

# THE INS AND OUTS OF MEDIATION

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## FOREWORD

The first print of *The Ins and Outs of Mediation* was published in a limited edition in 2006.

The enthusiastic responses since received have motivated the publication of this revised version, just six months later.

When we refer in the text to the single definite person androgynously, with a pronoun in the third person, the masculine pronoun, 'he' is used.

In the meanwhile HU- (Utrecht University of Professional Education) Mediation, the center dealing with mediation, in all its facets, within the Utrecht University of Professional Education, has become a reality. HU-Mediation focuses on the areas of education, contract and business issues and works to advance knowledge in the mediation field. At HU, custom-made electives are provided in diverse studies. In the educational sphere, mediation can be chosen as a minor, and is offered in an extensive context. HU- Mediation also offers post graduate mediation courses.

Utrecht University of Professional Education also gives various training-courses, both internal and external, in the areas of communication, conflict resolution and mediation. Moreover, it is now possible to have mediations provided by experienced, registered and certified mediators. HU-Mediation works closely with the Faculty of Society and Law at Utrecht University of Professional Education's knowledge center, Social Innovation. This creates numerous opportunities for further study and research in the areas of mediation and conflict resolution.

Student mediators are also trained within Utrecht University of Professional Education to prepare them to ultimately manage their own conflicts. Above all, they are equipped with mediation skills for later. Utrecht University of Professional Education also aims to make mediation available to all its employees in the event of internal conflicts, in order to minimize the occurrence of legal proceedings. Moreover, HU-Mediation aims to broaden awareness of mediation, and its field of specialization, among Utrecht University of Professional Education employees. This book, *The Ins and Outs of*

Mediation, has been written with these aims in mind. It is with this book that we seek to present a concise impression of the mediation process, along with mediation skills and techniques. It is our sincere wish that with this information, enthusiasm takes hold and the reader, at some point, makes use of mediation in one or more of its numerous applications.

Utrecht, May 2007

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## INTRODUCTION

Although mediation is an ever-growing field and more generally accepted than ever before, there are still many people unfamiliar with all the implications of mediation. This book is for those individuals. It is a practical guide for all who want to gain understanding about mediation. The mediation process, rules of the game, as well as the skills and techniques used during mediation, are described and explained plainly and concisely.

The book is organized as follows:

Chapter 1 raises and answers the question, 'What is mediation?' The conflict management method of mediation is examined alongside other existing conflict resolution methods. The concept 'mediation' is defined and the advantages and disadvantages are explored.

Chapter 2 focuses on the mediation process. The mediation agreement, the different phases of the mediation process and the mediation settlement agreement are described.

The phenomenon communication is treated in chapter 3.

Communication is related to mediation in three different ways: miscommunication is almost always the source of the conflict, the conflict is expressed in the communication among the parties involved and finally, communication is the ideal means to resolve conflicts.

The following mediation skills and techniques, listening; questioning; reformulating; mirroring; summarizing; metacommunication; peeling the onion and look-ahead techniques, are spotlighted in chapter 4.

Chapter 5 describes the utilization of questioning techniques in the different phases of the mediation process. And finally, chapter 6 outlines some of the pitfalls a mediator can encounter.

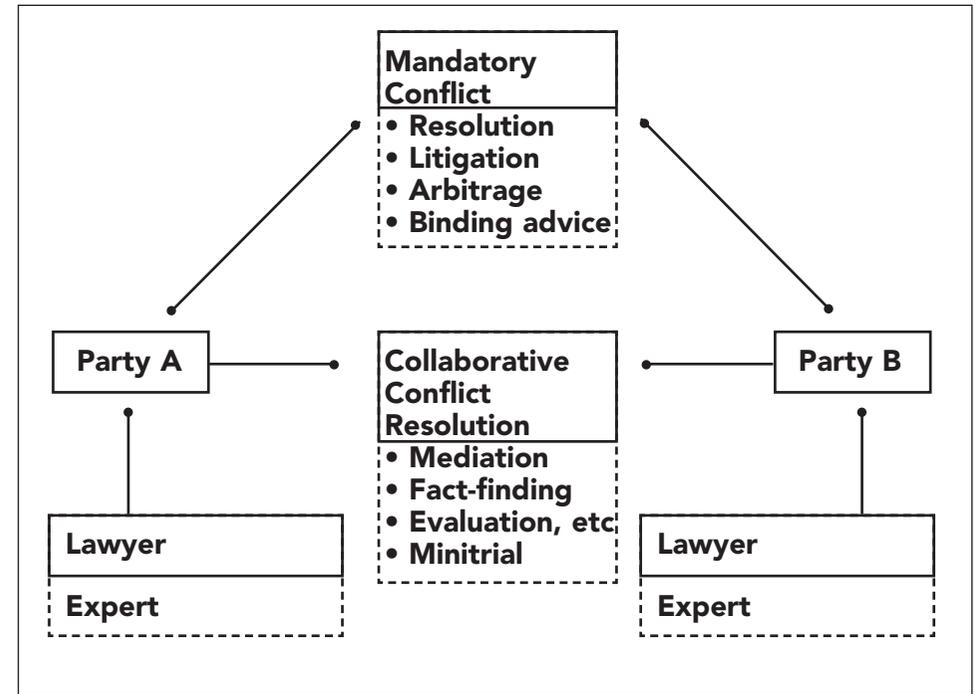
# 1. WHAT IS MEDIATION?

## 1.1. Mediation and other existing conflict resolution methods

Mandatory (or court annexed) and collaborative conflict resolution are two forms of conflict resolution. When parties have decided to take their dispute to court, the judge's ruling is an example of mandatory conflict resolution. The judge is thus the neutral third party and determines the outcome based on the law. Mandatory conflict resolution is about the content of the case; the relationship between the parties is not central to the decision-making process. In the case of arbitration (a common form of conflict resolution in certain areas) the arbiter makes a decision after having heard both sides of a dispute. The same applies to the binding advice given by an expert at the request of the parties. This form of conflict resolution is used by arbitration boards (also known as conciliation boards) in consumer cases. The advantage of mandatory conflict resolution is that it always leads to a decision. The drawback is that the conflict almost always ends with a winner and a loser.

