further time in a safe environment to consider the dispute from the perspective of the other party and moreover, to assess their own position relative to their improved understanding of the dispute. Of the eight Cases, only the mediators in Cases #3 and 4 summarized the parties' concerns and interests prior to ending the private session. As an observer, I could see the difference this practice made as the parties in Cases # 3 & 4 were able to return to the joint sessions with their interests and issues more clearly defined than those in the other six Cases.

In each session observed, the mediator(s) moved directly from the joint sessions into the private session without engaging the parties in (or explaining the benefits and purpose of) brainstorming or problem-solving prior to the individual caucuses. After the private session, mediator(s) engaged in reframing and getting parties to make concessions. Parties that had agreed, during private session, to offer a compromise or concession, presented their offer during joint session. Although mediators thought they were engaging in interest based negotiating, valuable opportunities to facilitate direct interaction between the parties were consistently overlooked. Most of the deal making took place in the private sessions with only the mediator(s) privy to inside information and understanding both perspectives of the given dispute. With the exception of Case #3 and #6, the disputants did not get an opportunity to fully understand the other side's point of view.

Moreover, there was very little interaction/communication between the co-mediators-- even among those who had mediated together in the past. Only the mediators in Case #8 caucused with each other to differences in perspective of the Case. The others missed an good opportunity to model the type of collaborative behavior that

parties are encouraged to emulate. Accordingly, during later stages of the mediation, when the mediators tried to move parties from positional bargaining to inventing options, the parties were unable to do so because they had not been taught to do so, nor did they see the benefits in doing so.

In the eight cases, when no agreement was reached after the second joint session, the mediation was terminated by the mediator(s). In every case observed, Harvard Mediation Program administrative issues i.e., getting parties consent to have the Program call them for feedback, were taken care of prior to thanking the parties and putting the case back in the docket for a hearing.

The eight case studies, and my personal experience as a mediator, support my claim that much of the flexibility (claimed by mediation advocates) regarding the structure of the process and the mediator's role (which I described in Chapter One) is missing in the small claims court observed. Furthermore, the small claims court is still overburdened by too many cases and too few magistrates to hear complaints. Thus, within the court system, mediation is just another tool to quickly process cases. The mediation program by falling within the guise of the court system is heavily influenced by the court's procedures; therefore inheriting some of the same problems previously associated with the court system (described in Chapter One). For example, mediators (even though they are rarely rushed by the clerks) know that they have a limited timeframe in which to mediate cases and send them back to the magistrate if no agreement is reached. If a mediation goes on too long (i.e., through the morning and into the afternoon) it is likely that the parties will miss the hearing and have to return for their court hearing another day. Court clerks consistently stress the importance of turning over cases quickly so that parties can be spared the inconvenience of having to return to court.

Consequently, what was originally designed to provide greater flexibility and access to justice for the "deserving poor" has in fact just fallen within the shadow of the court system which is still plagued by too many cases, too much administrative

bureaucracy, and too little connection between the small claims court and the mediation program which further compound the problems inherent in "principled negotiations."

**A Closer Look At " Principled Negotiation "**

> "We do think that, in addition to providing a good all-around method for getting what you want in a negotiation, principled negotiation can help make the world a better the place. It promotes understanding among people, whether they be parent and child, worker and manager, or Arab and Israeli."[45]

***Getting to Yes***

Many of the concerns raised by revisionists about mediation occurred in the Case Studies. Although the sample size is too small to reach statistical conclusions, some important factors stand out that warrant attention. For instance, Cases #4,6,7,8, were examples of what Auerbach referred to as "second class justice." In each of these cases, the rights of the disadvantaged individuals were dependent on a process which deemphasizes the importance of legal rights in the interest of reaching agreements based on "fair" criteria developed by the parties. In Cases #4 and 8 we saw Laura Nader's criticism of the coercive elements of mediation emerge as the mediators in each case suggested (based on their interpretation of the potential losses for the defendant in Case #4 and the plaintiff in Case #8) to the parties that they consider taking agreements that were blatantly unfair (and unsatisfactory) and infringed on their rights. In case #4, we saw the mediators agreed to an agreement reached by the parties that was not only illegal but was not based on any standard of fairness (i.e., what's fair about a woman coming into to court for a $2000 claim and walking out having made a $5000 plus settlement on a inflated claim?). The defendant in this case acquiesces in part, because she had expected to

[45] Getting to Yes, p. 154"

come into court for battle and was surprised that the experience had not been as "heated" as she had expected. Consequently, the process and its informality did in fact give the defendant a false sense of security which proved to be a disadvantage for the defendant.

The plaintiff in Case #1 had a poor bargaining position but unlike the defendant in Case #4, she did not let her defenses down; not allowing her frustration and emotion to be defused. The plaintiff in Case #1 was able to hold on to her position, even if she could not articulate that position well.

Why then, considering the sample size was so small did almost all of the issues raised by legal critics of mediation appear in the Case Studies? One explanation could just be a coincidence; that I happened to observe the cases that included the elements mentioned above. Another explanation could be my interpretation of the case. That seen through different eyes, a different set of conclusions would have reached. The other explanation[46] is that problems encountered in the cases are endemic of the mediation model that make the type of assumptions that "principled negotiation" makes.

Much of the criticism leveled against interest-based (or "principled negotiation") is about the simplistic view that the authors take to conflict and people. In prescribing interest-based mediation as a method for all, the book assumes that parties involved in personal disputes have an equivalent stake in resolving their dispute reasonably; with the real problem being the lack of communication and understanding between people.

In assuming such as posture, the concepts exposed in Getting to Yes takes a pluralist view of conflict and power; a communitarian vision of people, assumes universal core principles (or standard of behavior) that we should all ascribe to; and focuses primarily on process issues to the almost complete exclusion of matters of substance and justice.

[46] The theory that my own experience as a trained mediator suggests and the literature supports.

## POWER IMBALANCES

Much has already been written about the role that power has on the outcome of a dispute (McCarthy, 1991; Amy, 1987; Auerbach, 1983; Merry, 1985). Interest-based negotiation assumes that power is democratically operative. The Cases however, illustrates that power is neither democratic nor easily given away. Of the eight case observed, there were negotiating imbalances between the parties in Cases # 1, 2, 4 and 8. In cases 1, 2, and 8, the mediators were cognizant of the imbalance and attempted to address them. The mediators recognized the imbalances in all of the above case except Case #4 where the imbalance was more difficult to discern because of the psychological undertones of the Case. Although the mediators in Case #4 noticed that the defendant was not "into the process" they did not equate the defendant's acquiescence to every issue at the table with her feeling disempowered, frustrated, and tired of the whole mess with her "son and that car." The defendant in Case #4 was vulnerable to manipulation because she blamed herself (by co-signing for the car) for being in this predicament and just wanted to get the case behind her and move on. Moreover, the defendant was upset that her son had caused someone else trouble. All of this inhibited the defendant's ability to assess the validity of the plaintiff's case and the full impact of the agreement she had consented to. The mediators, not cognizant of the implications of the defendant's disengagement, allowed the process to continue, rather than taking advantage of the private session to explore what was causing the defendant's "distance." Consequently, when the plaintiff "convinced" the defendant to sign over the title to the car, the mediators assumed that the defendant has agreed to under rational circumstances.

By contrast, once the mediators' in both Case # 1 and #2 recognized that one party was at a clear bargaining disadvantage, the process was transformed from one of equals seeking mutual gains to one where the mediators began seeking concessions " that would make her [weaker party] feel better." In Case #1, the mediators, by not reality testing the airline's position legitimized it. Why did the airline-who had such as strong BATMA decided to try

mediation? Was there something missing that the mediators did not uncover? Were the parties trying to avoid the issue coming before the magistrate for some reason? Did this airline have a history of defaulting on payments for lost luggage? Had the airline prior experience about court rulings in similar situations? Was there something inherently wrong with their customer complaint procedures that obstructed parties from restitution? Addressing these questions may have provided the mediators with greater insight as to the true reason the defendants had opted for mediation instead of adjudication. Further probing of underlying interests rather than seeking concessions for the party with the weak negotiating position, would have been a more effective mechanism (for getting at many of the underlying issues which were not revealed during the mediation) for balancing the inequities.

In Case #2, the plaintiff was well versed in negotiation strategies ("I've read all the books.") The mediators, however, were so occupied with process and legal issues of the dispute, that they did not recognize its importance. It never occurred to the mediators that the plaintiff's decision to use mediation may have been strategic. Specifically, that the plaintiff intended to use her negotiating experience to manipulate the process, (an opportunity that she would clearly not get before the magistrate). As in Case #1, rather than attempt to get the plaintiff to make a more realistic assessment of her BATMA, the mediators tried (not to get both parties on even paying ground) but to minimize the damage to the defendant. The mediators in Case #2 compounded the weaker party's position by shifting from the validity of the plaintiff's interests to moral appeals; a naive approach considering the plaintiff had planned to "get" the defendant all along.

In contrast to the cases previously mentioned, Cases # 7 and 8 at first, also appear to have the parties that are significantly disadvantaged, i.e., the plaintiffs in both cases. Closer assessment however, shows that in fact the parties in each case were very much equal. In each case, neither party was able to coerce other into reaching an agreement s/he did not feel was appropriate.[47]

47 Even though the plaintiff came very close to being coerced in Case #8.

Of the Case studies described in Chapter Three, Cases #3 and #6 had parties that were equally matched throughout the mediation. In both cases neither party could force the issue in his/her favor; neither party was subordinate to the other; and both parties recognized the other's ability or potential influence.

## REAL AND PERCEIVED POWER

Getting To Yes also does not acknowledge the difference between real and perceived power and how external power dictates the amount of power one will have in the mediation process. Moreover, by further assuming that there are multiple sources of power, Getting to Yes assumes that these sources are equivalent in magnitude and impact on the negotiation process. Little distinction is made between symbolic sources of power (i.e., conviction, will) and actual sources of power (i.e., money, access to legal representation.) Mediation, due in part to its informal nature, gives the false impression that just because one sits at the table with the adversary, they have become equal. This illusion masks the important social relationships that play themselves out during the mediation process.

Cases #1 and 7 are similar in that both plaintiff must negotiate with more powerful and legally savvy entities. In case #1, the plaintiff must try to get the Airline representatives, whose job is no doubt to represent the Airline in disputes. The representatives have the advantage of understanding the court system and moreover, of being backed by one of the largest, most powerful business in the country. In Case #7, the plaintiff must also defend herself against the lawyer whose job, like the airline reps is to seek restitution (or limit the amount their respective companies may have to pay out) for the management's company she represents. The difference between Case #1 and 7 is the social status of the defendant. The plaintiff in Case #1 was a poor woman with little education and no command of the English language. She was therefore unable to argue her case effectively and was disadvantaged by a mediation process which assumes that both parties are equally/best suited to present their own cases.

In Case #7, the plaintiff was educated and well suited to argue her case. She supported her points with facts, had all of her receipts, and clearly understood her rights. She further knew that did not live in the apartment at the time in question and was not about to be manipulated by the management company's representative who was trying to coerce her into paying a debt she did not owe. Although neither plaintiff gave in to the coercive tactics employed by respective defendants, the plaintiff in case #7 had a real source of legal power (i.e., written documentation, canceled checks) whereas the plaintiff in case #1 had just symbolic power.

BATNA

Getting to Yes, suggests developing one's BATNA as a source of power. One must recognize that the strengths of one's BATNA is directly related to one's relative strength, position in society that stratifies people and provides privileges" (Merry, 1985). Getting to Yes addresses the issue of power by exposing the development of the "BATNA." But in practice the BATNA does not alter your position in a negotiation process, but moreover BATNA helps parties understand their position relative to their options and to the other side's position. Critical theorists would argue that by taking BATNA as a measure of settlement or objective criteria, Getting to Yes incorporates all of the inequities that exist in society at large.[48] By this I mean that objective criteria is (in other words - the socioeconomic structure) is seen as a neutral backdrop against which issues are contested and seldom seen as a crucial factor of power. But when that backdrop becomes viewed as an institutional structure designed to benefit the powerful in society, a different perspective is achieved on the use of BATNA.

For example, let's look at the example provided in Chapter One about the use of market value as the objective criteria (or the BATNA). When one looks at market value of a home as "independent of either side's will" it appears as a fair criteria that does not favor one party over

48 This theory was brought to my attention by Professor Michael Wheeler during one of the many feedback sessions I had with him regarding my thesis.

the other. By these standards, one party should be willing to pay what the market will bear for the property or they have the choice of not buying the property. But when one views the same class, with complete control over the total commodity supply..." [49] one clearly sees that the most vulnerable participants in place markets are those with the fewest alternatives and control of that supply. The fact the mediation accepts the BATMA and other "objective" criteria as universal lends support to criticism that mediation inadequately views disputes as isolated from the social structure. BATNA, does not address the societal inequities that create different bottom lines for different people, it merely provides parties with a comparison on their best nonnegotiated option to their negotiated agreement. So, parties with strong bargaining positions dictate what they are willing (or not willing) to give up. The weaker parties are left in the position of seeking concessions or minimizing the damage.

## COMMUNITARIAN VISION OF PEOPLE

Getting to Yes takes a rather simplistic communitarian view of people. The process assumes that as described in Chapter One, people are rational and prefer non-adversarial to adversarial encounters when the latter can meet their self-interest. The book further assumes that despite the issues that separate parties in a dispute, there is an overarching interest/need by individuals to keep the social system functioning. This assumptions is what gives phases "Separate the People from the Problem" and "insist on the use of objective criteria" its strength. People are able to sacrifice some of their personal gains for the sake of harmony.