Parties always look for a neutral third person to guide the process of solving a dispute in collaborative conflict resolution. At the same time, parties remain responsible for the question that divides them. Besides the substance of the conflict, the relationship between parties plays an important part. Mediation is an example of collaborative conflict resolution. A neutral third party supervises the disputing parties. The objective is that they themselves resolve the matter dividing them. Therefore, the mediator does not provide a solution but makes certain that the parties themselves find a resolution satisfactory to all concerned. Shuttle mediation also falls under the category of collaborative conflict resolution. In the case of shuttle mediation, in order to reach a solution the mediator goes back and forth from one party to the other. A mediator, of course, is unable to force a solution. Still, he aims to steer the parties towards a resolution. Shuttle mediation is particularly common in international conflicts, which have seriously

escalated. The defining characteristic of collaborative conflict resolution is thus a neutral third party that supervises or guides the disputing parties but does not decide the outcome.



**Figure 1 Diagram mandatory and collaborative conflict resolution**

(Source: Brenninkmeijer et al. 2005)

## 1.2. Definition of Mediation

The following definition of mediation is used in this book:

“Mediation is a type of conflict resolution, in which the disputing parties are facilitated by a neutral third party (the mediator) in order to discover solutions, themselves, for the questions dividing them.”

Parties can either choose, or have a mediator appointed, at the moment that they are no longer able to resolve the problems which have occurred between them. Problems between parties can occur in various areas:

- Labor rights, e.g., neglected conflicts, which have escalated; transfers; dismissal; and sexual harassment
- Tenants' and homeowners' rights, e.g., noise nuisance; and problems re fences and borders
- Family rights, e.g., divorce and child visitation
- Administrative rights, e.g., official treatment and fines

And also the following:

- Problems in an organization
- Intercultural issues
- Dissolution of a partnership
- Various issues re cooperation

A dispute can be considered for mediation if the chance exists that parties are capable of reaching a joint solution. If a willingness to make the effort to reach an agreement is lacking, mediation is a waste of time. Moreover, in order to take part in mediation, parties must have the capabilities to do so. This means, they must be equipped to represent themselves and above all be able to negotiate the outcome. In the case of obvious power inequality or if one of the persons is disabled because he has alcohol abuse issues or a mental disorder, parties are not suitable for mediation

### 1.3. Measure of escalation

The escalation ladder of Glasl (2001) is a useful model for determining the measure that a conflict has escalated. The different stages in the model indicate the stages of escalation.

In stage 1, parties are usually still capable of solving the problem themselves. A supervisor, confronted with the conflict between colleagues, in this first stage of escalation (see: figure 2), can play the role of the neutral third party, leading the process to a resolution. He can make a contribution to help resolve the dispute. In stage 2, parties proclaim their positions and stop listening to one another. The perception of the other party is a negative one. Furthermore, the insight, that resolution might benefit both parties, is nonexistent. A professional neutral third part is often needed in this stage to help them work-out their problem. This can be a mediator or another intermediary, guiding parties towards a solution to the problem.

In the final stage, stage 3, the situation has escalated to the point that parties can only think about how right they are, even if this is at the other's expense. Calling-in a mediator has little effect in this

phase. The positions have hardened. Parties are only out to destroy each other.

At this stage, a dispute is often fought in court.

Escalation stage 1 Win-win	Escalation stage 2 Win-lose	Escalation 3 Lose-lose
<ul style="list-style-type: none"> <li>. Matter-of-fact disagreement</li> <li>. Only those directly involved</li> <li>. Open dialogue with other parties possible</li> <li>. Willingness to look for mutual solutions</li> </ul> <p><b>Negotiation</b> <b>Mediation</b> <b>Litigation</b></p>	<ul style="list-style-type: none"> <li>. Beyond matter-of-fact Disagreement</li> <li>. Other parties also involved</li> <li>. No open dialogue possible</li> <li>.Winning for one is loss for the other</li> </ul>	<ul style="list-style-type: none"> <li>. Beyond matter-of-fact difference</li> <li>. Other parties also involved</li> <li>. No dialogue -talking about one other not to one other</li> <li>. Resolution becomes secondary to destruction of the other</li> </ul>
<b>Negotiation</b>	<b>Mediation</b>	<b>Litigation</b>

one's own influence is meaningful → other's influence is meaningful

Figure 2 Glasl's model of escalation stages

(Source: NPI Zeist)

### 1.4. Advantages of mediation

Short term solutions to a conflict are one benefit of mediation. Resolution via mediation can take place within a few weeks. Conflicts that drag on are wearing and a source of negativity. Parties are often able to reach satisfactory results within six to eight weeks of mediation. Secondly, a mediator's services are much more affordable than those of a lawyer or litigation procedure. Moreover, both parties are involved with the realization of a solution. This provides a sense of responsibility for the agreements made. This, in turn, leads to acceptable and sustainable solutions. This is a great benefit when compared to court imposed decisions. Another advantage is the flexibility gained in the relationship between parties. Parties are thus better able to manage conflicts, which may come-up in the future.

The advantages can be summed-up

- Time saving (quick realization resolution)
- Cost saving
- Win-win situation
- Sustains relationship
- Long-term perspective
- No negative publicity (confidentiality)
- Acceptable and sustainable solutions

### 1.5 Disadvantages of mediation

A drawback of mediation is that parties might not reach a joint agreement, therefore ending up in court after all. In the long run, this means extra costs and time: it takes the judge a few months to decide the question, at hand. Also, mediation is confidential, thus mediation cases receive little publicity. There are, however, matters that are benefited by publicity. In addition, there are cases where a principle ruling is vital and mediation does not result in such a ruling.