This unrealistic view of how people function fails to recognize the what Lax and Sebenius call the conflict between "claiming and creating".[50] Creating a bigger pie does not mean that (when it is time to claim the pieces) the more powerful of the two parties

[49]Logan & Molotch, *Urban Fortunes*, p. 23.

[50] For more on creating vs. claiming see, Lax and Sebenius, *The Manager as Negotiator.*

will take less. When the game of mediation is transformed from the problem-solving phase (or creating value phase) to the distributive phase (i.e., who gets what), the intentions, spurred by self-interest, of the parties change. Basic human nature (and American culture) would say that in disputes involving an unequally powerful party, s/he (because s/he can and because there is a certain gratification in getting as much as one can) will still claim a bigger proportion of the pie. When a mediator does not recognize the difference between claiming and creating value, the consequences could be disastrous for the weaker party, who has just identified their interests as has little protection to safeguard against being manipulated.

**RELATIONSHIP INTERDEPENDENT**

The parties in Case #6, had a relationship that was important to both men; a significant difference between that Case and the relationship in Case #6. In Case #6, the parties belonged to a close knit community structure, i.e., the Haitian community. Within this other members of that community had been creating external pressure on the men to settle their "fight." The defendant, "Morri" had a service that the plaintiff thought very highly of. The defendant had done previous work on the plaintiff's car that he had been satisfied with. In fact, both men mentioned how the plaintiff s family members still brought their cars to Morri's shop despite the disagreement between the two men. An alternative to dividing the differences could have been presented as Willio obviously needed more work done on his car and Morri was capable of providing it. A solution involving no exchange of money would have been optimal because it would have taken into consideration both of the parties' financial constraints; an issue that both alluded to on several occasions. Moreover, pursuing joint gains in Case #6 would have served an even more important purpose. The plaintiff's legal rights would have been upheld while the defendant's identity as a fair and trustworthy businessman would have been restored. The parties focused specifically on money and never moved to the mutual gains options that existed for settlement. The mediator did not assist the parties in pursuing a mutual

gains resolution, when one could have been possible.[51]

In Case #5, although the parties did reach agreement, neither was particularly pleased with the process. The defendant did not feel satisfied that she had to return the furniture, while the plaintiff was upset that the mediators allowed the defendant to "belittle" her in the manner which she did. This suggests that there is strong connection between party satisfaction with a case and agreements that go beyond monetary and/or tangible aspects. The emotional issues important to feeling satisfied (with the outcome) were inadequately addressed in Case #5.

Case #2 was similar to Case #5 in that the parties at one time had a personal relationship. In both cases, there was no present or future relationship to salvage, no trust existed between the two parties and no possibility of joint gains could be found. In Case #2, the only interest that the plaintiff wanted satisfied was financial; while the defendant's interest was to prevent the plaintiff from taking his money. Consequently, Case #2, like Case #5 was a zero-sum negotiation; a gain for the plaintiff would result in a loss for the defendant.

In comparison to Case #6, the parties in Case #5 hated one another and were not interested in salvaging that relationship. Like in Case #3, the parties were completely hostile to one another. The mediator's reaction to this hostility in both cases was significantly different. The mediator in Case #3 used the private session to validate the defendant's (i.e., the abused party) issues as legitimate and, to diffuse the impact of the disparaging remarks made by the plaintiff. The mediators in Case #5, although faced with the same level of hostility between parties, did not possess the same level of experience necessary to address the real hurtful and negative feelings surrounding the mediation. Two very different experiences resulted out of the mediation becuase of the cultural backgrounds of the parties. In Case #3, the parties did not each agreement and neither party walked out of the process feeling hurt, degraded or worse off than when they entered.

[51] This oversight may have been due in part to the confusion that preceded the agreement. The plaintiff suggested that they split the difference and after balking for several minutes, the defendant pulled a bank check out of his pocket, made it out to the defendant for $200 and walked out of the room.

## MEDIATION AS FLUID

There are psychological, emotional, financial and external reasons that influence and dictate behavior. Moreover, there is something psychological disturbing to be the loser, as the defendant in Case #3 found out when she reached an agreement in a prior mediation, that later she regretted. As a result, she was not interested in being the "loser" again. Her past experience influenced what she was willing to concede and what wasn't negotiable.

This case supports critics view that mediation and the strategies one employs during the process are not static but dictated by one's alternative, choices and position in a dispute. This issue needs to be taken into consideration during the assessment of a case. For example, the fact that the plaintiff in case #2 waited to take the defendant to court after she had moved out of the apartment and after she had received a settlement to vacate her lease early, was a strategic decision. The mediation would have been completely different had she still been living in the apartment or had an interest in staying in the apartment. In this scenario, the plaintiff would have had to compare the benefits of getting triple the security deposit ($2,100.) with wanting to stay in the apartment. Getting to Yes (nor does the HMP) does not address the fluid and changing dynamics of conflict.

## THE ROLE OF THE MEDIATOR

The case studies clearly showed that in situations where one party was at a significant disadvantage over the other, the role that the mediator played was critical to the outcome. In Case #8, the mediator in an effort to get the plaintiff some restitution suggested to the plaintiff that he consider accepting the defendant's offer. The mediator, almost inadvertently became the conduit of coercion for the defendant. This same mediator by not recognizing the larger public implications of the case, (the potential of the defendant cheating others) and sending the case back to the magistrate,

almost inadvertantly aided the type of obstruction of justice, as described by Laura Nader, which hides cases with larger implications behind the private guise of mediation.

**SUMMARY**

HMP explicitly defines the mediators responsibility to explore the conflict and possible solutions by assisting the parties to communicate, more effectively with one another; placing primary focus on the process issues that can lead to the resolution of disputes. HMP claims that by placing the mediatoes focus on process rather than substance issues the likelihood that the mediator can remain neutral toward the outcome is increased. The mediator is supposed to be neutral and the parties empowered.

The most significant problem with this non-interventionist mediation model is that it limits the mediators responsibility to mostly process issues to the virtual exclusion of any discussion as to what responsibility (if any) the mediator should have for ensuring fair and just outcomes. All balance of powers or inequities are assumed achievable by just "tweaking" the process. Interference of the "neutral" in the substantive aspects of a mediation, for the most part, is considered unprofessional and undermining to the legitimacy of the mediation process. The assumption is that a fair process will at least give the parties an equal opportunity at reaching ageement that satisfies their interest during the mediation. In this context, both parties are equal: they sit at the same table, get equal shares of the mediator's time and adhere to the same rules. But this symbolic balance of "relative power" is not the same as substantive power and should not be confused as such. Power to frame the scope of an ageement; power to be able to rely on objective criteria that has been established to benefit you; power to walk out of a mediation knowing that one's alternatives are sufficiently strong to accomplish one's goals are substantive--these things are real.

Mediators must recognize that the implications of neutrality in practice are more severe than those in theory. In theory, "neutrality" sounds good; the mediator facilitates a process that the parties have ultimate control over the outcome. In practice, neutrality, in situations of unequal power, only serves to manifest and maintain the equities that exist in a society at large. Moreover, in mediation people and conflict are not static - one cannot look at a dipsute as isolated from the social conditions and issues that caused it. Disputes are part of "a complex social system" which dictates one's move (or position) in a dipsute at any given time. Moreover,"where a community definition of justice (and even honor) prevails, judicial resolution of "private" disputes according to "neutral principles and due process guarantees makes no sense. It contradicts the fundamental assumptions of participants, for whom dispute are not private, principles are not neutral, and due process is an impediment. [52]

One could argue that much of what resulted in the preceding cases can be attributed to mediator inexperience and that more experienced mediators would have done things differently. Although I would tend to agree with that assessment, the fact remains that the mediators observed are the same people who are in the courts mediating real cases. Further, even the presence of some of the Progam's best mediator's over-looked critical social, cultural and communication issues during the mediation. Thus I am inclined to believe that the mediators, regardless of the level of experience, internalize Harvard's philosophy into their mediations procedures--sometimes despite their better judgment. It is when a mediator's better judgment is not used, that many of the concerns and issues raised by the revisionists materialized.

[52] Auerbach, *Justice Without Law?* p. 120.

# CHAPTER FIVE

## INTRODUCTION

Chapter Five will provide Harvard Mediation Progam with recommendations for training.

## THE SMALL CLAIMS MEDIATION MODEL USED BY HARVARD

As I have alluded to in Chapters One and Two, the Harvard mediation model is more accurately an extension of the negotiation model developed by Fisher and Ury in Gettinig toYes. The model is effective in negotiaton because "parties are linked to one another through a network of social and business relationships that renders a fued disruptive and dangerous" (Merry, 1985). Parties with interdependent relationships (i.e., one cannot advance his interest without the other) have a mutual interest in seeking an agreement which will enable them to continue their relationship. In mediation however, several conditions are different from thoseof standard negotiation. First, HMP records show that well over 80% of the parties that mediate have had little interaction prior to the dispute. Thus, there will be little incentive for parties to compromise their gains for the benefit of an unknown person. This assumption of interdependence between parties further complicates the process by skewing mediator's expectations (and affecting the way they perceive) of the behavior the parties will employ throughout the process. Thus behavior that should be recognized as self serving is often ignored while the mediators seek joint gains and concensus between parties.

## HARVARD MEDIATION PROGRAM/DIAGNOSTIC ISSUES

The Harvard Program is well established and has all the mechanisms in place to provide on-going training and evaluation of mediators. At present however, the emphasis of the Program has been primarily to provide Law students with practical mediation

exposure. The Program has successfully accomplished this end but now more attention needs to given to the quality of the training program. Too much reliance has taken place that students will continue to receive their training by experienced court mediators, when in fact, demanding school schedules and other commitments preclude the more experienced mediators from attending court on a regular basis. Thus, mediators lacked many of the diagnostc skills necesary to determine whether a particular case is approprite for mediation, whether alternatives exist (outside the judicial system) that can successfully intervene in the disptue, and whether they had personal conflicts or issues which would warrant them not participating in certain cases.

From the outsider's prospective, it appears that the Program lacks genuine concern with issues of culture, communication, and justice; serving merely as an academic excersise for students. At present, the goals of the Program do not appear consistent with the true objective of the mediation -- to assist people to resolve their disputes in a manner that is fair and protects the right of individuals. Moreover, the parties involved in disputes, often don't feel the process helped them much. Others feel "it's just a waste of time because we ended up seeing the judge anyway."

The Program needs to step away from itself and ask:

- Are we serving the needs of the communities in which we mediate?
- Are mediators being trained to address some of the complexities surrounding mediation for example, in the urban environment?
- Are we equipting students with the best set of skills so that they can be effective in a variety of settings?
- Is providing rudimentary skills (with little systematic, person-to-person feedback) sufficient and serving the best interests of Harvard Law School, students, of disputing parties?
- How do the assumptions in GTY impact our mediation Program?

## INTEREST-BASED MEDIATION

The Harvard Mediation model focuses primarily with notions of joint interests which is both unrealistic and unpractical given both the distributional and competitive

nature of small claims court (i.e., individuals try to mazimize their gains in a game of winners and losers). Moreover, even the emphasis on interests has competitive elements as the parties actively try to convince the other side why their issue or criterion should have more credence over the other's. What is most disturbing about Getting to Yes' relative to interests is that the negotiation model ascribed to by Fisher, Ury & Patton focus on interests without ever questioning the legitimacy of those interests. The Program by teaching only interest-based mediation techniques to its mediators, limits the assessment abilities and effectiveness of the mediators. The case studies described in previous chapters distinctly showed that the mediators adhered to Harvard's training almost verbatim. The problem with teaching only interest-based negotiation, is that Harvard's small claims cases are not interpersonal, but are minor commercial disputes between parties who have had minimal interaction prior to the dispute. "Community base conflict erupt without any prior or continuing relationship significantly distinguishing it from collective bargaining and business disputes from which Principled Negotiation is modelled."[53] Even among the parties in Case #6, who had an interest in preserving their relationship, the overarching concern for the plaintiff was to seek restitution for the injustice that occurred. The primary concern for parties was not to preserve a relationship but to seek restitution for their case. Thus, many of the techniques used in integrative bargaining are irrelevant given the types of cases in which Harvard mediators--distributional, non-interpersonal disputes.

**TRAINING RECOMMENDATIONS**

(1) • The program needs to provide mediators with a more realistic view of the complexities involving disputes (i.e., social, cultural, etc.) so that mediators develop a greater understanding and appreciation of the process. Thus far, inexperienced mediators go into the process with

[53] Auerbach, p. 118

naive expectations of how parties will behave, based on what they have been taught in the training; esacerbating the inequities and problems which already exsist.

(2) • Program training should expose its mediators to a variety of mediation models so when a situation arises where interest-based negotiation is not appropriate, the mediators will know what other methods exists and which would be most appropriate to address the situation at hand. What currently happens is that mediators become overwhelmed and often compound the problem that presented itself during mediation. Effective mediators needs to have as many tools as possible to do the best job they can. Limiting their repertoire of skills only serves to greatly disadvantages the mediators and the parties.

• The criticisms and shortcomings of the Mediation model used should be discussed during training so that mediators are aware of them and develops of greater understanding (and effectiveness) of mediation in general.

(3) • The Program should train it's mediators to determine which elements of a case make interest-based negotiation appropriate and which elements suggest that another method may be more appropriate. Role plays which currently exist can be adapted to meet this objective.

• Training should emphasize to its mediators that it is acceptable and appropriate to send some cases back to mediation upon determining that the case should be heard by a magistrate. Increased communication and greater connection between the court program and HMP would facilitate the process and remove the stigma that mediators often face when they send too many cases back for a hearing.