A summation of the disadvantages is as follows:

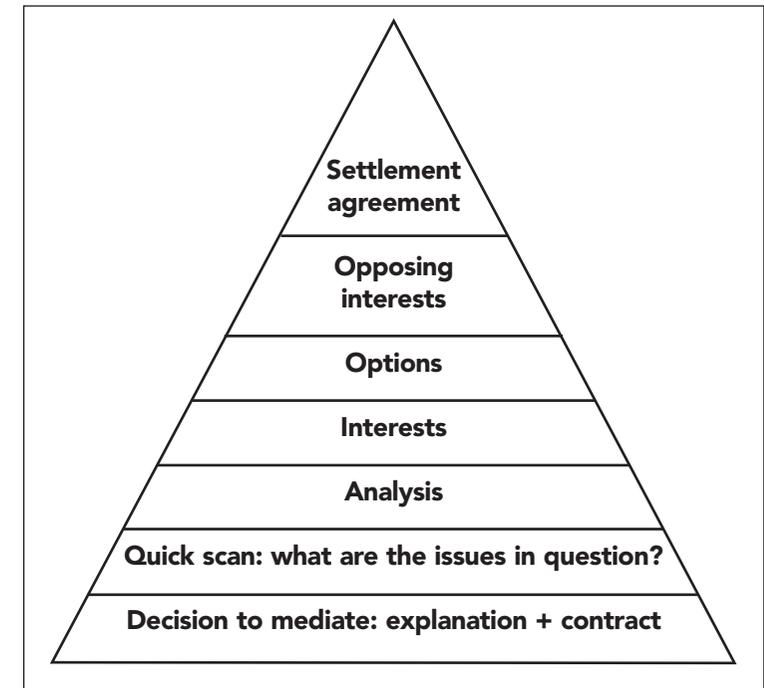
- Wasted time (if mediation fails)
- Additional costs (idem)
- No publicity
- No principle rulings

## 2. THE MEDIATION PROCESS

### Introduction

The different stages of the mediation process are described in this chapter. The pyramid is the foundation for the discussing the different stages of the mediation process.

### 2.1. The pyramid



**Figure 3 mediation pyramid**

(Source: Unknown)

The different stages of the mediation process are indicated in the pyramid.

The preparation for the process takes place before stage 1.

- Stage 1 decision to mediate - the intake
- Stage 2 the quick scan
- Stage 3 analysis
- Stage 4 examining interests
- Stage 5 options: enlarging the pie
- Stage 6 conflicting interests
- Stage 7 final agreement and closure

## 2.2 Preparation

The mediator is either approached by the parties for an appointment or the parties by the mediator, in the preparation stage. It is of vital interest in this stage that the mediator does not go into the substance of the dispute. The mediator's neutrality and independence are essential. If one of the parties should have the impression that a discussion has taken place with the other without his or her prior knowledge, there is chance that neutrality and independence are compromised.

Consider the following illustration: an employer and employee have been involved in a conflict for an extended period of time and the employer demands mediation to improve cooperation. It is vital that the mediator makes very clear to the parties that the person initiating or paying for the mediation has no influence on the mediation process. The mediator can provide insight by clarifying his role and by clearly explaining the entire process. It is not unusual for parties to request separate intakes before actually agreeing to begin with the mediation process. In that case, the mediator must preserve balance by conducting two intakes as desired, apart. As soon as the first appointment is scheduled, the mediator provides parties receive the following: a confirmation of the appointment; the mediation agreement (see: appendix 1); and a copy of the regulations of the NMI [Nederlands Mediation Instituut (Mediation Institute of the Netherlands)] (see: appendix 2).

### 2.3 Decision to Mediate: intake and the mediation agreement

The intake is the first step of the mediation process. The mediator arranges for parties to be received at (if possible) a neutral location. Furthermore, the way in which the parties are received must be carefully considered. It is important, for instance, to know

beforehand if the parties will be placed in the same or separate waiting room(s).

The mediator must also carefully think about the seating arrangement. Among other considerations, the mediator must be able to easily observe both parties. The parties meet the mediator for the first time together during this phase. This is the opportunity to assess their confidence in the mediator and to see if it 'clicks.' In addition, the mediator offers an initial explanation of the mediation agreement.

#### 2.3.1. The Mediation agreement

The mediation agreement includes all agreements made between the mediator and the parties. This agreement applies to all parties and thus all adhere to it.

It is important to focus on the following aspects of this agreement:

- Commitment  
The mediator discusses the parties' willingness to make an effort to resolve the problem between them. This is referred to as commitment. Mediation is pointless without commitment
- The Role of the Mediator  
The mediator guides the process and, in a manner of speaking, shows the way. He has a neutral position and is impartial. This implies that he maintains the same professional distance towards both parties: in other words, multipartial. He does not interfere with the substance of the conflict, but instead lays the framework for parties to resolve their problem themselves.
- Confidentiality and privacy  
Everything that comes up during the different mediation sessions is confidential. Parties are obligated to secrecy regarding all that is discussed. Consequently, only the course of the proceedings may be reported to outside parties and not the essence of what is discussed.  
It is vital that parties feel free to speak their minds about anything and everything. In most cases sharing aspects of the questions' essence, with partners or spouses, usually creates no new problems. Still, it is important that both parties approve. If, for example, one of the parties is supposed to report to a superior or a member of the board (about the process), it is advisable that one of these is given a confidentiality clause (see: appendix 3) for signing. These parties are then also bound to all of the confidentiality terms stated in the agreement.

- **Mandate**  
The mediator must check to make certain that the correct persons are at the mediation table. In other words, are the parties at the table indeed the ones who are in conflict with one another? In addition, it must be clear to what extent the participating parties have decision making authority. If an individual with decision making authority is not in attendance, it is advisable to request that such an individual participates in the mediation sessions.
- **Voluntary nature**  
At any given moment, the mediator and the involved parties can agree to terminate the mediation. In the case of termination, it is advisable that this is discussed at the mediation table. Parties then have the opportunity to explore how to further proceed with the still unsettled question.
- **A general description of the issue at hand**  
It is essential to reach a clear consensus regarding the topic to be mediated. An account, described in as broad as possible terms, is preferable to a too detailed description. If the mediator describes the question in the written account too explicitly, there is the following risk: other issues, which come up in the course of mediation and are not specified in the agreement, can not be included in the settlement agreement.
- **Fees and costs**  
It is customary that each party pays half the mediator's fee. There are, though, other possible options, for instance, a 40-60% division. The parties may, in fact, make any agreement they choose in regard to sharing costs - as long as the mediator is paid. The employer usually carries the costs of a labor dispute.
- **Advisors**  
Parties are permitted to make use of advisors for additional support. It is, though, advisable to clarify the precise role of advisors before actual mediation starts. Are advisors equal partners or are they just observers, permitted to ask for recess at a certain point to confer with their clients? Transparent agreements regarding the part advisors play during the mediation process are made during the initial meeting.

### **2.3.2. Mediation reports**

A report following each mediation session is written by the mediator. These reports are not detailed notes or minutes, but are

instead a reflection of the mediation process. In addition, points of agreement, as well as points of controversy, are described. The mediator can also use the report to guide parties in a certain direction. This, however, may in no way affect the mediator's neutrality.