(4) • The Program should place greater emphasis on the legal rules governing small claims cases. Cases should not be decided exclusive

of the legal rights of parties as they are likely not to hold up as we saw in Case #3. When this happened, the parties often received "second class justice" with inadequate and unfair agreements. At present the training manual contains a brief piece on small claims law. This section should be expanded in the training manual and explicitly discussed during mediator training.

## OTHER TRAINING RECOMMENDATIONS

- The Program needs to provide on-going training and skill development for its mediators.
- Mediators should be required to attend regular follow-up training de signed to address specific questions or issues about cases.
- Inexperienced mediators should be prohibited from conducting mediations without an experienced co-mediator.
- Mediators should be observed by a trained and experienced mediator at least twice during each semester and a written evaluation should be provided to mediators so that they can be aware of which areas if any, need improvement.
- Feedback should be consistently provided to mediators to facilitate skill development of the experienced or weak mediator.

## SUMMARY

The eight case studies both supported and refuted many of the claims made by revisionists. When parties are interdependent and they have a stake in maintaining a positive future relationship, the mediator's intervention can focus on highlighting the problem solving skills and strategies that will lead to greater gains among the parties. When the parties relationships is not interdependent as we saw in all the cases except #6,

the mediator's primary role should be to ensure that one party does not impose his/her unsatisfactory settlement on the other. Taking a different position from those described above often lead to coercion and second class justice mentioned by revisionists.

We saw that in cases where significant power differentials existed between parties, the role of the mediator became critical to ensuring a fair outcome. Consequently, it also became obvious the Program's training should include a model that is both adaptable to the concems and issues prevalent in the case, and does not take a naive view of people and the world. Mediators must recognize that not all cases are amenable to mediation. That not all people want to be cooperative and that the implications of being neutral when inequities exist are more severe in practice than in theory.

We also saw that even those parties who were unable to adequately articulate their cases, they held on to their positions which were grounded in rights. Moreover, the disadvantaged party in each of the case observed was not easily manipulated by the stronger party--something contrary to what the revisionists predicted. The manipulation did not occur in part because of the process itself. Even with its fault, the mediation model used in the small claims courts transfers responsibility of the outcome to the parties. Moreover, it is a responsibility which most parties regardless of how disadvantaged, take seriously.

# APPENDIX A

SAMPLE
HARVARD MEDIATION PROGRAM TRAINING MATERIALS

## Mediator's Tool Kit for Active Listening

| Types of questions/actions | When to use | Examples |
|---|---|---|
| 1. Clarifying question | * you are confused by what has been said<br>* speaker is rambling<br>* you want additional information | * How, what, where, when and why questions<br>* "Could you repeat ... ?" |
| 2. Summarization | * to tie major ideas together<br>* to establish a basis for additional conversation<br>* after a long period of continuous speaking | * It seems that you are interested in replacing your shirts as well as continuing to use this dry cleaner, is that correct? |
| 3. Encouraging/Validating | * speaker is shy or otherwise reluctant to speak<br>* you want to acknowledge speaker's contribution to conversation | * Encourage: "Let's talk about ... ." "Could you tell me more about ... ?"<br>* Validate: "I appreciate your willingness to talk about this." |
| 4. Reflecting | * speaker is venting<br>* speaker is emotional | * "I understand that you are very upset ... " |
| 5. Restating | * you want to check your understanding of what has been said<br>* to emphasize a particular piece of information | * "So, you called Michael to tell him that you broke his typewriter, is that correct?" |
| 6. Reframing | * to reaffirm/demonstrate neutrality<br>* to diffuse emotional situation/language | * In response to: "John slammed into my car while I was at a stop light." Reframe: "So, I understand that you and John were in an accident." |

# TEN TIPS ON ASKING QUESTIONS

The ability to ask appropriate questions is an essential mediation skill. Ten tips on questioning include:

## 1. Identify the reasoning behind questions

A single question can cause defensiveness. A series of questions can feel like an interrogation. To avoid defensive reactions to any form of questioning, let the parties know the reasoning behind your line of questioning. For example, when trying to establish the nature of the relationship between two neighbors, you might start by noting, "We would better understand what you are saying , if we had a sense of how your homes are situated in relation to one another." Follow with an open-ended question ( a question which does not require a "yes" or "no" answer or a specific reply, but allows the parties to respond in their own way--see below) such as, "Could you describe the location of the two homes for us?"

## 2. Use open-ended prompts

During the early stages of mediation, a great deal of valuable information can be gathered by using brief, general , open-ended prompts such as, "Can you tell us what brought you here today?" or "Can you tell us about the situation that concerns you?" The use of open-ended prompts throughout the mediation session allows the parties to express their perceptions and feelings in their own words and in their own order, without interruption. The parties educate the mediator. Followup responses to open-ended prompts should vary according to circumstances. Consider the methods listed below.

## 3. Give acknowledgement responses

Brief, one-to-three-word statements or non-verbal gestures demonstrate that you are following the conversation. Try a nod of the head or "Um-hmmm," "Uh-huh," "I see," etc. If a person's comments become repititious, summarize what has been said to indicate that you understand, and then follow with a statement that encourages closure such as, "Now that I understand [illegible] we talk about . . . (new subject) " or an invitation to expand (see be[illegible]

## 4. Value silence

Never underestimate the power of silence. Silence in combination with your own thoughts expressed through facial and body expression can send invaluable messages such as, "I hear what you are saying and I need time to think about it, " or "I see that you need time to think about this more," or "Clearly it was difficult for you to express what you just did and you need a moment to recover from the feelings that have been aroused."

## 5. Offer invitations to expand

Brief phrases or prompts will signal the parties that you hear what has been said and that you encourage the person talking to say even more. Try phrases such as, "Anything else?" "Is there more you want to add?" or "Is there something else you think we should know?"

---

*(Prepared by the Massachusetts District Court Mediation Project. A. Davis. 1987.)*

## 6. Offer invitations to clarify or be more specific

Often a party will make a general expression which becomes more useful as it becomes more specific. For example, if one party says, "He always borrows my things without asking; I want them back!" the mediator might respond by saying, "Can you give me an example of what you mean?" or, if appropriate, "Please describe the items that you want returned." On other occasions, a party may not feel comfortable talking about a sensitive issue and may need a signal from the mediator that it is all right to raise the topic. In these cases a mediator might say, "Sometimes parents worry that their children are taking drugs. Is that a concern of yours?"

## 7. Make checks for accuracy

Many times you must check to make sure that you have understood a single thought correctly, for example, "Did you say that you purchased the car two years ago?" On other occasions you might want to summarize what has been said to see if you have an accurate picture of a person's more general perspective, for example, "So, from what you've said so far, I sense that you really like your neighborhood and that you want to stay there. Is that correct?" The mediator who can summarize both accurately and positively is in a good position to earn trust and build momentum.