### **2.4 The quick scan**

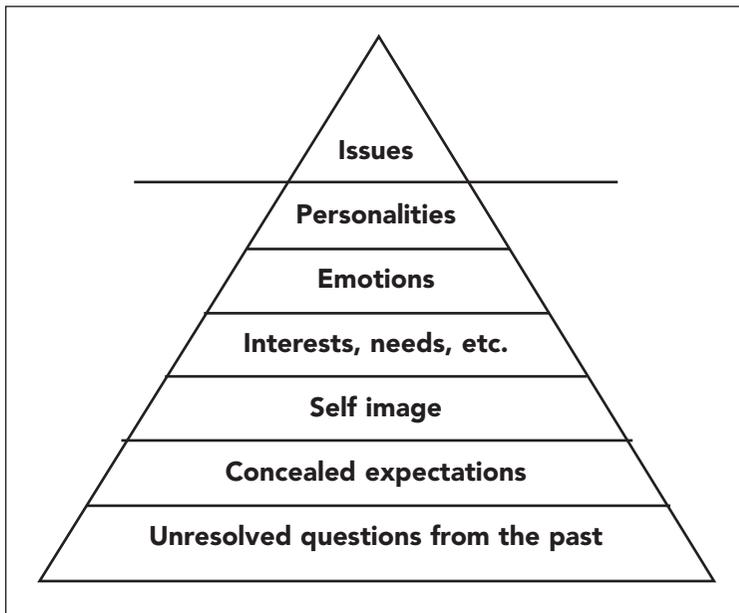
The phase in which the mediator initially explores parties' issues, at hand, is called the quick scan.

The mediator makes use of the shuttle technique in this phase. He shuttles, so to speak, from one party to the other, while spending equal time with each party. Parties have the occasion to briefly explain the situation and what they want included in the agenda. This is to provide the mediator the opportunity to gain insight into the conflict. He can then determine what each party feels is crucial and therefore what needs to be discussed. In addition, the mediator reassures the parties that they both will have every chance to relay their entire story. In this phase parties are still chiefly focused on their own standpoints and are limited in their ability to listen to one another. In short, interest in the other party is lacking at this point.

### **2.5 Analysis**

During the analysis stage, the mediator requests parties to go into depth regarding the issues that have come up during the quick scan. Parties' emotions will undoubtedly surface during this phase. It is both wise and essential to allow appropriate consideration for these emotions. This is to prevent trying to look for solutions before the anger, grief, rage or similar feelings have been adequately dealt with.

The numerous standpoints are primarily stated in this phase: parties will express their demands, rights and opinions. The figure of the conflict iceberg, here below, illustrates that what parties seem to be plainly stating can be found above water level. However, the essence is below water level and this calls for further exploration.



**Figure 4 Conflict iceberg**

(Source: Postgraduate course Mediation 2003)

The mediator articulates the underlying (both verbal and non-verbal) difficulties in communication. Moreover, reproach from both parties is reformulated so that parties are able to view each other from a new perspective.

## 2.6 Interests

The mediator helps parties articulate their existing interests, which might not be immediately obvious from the viewpoints expressed. What are the parties' real aims? What are their concerns and what do they require and long for? Communication plays a great part in many mediation cases. Parties appear to have little understanding of one another. They communicate on different wave lengths and empathy or sympathy seems to be altogether absent. Equipped with his skills and techniques, the mediator works to shed light on both parties' interests.

There are three categories of interests:

1. Communal interests: these are the questions for which both parties want a solution.

2. Compatible interests: these are separate interests but those which can coexist alongside one another.
3. Opposing interests: these are those questions for which parties have difficulty reaching any agreement at all or for which they can find no common ground. The mediator therefore places these opposing interests low on the agenda. Practice shows that when parties can agree on their common and compatible interests, they are then prepared to make concessions on their opposing interests.

## 2.7 Categorization stage and turning point

This is the connecting stage between the analyses of the parties' true aims and the negotiations regarding acceptable solutions. There are three key questions during this stage.

1. Have the emotions been adequately addressed?
2. Are all interests known?
3. Are the parties prepared to look for resolutions with consideration of the interests at hand?

## 2.8 Negotiating: generating options

Once parties are able to put their emotions aside and are prepared to empathize with the other, they have entered the phase in which negotiation is feasible. Negotiation can, however, only take place on the condition that all key issues are discussed. If even one point is not adequately dealt with, the mediator will realize that getting on with negotiations is not feasible. The mediator would then have to return to the mediation pyramid in order to review that particular point once more.

This method includes a number of key principles.

1. Distinguish the person from the problem
2. Focus on the interests and not the positions
3. Look for mutual solutions
4. Apply objective criteria
5. Think about your 'best alternative' ((BAWN: Best Alternative Without Negotiations)

All of the interests opted by the parties are points which can generate options. Through the act of brainstorming, parties attempt to achieve as many possible solutions, relevant for them.

Brainstorming is a means for allowing parties - without getting into discussions - to suggest all solutions, out loud, that come to mind:

this includes out of the ordinary, unrealistic or impractical solutions. This usually takes place in a relaxed atmosphere. The communication is renewed and parties are confident that acceptable resolutions will follow; except to categorize the various mentioned solutions and to structure the meeting, the role of the mediator is almost unnecessary at this point.

## **2.9 The settlement agreement**

When parties have discussed all solutions and reached consensus regarding the different issues, the mediator (or other third party, for example, legal advisor or lawyer) draws up a settlement agreement. The settlement agreement contains all points of agreement between parties. The mediator makes sure that the results are tested for viability. This can be either done by the mediator himself or by another. The mediator is not one of the parties in the settlement agreement.

Parties have the obligation to respect the terms of the settlement agreement. If this is not the case then the obvious step, in the spirit of mediation, is to discuss the controversy within the framework of mediation. This is usually established beforehand. If the matter still remains unresolved the agreement can be enforced in a court of law.

## **2.10 Closure**

The mediation process can be finalized with a ritual. If and how a ritual is included depends on the wishes of mediator and the parties. It is the mediator's task to inquire if there is any interest in a ritual ending to the process. A handshake; kiss; giving a gift or a meaningful article; drinking a cup of coffee together; or going out to eat; are various examples of rituals for concluding mediation.

# **3 COMMUNICATION**

## **Introduction**

An unresolved conflict goes hand in hand with poor communication. Most people involved in a conflict either communicate poorly with one another or not at all. This chapter deals with the phenomenon of communication.