## 8. Follow a line of thought

Often mediators must use a series of questions. For example, it might be important to gain a composite picture of a particular issue or to develop the terms of an agreement. At these times, it is helpful to identify the goal of the questioning (see item #1 above) and to stay focused. When working as a team, allow your co-mediator to complete a line of thought before injecting a new concept. The language of agreements must often be fine-tuned in a back-and-forth dialogue between the mediators and the parties, in private or joint sessions. Questions which narrow the subject matter may be appropriate at this time.

## 9. Encourage problem-solving

As the parties' concerns become clear and you shift from determining issues to resolving them, remind the parties of their role as problem-solvers. "So, have you thought about ways to resolve that issue?" "Can you think what might be done to make sure that issue doesn't arise again?" "Can you suggest methods to explore to take care of that issue in the future?"

## 10. Weigh options tentatively

A primary responsibility of the mediator is to see that options are offered tentatively so that either party is free to think about, accept or reject them without feeling threatened, losing face or becoming entrenched in a position. Try, "What if she agreed to keep the stereo down after 10:00 p.m.? " or "How would you feel if he agreed to pay for half of the fence?" or "If he agreed to shovel his side of the driveway, would you take care of your half?"

# APPENDIX B

## HMP TRAINING CHECKLIST

## MEDIATOR'S CHECKLIST

**I. Co-mediation**
- prepare together before mediation
- model successful communication and constructive interaction
- debrief and offer feedback after mediating

**II. Preparation**
- seating
- where will party/parties go during a private session or mediator caucus?
- consent forms and any other paperwork
- supplies (calendar, calculator, tissues, paper, pens)
- what facilities are available? (telephone? copy machine? restrooms?)

**III. Opening**
- introductions
- mediators' role (help them reach their own solution; mediators not judges)
- voluntary
- advantages of mediation
- agreements reached are contracts enforceable in court
- confidentiality
- overview of mediation process (joint sessions, private sessions, mediator caucuses)
- ground rules (no interrupting)
- consent form

**IV. Body**
- questioning
- active listening (rephrasing, reframing)
- 7Es: interests, options, criteria, alternatives, relationship, communication, commitment
- body language, eye contact

**A. Joint Session**

**B. Private Session**
- always back to back (one with each party)
- escort one party out (how long? what should they be thinking about?)
- reemphasize confidentiality at beginning and end
- watch the time (5 minutes is good; no more than 10 -- no! no!)
- "thank you for waiting"

**C. Mediator Caucus**
- escort parties out (how long? what should they be thinking about?)
- watch the time (3 minutes is good; no more than 5 -- no! no! no!)
- "thank you for waiting"

**V. Closing**
- have we already made sure the parties have AUTHORITY to settle? (do this early!!)
- is this agreement FINAL?
- is this agreement COMPLETE?
- is this agreement ENFORCEABLE?
- is there OWNERSHIP by the parties?
- do the parties UNDERSTAND the agreement?
- have we checked and rechecked to make sure the parties AGREE to the terms?

# APPENDIX C

WHAT IS MEDIATION? FORM

Commonwealth of Massachusetts
District Court Department of the Trial Court
Cambridge Division

P.O. BOX 338, FORTY THORNDIKE STREET, EAST CAMBRIDGE, MASSACHUSETTS 02141
617/494-

MEDIATION?

Why you should try it.

MEDIATION WORKS -- Most mediations lead to an agreement between the parties.

MEDIATION SAVES TIME -- The trial list is often long, and you might wait before you see the Clerk Magistrate. Mediators will be able to work with you as soon as your case is called.

YOU HAVE NOTHING TO LOSE -- If you don't reach an agreement in mediation, you can come back before the Clerk Magistrate today. You will not lose your place in line.

YOU MAKE THE DECISION -- In mediation no one else makes a decision for you. You will have the opportunity to discuss your dispute with the other party. Mediation allows you to solve your problem with the help of a mediator.

AGREEMENTS HAVE THE SAME WEIGHT AS COURT JUDGMENTS -- Any agreement you reach in mediation is legally binding. It has exactly the same legal weight as a decision made by the Clerk Magistrate.

If you would like to try mediation, when the court clerk reads your name, let them know you would like to mediate your case. Remember: mediation can work for you!

# APPENDIX D

SMALL CLAIMS FORMS &
COURT PROCEDURES

## INSTRUCTIONS FOR PERSONS FILING A SMALL CLAIM — Complete Parts 1-6 on front of form.

**Part 1.** You may bring your small claim only in the court for the area where either the plaintiff or the defendant lives or has a place of business or employment. A small claim against a landlord arising from the rental of an apartment may also be brought where the apartment is located. You may find it easier to enforce a decision in your favor if you bring your small claim where the defendant lives or works, but you are not required to do so. The Clerk-Magistrate's office can tell you which court serves an area and the fee you must pay to file your case.

**Part 2.** The person filing the claim is called the plaintiff.

**Part 3.** The person or corporation being sued is called the defendant. If you are suing a company which is not a corporation, you should name the owner(s) doing business as the named company as the defendant; the names of the owner(s) can be obtained from the City or Town Clerk where the company's offices are located. If you are suing a company which is a corporation, you must have the exact legal name. You can find this information from the Corporate Records Division of the Secretary of State's Office, One Ashburton Place, Room 1712, Boston, MA 02108.

**Part 4.** Fill in the amount you are suing for and briefly explain your claim. State your claim clearly so the defendant can understand why he is being sued. Fill in as "costs" the amount of the filing fee. Sign your name in the space provided.

**Part 5.** Indicate if you are willing to attempt to mediate this claim.

**Part 6.** If you cannot sign this affidavit because you are unsure whether the defendant(s) is (are) in the military, draw a line through it. You may then obtain judgment if the defendant fails to appear only by a judge's special order.

Return the completed form, with all parts intact, together with a check or money order (made payable to "Clerk-Magistrate") for the filing fee. You may mail the completed form and filing fee to the Clerk-Magistrate's office of the court where you are filing your case.

## INSTRUCTIONS TO THE PLAINTIFF AND THE DEFENDANT

**1. WHAT IS THIS DOCUMENT?**
This is your copy of the "Statement of Small Claim and Notice of Trial" which the court has issued in this case. The plaintiff named on the front of this form has sued the defendant in small claims court for the amount and reasons stated. This form notifies you when you must appear for trial at the court.

**2. WHAT IS SMALL CLAIMS COURT?**
The small claims court is not a separate court, but a special session of the District Court, the Boston Municipal Court or the Housing Court. It is designed to resolve smaller cases, making it easier and less expensive for the public to use the court.

**3. HOW IS THE DEFENDANT NOTIFIED OF THIS CLAIM?**
The defendant is sent two copies of this "Statement of Small Claim and Notice of Trial" — one by first class mail and one by certified mail. If the plaintiff inquires, the court will tell the plaintiff if the Post Office is unable to notify ("serve") the defendant.