## **3.1 Communication**

Conflicts are closely tied to communication. This connection can be identified on three different levels:

1. The source of conflicts can often be traced back to communication
2. Communication is often a reflection of a conflict
3. Communication is the ideal instrument for conflict management (Source: Hocker & Wilmot, 1995).

The fact that conflicts can occur through miscommunication demands further consideration of the concept of communication. We apply the following definition:

'Communication is the mutual exchange of thoughts, ideas and information between people (either by means of direct or indirect contact).'

## **3.2 Communication patterns**

The source of conflicts can often be found in communication. In short, communication works along the following lines:

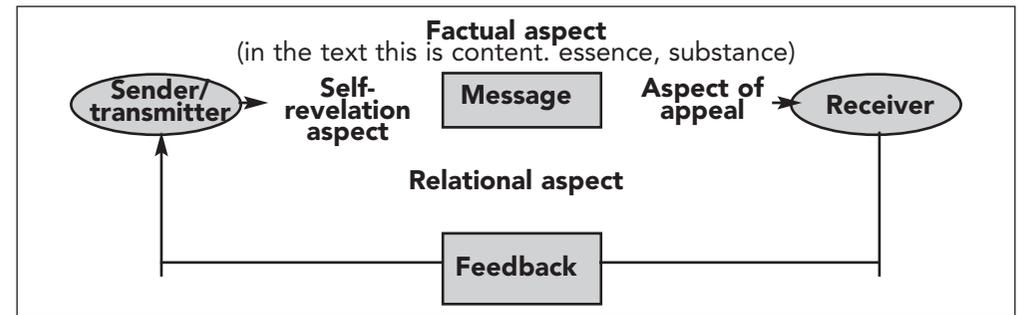
Someone (the sender) transmits a message to another person (receiver). The message is transmitted via a certain channel. This can be orally, in writing, non-verbally or through another means. The receiver decodes the message and adds his own interpretation to

the original. Subsequently, the receiver reacts to the transmitter and the roles are switched. The original receiver is now the transmitter, he gives feedback to the original transmitter, who is now the receiver. This cycle can be endlessly repeated - and each time the receiver adds his own interpretations to the transmitter's message. And these interpretations are incorporated into the message.

The above illustration shows that miscommunication can result whenever a receiver's interpretations differ from the transmitter's intended message.

These interpretations are affected by the following factors:

1. The relationship between transmitter (sender) and receiver. A warm or friendly relationship leads to a positive interpretation of the message. A strained or hostile relationship, on the other hand, leads to a negative interpretation of the message.
2. The environment in which the message takes place. The chance is greater that a message will be interpreted erroneously in a disruptive environment or one in which the receiver feels uncomfortable than in a calm setting where the receiver feels at ease.
3. The way in which the message is sent out. Spoken words can be immediately assessed in relation to non-verbal reactions during face-to-face contact.
4. A person's attitudes. An individual who is confident about his own being has less of a tendency to sense rejection in someone else's message than an individual who has a poor self-image.
5. The moment the message is received. Ample time, calm and a focused state of mind aid understanding a message as intended by the sender. An absence of focus can contribute to distortion of the sender's intention.



**Figure 5 Diagram communication**

(Source: Schulz von Thun, 2005)

As a conflict builds, the original message transmitted by the sender loses more and more significance, while the receiver's interpretations, feelings and convictions connected to that message, take over. In mediation discovering the facts is usually of minor importance in contrast to the pursuit of the underlying meaning.

### 3.3 Verbal and nonverbal communication

Communication can be categorized in verbal and nonverbal communication. It is generally accepted that the communication message is determined for 70 - 80% by nonverbal communication. Nonverbal communication includes body language and tone of voice. Tone of voice refers to intonation, tempo, pitch, quality, volume, etc.

Verbal communication is about words. Verbal and nonverbal communication is usually mutually supportive. If this happens not to be the case, then nonverbal communication carries more weight. Let us look at the possible response to the question, "How are you?" Imagine the answer is "Fine." while the expression on the respondent's face is grim and accompanied by a deep sigh.

In mediation, it is advisable that the mediator verbalizes his observation of the nonverbal communication.

### 3.4 The four aspects of communication

Each and every message of communication consists of four aspects (Shultz von Thun, 2005): content, self-revelation, the relation between the actors and appeal. These aspects color the message. These are briefly described below.

### **3.4.1 Content aspect**

The content aspect refers to the matter at hand. It is essential in mediation that the content is as unambiguous as possible. Terms like quick, a lot and fast call for clarification. There is, after all, the risk that these concepts will be construed by the different parties in their own way and therefore differently understood.

### **3.4.2 Self-revelation (expressive) aspect**

People reveal facets of themselves through expression. An individual may be angry, frightened, cheerful, and so on. State of mind is thus visible through nonverbal communication: facial expression, tone of voice, posture and manner of speaking. Mentioning nonverbal signals also shows recognition of nonverbal communication.

It is, though, important to check to see if what has been mentioned, in fact, applies. This can be done in the following way: 'I see that you are looking away. I believe that you're feeling ill at ease. Am I correct?'

### **3.4.3 Relation between the actors (parties)**

Both verbal and nonverbal communication can expose how parties feel about one another.

Word choice can be friendly or unfriendly; tone can be mild or hard.

Just the way in which people look at each other speaks volumes.

The relationship aspect of communication between parties is fundamental in mediation; it often lies at the core of the disagreement.

In most cases, it is even the essence of the problem itself. Spouses in the process of separating may fight about division of property, while the real problem is that one of the partners feels humiliated because the other has been unfaithful. If parties are able to communicate with one other about this relational aspect and to normalize the relationship, a resolution of the conflict usually follows, as a matter of course.

### **3.4.4 Appeal**

The appeal aspect of communication makes clear to a party what he want from the other. 'I want you to stop doing this'; 'I want you to apologize' or 'I want you to listen to me,' are clear messages with an appeal aspect. The mediator takes constructive action by unraveling these messages or standpoints and illuminates their source. Sometimes the appeal made to the other is not so obvious, or even hidden. A deep sigh, says something, but it is not automatically clear what the sighing person wants and leaves too

much room for interpretation. The mediator can ask then for clarification, for example, 'What does your sigh signify?'

### **3.4.5 The interrelationship of the four aspects**

When people are involved in a conflict, the image of each other tends to be negative; the chance is very real that this image grows increasingly negative as the dispute progresses. (Also see: stages of escalation p. 13)

Communication between parties progresses in a parallel process. The four aspects of communication affect each other and can have a reinforcing effect. During mutual communication parties focus on the content aspect (the matter at hand). This is due to the fact that this (content) is experienced as the safest terrain. This content aspect can not, however, be regarded as separate form the other aspects of communication.

The self-revelation aspect of communication discloses a part of the individual, who is doing the communicating. In the case of conflict, parties are usually unwilling to show their vulnerability. Emotions such as grief, pain, and desperation are suppressed, while anger, indifference and bitterness get free reign in circumstances of conflict. This expressive element of communication, however, influences the manner in which the content aspect of communication takes place. If one party injects the content with reproach, the other party may very well hear a different content; he will only hear the anger and accusations and consequently react to these. The first party, accordingly, concludes that the other party is not listening to what he is saying.

The relational aspect of communication, which is the key aspect during a conflict, is often forgotten by the parties involved; they do not recognize the fact that there actually is an existing relationship with one another. While it is, in fact, the poorly functioning relationship, that is affecting the conflict's essence and thus making it impossible to discuss it constructively.

The aspect of appeal is about what one person wishes from another. If a relationship is strained, a wish can be turned into a demand: 'I wish we could communicate better.' thus becomes, 'Listen to me.' If a relationship is damaged, the chance that the appeal is heard and granted is very small. This, in turn, is carried over (or translated) when the conflict's essence is addressed.

### **3.5 Communication as reflection of the conflict**

Through their manner of communication, parties who are in conflict with each other reveal much about the conflict: in other words, the

way in which their communication works, rather than the actual content of the dispute. This is expressed in both body language and in verbal communication. Gestures, for instance, make clear if contact is experienced as pleasant or unpleasant. Screaming and harsh language also indicate conflict. Expressions of disregard, such as, silence or turning away from the other, also point to a conflict between parties.

### 3.5.1 Emotions

Emotions have a tremendous impact on a conflict. A person who is caught up in emotion has difficulty listening and fills-in, for himself, the intention of what is being said: 'He's never said a kind word about me, so he's certainly not doing so now.'

It is up to the mediator to identify, explicitly mention and channel the emotions, which are present. When emotions are identified and plainly named this leads to a feeling of affirmation by the emotional party. On the other hand, it could be that the emotion attributed to the individual is not recognized by that person. It is, therefore, vital for the mediator to double check, to be certain that the emotions he perceives actually play a role: 'It is my impression that you are distressed, is that right?'

### 3.5.2 Fight patterns

The extent to which a conflict has escalated can be heard in the communication. The tone of voice, the choice of words and body language provide valuable information about the parties' internal relationship.

In addition, the communication between the parties also shows something about their relationship. (Source: MacGillavry, Brenninkmeijer et al. 2005) The following are three distinct concepts in this context:

1. Demand and withdraw behavior
2. Symmetrical escalation
3. Accentuation

It is MacGillavry's position that demand and withdraw behavior especially occurs in conflicts within (primarily) task-directed relationships.

A task-directed relationship is one where the established division of jobs, tasks, duties and responsibilities are the principal aspect of the relationship. The conflict that arises is about these tasks; both parties demand that the other conform to the agreements. At the same time both feel that the other party is not entitled to claim anything. One person becomes demanding and the other

withdraws. The more the one withdraws the more demanding the other becomes.

Symmetrical escalation (escalation equally mounting on both sides) is most common in relationships based on autonomy.

This type of relationship is characterized by a weak connection between the two parties, due to mutual independence. Parties have almost no need to consult with each other because they function independently and separately. Autonomy, lack of communication and mutual responsibility can lead to rapid escalation in the case of a dispute.

Parties in a relationship based on mutual consultation tend to discuss just about everything. Fight patterns during conflicts in such a relationship can also be characterized by consultation, but then in an atmosphere of dispute. Accentuation is the stumbling block for the individuals involved.

Accentuation can be defined as follows: a struggle in which the debate is based on totally opposing views of cause and effect and where parties are intent on persuading one another. And persuasion almost always fails. Consequently, this leads to more words, more examples and conviction, all with the same outcome: the other still accentuates his or her standpoint.

### 3.6. The communication wall

Communication is a process where all those involved should be checking continuously if everyone is on the same wavelength, so that misunderstandings are avoided. The following questions ought to be included in mediation: 'Do all understand each other'; 'Is everyone interpreting what is said in the same way'; and 'Are all operating from the same framework of reference?' In everyday communication this is not always the case. The assumption, more often than not, is that by simply expressing an intention leads to the other exercising the action, which is concealed within the intention.

The following example is an illustration: A husband and wife mention to each other that the living room windows need washing. The woman then tells her husband that she has a back ache. What she really means is, 'I don't feel up to doing the job, will you take care of it?' When she comes home that evening she reacts disappointedly because her husband has not washed the windows. This was, after all, the (her) plan. The communication wall (see: figure 6) illustrates that mutual checking prevents parties from getting into a conflict.

<b>Intended</b>	#	<b>Said</b>
<b>Said</b>	#	<b>Heard</b>
<b>Heard</b>	#	<b>Understood</b>
<b>Understood</b>	#	<b>Agreed</b>
<b>Agreed</b>	#	<b>Done</b>

**Figure 6 The communication wall**

(Source: Unknown)

### 3.7 Communication as instrument for channeling conflicts

If a conflict is not resolved on its own accord (for example, through the passing of time) and still is in need of resolution, 'talking it over' is crucial.

The deadlocked communication needs reviving. And focusing on the relational aspect is an outstanding method for getting communication going again. The way in which parties communicate is so much more important than the topics discussed. During mediation the mediator functions in the role of process manager. This means that he focuses on the process and to a far lesser extent, the content of the conflict.

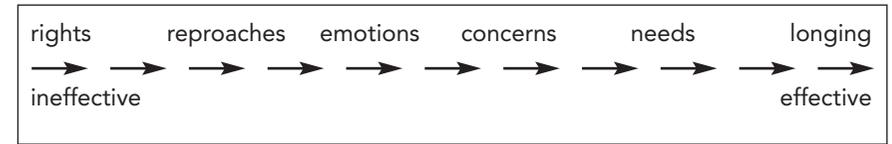
Effective communication focuses on the essence of the question. This essence is formed by the parties' interests. In the majority of conflicts, parties discuss the positions they have taken instead of their underlying interests. It is even feasible that parties are not aware of their own interests. Parties might also be afraid of making their interests known, simply because interests are oftentimes associated with vulnerability. It is up to the mediator- via the technique called peeling the onion (also see: 4.6) – to make these interests the central topic of discussion.