**4. ARE ATTORNEYS NEEDED IN SMALL CLAIMS COURT?**
No, but you may hire one if you wish.

**5. WHAT ARE "COSTS"?**
If the plaintiff prevails, or if both sides settle the claim, the plaintiff may recover from the defendant as "costs" the court filing fee and postage. By court order the plaintiff may sometimes recover certain other costs of bringing the claim.

**6. IS THE DEFENDANT REQUIRED TO FILE AN ANSWER?**
The defendant may send a signed letter to the court, saying clearly and simply why the plaintiff should not prevail. This "answer" should state those specific parts of the claim that are denied. However, the defendant is not required to file an answer. The defendant should send the plaintiff a copy of the answer, if one is filed. In the answer, or in a separate letter sent to the court, the defendant may set forth in writing any claim against the plaintiff within the jurisdiction of the small claims court. Both claims will be treated as one case if the defendant mails a copy of his or her claim to the plaintiff at least ten days before the scheduled trial date, or if the judge orders that they be so treated. Such claims are not compulsory. The plaintiff need not file a written answer to the defendant's claim.

**7. WHAT IF THE DEFENDANT ADMITS HE OWES ALL THE MONEY?**
He or she should contact the plaintiff and arrange to make payment. If payment is not made before the trial date, both the plaintiff and defendant must appear in court.

**8. WHAT IF THE DEFENDANT ADMITS HE OWES THE MONEY BUT NEEDS TIME TO PAY?**
He or she must appear in court on the trial date and give his or her reasons for requesting time to pay.

**9. WHAT IF THE DEFENDANT BELIEVES HE OWES NOTHING, OR ONLY SOME OF THE MONEY CLAIMED?**
He or she must appear in court on the trial date. He or she will be able to question how the plaintiff arrived at the amount claimed.

**10. WHAT IF THE DEFENDANT BELIEVES THE PLAINTIFF OWES HIM MONEY?**
The defendant should indicate in his or her answer, or tell the court, that the plaintiff owes him or her money. The plaintiff's original claim and the defendant's claim against the plaintiff (called a "counterclaim") may be treated as one case and tried on the date the original claim was scheduled. The defendant is urged but not required to send the plaintiff a copy of a written counterclaim, if one is filed.

**11. WHEN AND WHERE DO THE PLAINTIFF AND THE DEFENDANT HAVE TO GO TO COURT?**
Unless the plaintiff and defendant settle this case before the trial date, both sides must appear in court on the date the case is scheduled for trial. The date, time and the court location to which both sides must report are shown on the front of this form.

**12. WHAT IF I CANNOT COME TO COURT ON THE TRIAL DAY?**
You should call or write the person on the opposing side and ask him or her to agree to postpone ("continue") the case. Continuances should be only for a good reason, such as illness, an emergency, or the unavailability of a witness. If both sides agree, or if the opposing side does not agree; or if you are unable to reach the person on the opposing side, you must write the Clerk-Magistrate of the court to ask that the court give you a continuance. Do not wait until the last minute. If the other side makes a reasonable request for a continuance, it may save you some inconvenience if you agree to the request.

**13. WHAT IF I DO NOT COME TO COURT ON THE TRIAL DAY?**
If the plaintiff does not appear for trial, and the defendant does appear, the case will be dismissed. If both the plaintiff and the defendant do not appear for trial, the claim will also be dismissed. If the defendant does not appear for trial, and the plaintiff does appear, the court can enter a default judgment and order the defendant to pay the amount claimed. The judge may ask the plaintiff to present some evidence of the claim, even if the defendant is not present.

**14. HOW SHOULD I PREPARE FOR TRIAL?**
It may be helpful to write down ahead of time the facts of the case in the order in which they occurred. This will help you organize your thoughts and make a clear presentation of your story. On the trial date, you must bring with you any witnesses, checks, bills, papers, photographs or letters that will help you prove your case. If you need a witness to come to court but the witness will not come, ask the Clerk-Magistrate to issue a summons to the person. You may need an expert witness to prove any matter not within common experience. The laws governing small claims are the same as those for major lawsuits, except that simplified procedures are used. The plaintiff must prove that the claim is one which the law recognizes and that the defendant is liable, or the judge will enter a decision for the defendant.

**15. WHAT WILL HAPPEN ON THE DAY OF THE TRIAL?**
Be sure to arrive on time. If your case is not resolved by a mediator, a trial will be held before the judge. The plaintiff will be asked to tell his or her side of the story, then the defendant will tell his or her side. Each will have an opportunity to ask questions of the other side and the other side's witnesses. To prevail the law requires the plaintiff to prove the validity of his or her claim.

**16. WHAT WILL THE JUDGE DO?**
The judge will make a decision. Notice of the decision (called a "judgment") will be given or sent to each side.

**17. CAN I APPEAL THE JUDGMENT?**
If the defendant loses the case, he or she can appeal for a jury trial of any disputed questions of fact before a jury of six persons, but he or she must post a bond unless waived. If the plaintiff loses, he or she cannot appeal, since he or she chose to bring his or her case in small claims court.

**18. WHAT SHOULD THE PLAINTIFF DO IF THE DEFENDANT FAILS TO PAY A JUDGMENT?**
The plaintiff must contact the defendant and ask for payment. If the defendant still fails to pay, the plaintiff should inform the Clerk-Magistrate. If the court has made a payment order, the Clerk-Magistrate will give the plaintiff a notice ordering the defendant to appear in court to show cause why he or she should not be held in contempt and be subject to punishment. The plaintiff must arrange to have an officer serve this notice on the defendant. If the court has not made a payment order, the Clerk-Magistrate will inform the plaintiff how to bring the claim before the judge to have a payment order made.

| STATEMENT OF SMALL CLAIM AND NOTICE OF TRIAL | For Court Use Only → | DOCKET NO. | Trial Court of Massachusetts Small Claims Session |
|---|---|---|---|

PART 1

☐ BOSTON MUNICIPAL COURT ☐ DISTRICT COURT _____ Division ☐ HOUSING COURT _____ Division

PART 2

PLAINTIFF'S NAME, ADDRESS, ZIP CODE AND PHONE

PHONE NO:

PLAINTIFF'S ATTORNEY (if any)

Name:

Address:

PHONE NO:

PART 3

DEFENDANT'S NAME, ADDRESS, ZIP CODE AND PHONE

PHONE NO:

ADDITIONAL DEFENDANT (if any)

Name:

Address:

PHONE NO:

PART 4

**PLAINTIFF'S CLAIM.** The defendant owes $_____ plus $_____ court costs for the following reasons: Give the date of the event that is the basis of your claim.

SIGNATURE OF PLAINTIFF X DATE

PART 5

**MEDIATION:** Mediation of this claim may be available prior to trial if both parties agree to discuss the matter with a mediator, who will assist the parties in trying to resolve the dispute on mutually agreed to terms. The plaintiff must notify the court if he or she desires mediation; the defendant may consent to mediation on the trial date.