Effective communication and aiming to resolve the conflict are interconnected.

Communication aimed at resolution is future-directed. Parties frequently find themselves stuck in the past, at the conflict's source. It is the task of the mediator to have the parties look forward. This means that the rights claimed by parties are changed into reproach; consequently, reproach evolves into emotion and emotions translate into concerns. Concerns, in turn, are converted into needs and needs lead to longing.

Longing represents the future and transformation, where there is so much more perspective to be discovered than in the notion of someone's 'rights,' which are linked to the past.

The effectivity bar below (figure 7) illustrates how the mediator takes useless and ineffective information and transforms it into useful and effective information



**Figure 7 Effectivity bar**

(Source: Center for Conflict Management 1977)

## 4. MEDIATION SKILLS AND TECHNIQUES

### Introduction

The following skills and techniques will be discussed here:

- Listening
- Questioning
- Reformulating; re-labeling; reframing; neutralizing; normalizing and focusing on mutuality
- Mirroring or reflecting
- Summarizing and paraphrasing
- Peeling the onion
- Metacommunication
- Look-ahead techniques

### 4.1 Listening

Active listening implies that the other is invited to tell his story. That is, it is listened to openly and impartially, devoid of prejudice. Active listening calls for an ear for the verbal aspects of communication and an eye for the nonverbal aspects. Emotions, meanings and intentions are, in a matter of speaking, read. The conditions for active listening are caring, interest and curiosity. Information is thus gathered; at the same time adequate attention is given to creating an agreeable atmosphere.

### 4.2 Questioning (also see: 5. Examples of questions)

Questioning is an essential instrument for the mediator. Questions are an affirmation for the person being questioned that he matters. In addition, they make clear that mediation is about the parties and not about the mediator. A good question can be very constructive. That is to say, it creates clarity regarding the dispute. A question can stimulate consideration about and reflection on one's own actions and those of the other.

There are various types of questions. There is also a distinction made between open and closed questions: these are respectively,

questions aimed at gathering information and questions for the purpose of transforming a stalemated process.

#### **4.2.1 Open and closed questions**

Open questions are inviting and provide the other party with the freedom to share that which he or she wants to with the questioner. Closed questions, on the other hand, summon either confirmation or denial. They offer little additional information and usually serve to check concrete matters.

#### **4.2.2 Questioning aimed at attaining information**

Linear questioning contains factual questions that start with how, who, what, where and when

Precision questioning contains questions intended to receive additional explanation, information or clarification, for example, 'What do you mean by the near future?'

Argumentative Questioning include those questions which probe into the origin of parties' standpoints or positions

#### **4.2.3 Questions aimed at breaking the deadlock**

Stimulating questions are those that ask parties to view the conflict from a different perspective. Consequently they stimulate creativity: 'How does the neighborhood policeman, who you both admire, because of his fair attitude, see this situation?'

Hypothetical questions are just as valuable for promoting creativity. Hypothetical questions ask that imagination is used to picture a non-existent situation: 'Imagine that you had enough money to support yourself. What are the issues that you would want to discuss with your ex-husband?'

Reflective questions lead to parties taking pause to consider their own attitudes and behavior in relation to the dispute: 'What makes this ring so important to both of you that you are prepared to risk a relationship that was good - up until this point?'

Suggestive questions allow the mediator to have his own opinion resonate. Using these questions is motivated by the idea that it helps the process to move forward: 'Is putting an end to your relationship really the only option you have left?'

Strategic questions are a repetition of questions for which an answer has already been given. These are asked for strategic reasons: 'If I hear you correctly, your primary goal is to reach a working cooperation?'

Confrontational questions are questions that pinpoint the opposing positions in a direct way: 'You both indicate wanting to get divorced as fast as possible, but neither of you have been able to make an

appointment for the next month and a half...what am I supposed to think?'

Confrontational questions demand good timing and a painstaking formulation, to avoid that the person they are directed to experiences being attacked.

Relational questions shed light on the relationship: 'How have you been dealing with the problems you've been confronting these last few years?' and 'Can you think of any ways that there has been cooperation between you?'

Circular questions are questions which focus on reciprocity. Both parties play a part in the dispute and will need to contribute to a solution: 'What do you require from the other person in order to put this behind you?' and 'What can you offer the other person so that he or she can do the same?'

#### **4.3 Reformulating, re-labeling or reframing**

The meaning behind the message is expressed by reformulating, re-labeling or reframing, in such a manner that the other party can listen without his or her emotions getting the overhand. The following are various forms of reformulating: neutralizing; normalizing; positive reformulating; and focusing on mutuality.

1. Neutralization: a negative expression is restated in neutral terms: 'He is a money grubber' becomes 'Is money an important issue to discuss?'
2. Normalization: (highly emotional) common human reactions to certain circumstances and experiences are responded to as if they were 'normal' or 'just human.' 'He is a money grubber' becomes 'It is not unusual for people to consider money to be important. It makes life easier.'
3. Positive reformulating: The accusation directed to the other, 'He is a money grubber' is transformed to the underlying wish of the person making the accusation: 'You have a need for immaterial things.'
4. Focusing on mutuality: That which is mutual is sought out: 'He is a money grubber' becomes 'It is to you both of your interests that you have enough financial means to get along'

#### **4.4 Mirroring or reflecting**

Mirroring and reflecting is the repetition of words already spoken. This can be a key word, for example, 'Ignored, you said?' It can also refer to part of a sentence, in order to address underlying feelings:

'This is painful for you, is that right?' It can also make reference to nonverbal signs that have been observed: 'You turn away and stare out the window whenever she mentions the pain of your child's death.'

By reflecting and mirroring the mediator grants 'voice' to the speaker, to allow the speaker to hear once again what he or she has said - or see what has been shown to the other. This provides the speaker with another chance to explain once more, emphasize - or even soften - what has already been said. This, in turn, gives the speaker (as well as the other party) more self-insight. Consequently, the speaker is empowered: allowance is made for his or her influence and autonomous contribution.