☐ The plaintiff is willing to attempt to settle this claim through court mediation.

PART 6

**MILITARY AFFIDAVIT:** The plaintiff states under the pains and penalties of perjury that the:

☐ above defendant(s) is (are) not serving in the military and at present live(s) or work(s) at the above address.

☐ above defendant(s) is (are) serving in the military

X _____ _____

SIGNATURE OF PLAINTIFF DATE

NOTICE OF TRIAL

**NOTICE TO PLAINTIFF:**

You have sued the above defendant in Small Claims Court. You are directed to appear for trial of this matter on the date and time noted to the right.

You should call the court prior to the hearing date to learn whether the defendant's notice of trial was delivered and whether the defendant has filed an answer.

**SEE ADDITIONAL INSTRUCTIONS ON THE BACK OF THIS FORM**

NAME AND ADDRESS OF COURT

DATE AND TIME OF TRIAL

_____ AT _____

DATE TIME

ROOM NO

BOTH THE PLAINTIFF AND THE DEFENDANT MUST APPEAR AT THIS COURT ON THE DATE AND TIME SPECIFIED

COURT USE ONLY

FIRST JUSTICE

CLERK-MAGISTRATE OR DESIGNEE

PLAINTIFF'S COPY

**INSTRUCTIONS FOR FILING A SMALL CLAIM** — You must complete Parts 1-6 of this form. See instructions on reverse.

DC SC * 8/86) ATENCION ESTE ES UN AVISO OFICIAL DE LA CORTE. SI USTED NO SABE LEER INGLÉS, OBTENGA UNA TRADUCCIÓN

rev. 09/90

GENERAL SMALL CLAIMS COURT PROCEDURES

I. Filing the Claim: The plaintiff files a claim by filling out a form in the Clerk's Office and paying $16.25 for claims up to $500, or $21.25 for claims that are more than $500. Small claims are generally limited to $1500; the exception is motor vehicle claims for property damage, which have no upper limit. The court sends a copy of the complaint with the hearing date and time, and a request for an answer by registered letter to the defendant at the address supplied by the plaintiff.

II. Hearing Date: The court clerk reads the list of small claims cases at the time specified in that particular court. (For example, Brookline meets at 9:30 a.m. on Thursdays and Quincy, at 9:00 a.m. on Fridays.)

A. Both parties present: The parties will be offered the chance to have their cases mediated before appearing in front of the judge. If they refuse mediation, they wait until the judge can hear their case.

B. Plaintiff present, defendant absent:

1. If the defendant was served, that is, if the defendant received the registered letter sent by the court, s/he is considered to have been served with notice to appear. With the plaintiff's consent, the defendant may be able to switch the time and date of the hearing and so notify the court. Otherwise s/he must appear at the time and date specified.

   A default judgment will be entered against the defendant after the plaintiff returns to the clerk's office and fills out a military affidavit stating that the defendant's absence was not due to military service.

   The default judgment can be removed by motion and after a hearing before a judge as further explained below. Once the default has been removed, a new hearing date must be set and the process re-initiated.

2. If the defendant was NOT served, a default cannot be entered against him/her. The

plaintiff must return to the clerk's office and apply and arrange for constable service costing about $15, including mileage charge, and set a new court date.

C. Plaintiff absent, defendant present: This causes a non-suit, which can be removed on motion by the plaintiff and after a hearing by the judge.

D. Removal of default or non-suit: Generally the judges prefer to decide small claims cases on the merits, so if there is any reasonable cause why the absent party did not appear, the judge will be inclined to grant the motion to remove the default or non-suit.

III. What if the Guilty Party Doesn't Pay?

A. Notice of Default: After a default judgment is entered, a notice is sent to the absent defendant who has thirty days to pay the amount claimed by the plaintiff. Fewer than 50% of such defendants pay up in response to default notices.

B. Supplementary Process: In a separate process, roughly parallel to filing the small claim itself, the plaintiff files an application for supplementary process. The defendant is then served by registered mail, or by constable service if registered mail proves inadequate and if the plaintiff is willing to bear the costs. Supplementary process is also used when a party reneges on a mediated agreement.

1. Defendant does not appear. If the defendant does not appear on the day appointed for the supplementary process hearing, the plaintiff must apply in the clerk's office for a capias or civil arrest warrant costing between $30-50, which a constable or deputy sheriff will serve on the defendant. Almost all defendants served with a capias subsequently show up for the rescheduled hearing.

2. Both parties or defendant only appears. The judge will question the defendant at the hearing to determine whether s/he is able to pay the judgment.

If the defendant seems solvent, the judge will work out a payment plan and order the defendant to follow it. If the defendant seems unable to

PLAINTIFF yes no

Is party willing to be called for follow-up info.? please put circle around appropriate response

DEFENDANT yes no

HARVARD MEDIATION PROGRAM - INTAKE SUMMARY

____BRKLNE ___DRCHESTR ___ROXBRY ___CAMBRIDGE ___QUINCY

Date of Mediation: _____

Mediator(s): _____

Case Number: _____

Date Case Filed: _____

PARTIES

Plaintiff _____ Defendant _____

Address _____ Address _____

_____ _____

PH. # (day)_____(eve)_____ PH. # (day)_____(eve)_____

[Please indicate with a ✓ whether party prefers to be called day or evening.]

TYPE OF CASE

1) ____ Landlord/tenant

2) ____ Commercial Dispute (Faulty product or service, non-payt., etc.)

3) ____ Interpersonal Dispute

4) ____ Automobile Accident

5) ____ Other (describe) _____

JUDGMENT SOUGHT BY PLAINTIFF

_____

_____

SETTLEMENT

____ Settled

Terms of the settlement include:

____ Money Payment When Made? _____

____ Other (describe) _____

Date should be completed? _____

____ Not Settled

Who called off the mediation? __Plaintiff __Defendant __Mediator __All

## CONSENT TO MEDIATE

We, the undersigned, have had the mediation process explained to us, and we voluntarily agree to try mediation. We understand that participation will not prevent us from being heard before the Judge, if the mediation does not lead to a settlement.

| | Signature | Date |
|---|---|---|
| Parties: | _____ | |
| | _____ | |
| | _____ | |
| Mediators: | _____ | |
| | _____ | |
| | _____ | |

# District Court Department of The Trial Court

DORCHESTER DISTRICT

NORFOLK, ss.

_____ (Plaintiff)
vs.
_____ (Defendant)

Small Claims Action No. _____

## SMALL CLAIMS MEDIATION
## MEMORANDUM
(Rule 174A)

Mediation Session(s) held _____ .
(date or dates)

☐ Successful. Terms of mediated resolution and agreed order for payment, if any:

_____ (Plaintiff)

_____ (Defendant)

_____ (Date)

_____ MEDIATOR

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