#### 4.5 Paraphrasing and summarizing

By paraphrasing, the mediator gives a clear and concise account of what has been said. The mediator makes use of his own words (as opposed to mirroring). At the same time, whatever might serve the process is selected. If parties, for instance, are furious because the other refuses to change a point of view, the mediator could apply paraphrasing in the following way: 'If I'm not mistaken, you both want to resolve this matter as quickly as possible.' By paraphrasing, the mediator does not limit the discussion to the content of what is being said. Emotions can also be paraphrased. 'You felt abandoned and you could have used some support, is that right?' The mediator also paraphrases on the process level: 'It's my impression that you are taking one step forward and two steps back.'

Summarizing is usually used synonymously with paraphrasing. Theoretically, summarizing spans a longer period of time than paraphrasing. A summary structures the dialogue. The topics to be discussed are explicitly named and, subsequently, plans for dealing with the issues are explored, in other words, 'What's the best way to go on?'

#### 4.6 Peeling the onion

Parties in conflict usually take a position that - to the outside world - is displayed as a point of dispute. Positions are expressed as demands: 'I demand weekly visitation of my child.' Interests are the motivation behind actions. This means that behind every standpoint, lays an interest. Peeling the onion is a technique for the mediator to get the heart of the matter and - in doing so - at the parties' interests. As its name indicates, this can be likened to peeling an

onion - layer for layer. (See: figure 8 below)

In response to the example mentioned above, 'I demand weekly visitation of my child,' the mediator could ask the following question: 'Can you tell me more about your thoughts on this?'

Answer: A child needs two parents for its upbringing and his parents are taking over.

Question: Imagine that you would only be able to see your child once month. How would that make you feel?

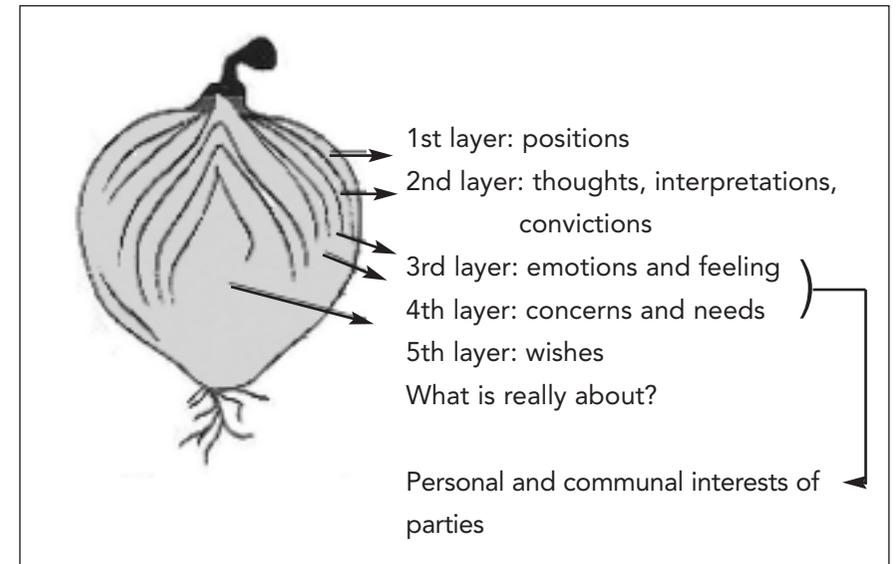
Answer: Terrible.

Question: Imagine that you were only allowed to see your child once a month. What would be your greatest concern?

Answer: That my child would become estranged from me.

Question: Is it correct that you want to build-on a relationship with your child for the future?

Answer: Yes, that's my point.



**Figure 8 Peeling the Onion: from standpoints to interests**

(Source: Fisher & Ury 2005)

#### 4.7 Metacommunication

Metacommunication is the discussion of the communication itself. The conflict occurring between parties is revealed through

communication. With the help of metacommunication, the mediator points out how the parties are communicating: 'It's my impression that the more you (one of the parties) argue your position, the more you (the other party), seem to withdraw. Do either of you recognize this pattern?'

By using this technique, both parties gain insight into the way in which they communicate with one another. Oftentimes, they realize that their manner of communicating is futile and ineffective. This, in turn, can help them find an opening for a new means of communication: 'What does it take to feel comfortable with the situation and what does it take to focus on what's happening, here and now?'

#### **4.8 Futurize or Looking-ahead**

Conflicts are firmly linked to the past; during mediation, parties must explain the history of these conflicts. It is the mediator's task to provide the opportunity for the account of the past to be told and at the right moment so that a transition can be made to look towards the future. The future is represented in questions, such as, 'Where do we go from here? How are you each of you going to resolve the problem? How are you going to relate to each other from now on? Looking to the future helps to clarify what has to happen at the moment in order to realize future goals. In other words, the mediator shifts from the past towards (the wishes concerning) the future. This allows for the present to receive the required attention. At the same time, the mediator considers how to progress with mediation aimed at achieving an acceptable future outcome.

## **5. EXAMPLES OF QUESTIONS**

### **Introduction**

In chapter 4 we discussed the skills and techniques applied by the mediator in mediation.

The concrete application of these skills and techniques is provided with example questions in chapter 5.

### **5.1 Opening stage**

From the parties' perspective, the aim of the intake is to be certain that their impression of the mediator and mediation process is positive; they have to feel confident that they are in good hands. From the mediator's perspective, the aim is to lay the foundation for an agreement and to create trust in his or her person as well as to settle the formalities.

- How has the choice for mediation been reached?
- Is mediation the choice of you both to reach a solution?
- What do you need to know about mediation or what conditions need to be met before you can definitely decide to mediate?

### **5.2 Quick scan and investigation stage**

Parties feel that the mediator is listening, both regarding their emotions and the content of their stories. A de-escalation of the conflict takes place and the tension is eased considerably. Superfluous information is interpreted so that it becomes valuable information. The focus of the parties shifts from the past to the future.

The following questions encourage progression in this stage:

- What is it that keeps you divided?
- How do your opinions differ?
- What was the 'last straw' for you?
- Why haven't you been able to settle this on your own?

- What do you expect from each other?
- What, in the past, have you been able to settle on your own?
- What is the central issue as you see it?
- Can you describe the core of the problem in one minute?
- Why do you think that you can reach a solution at this point in time?

#### **5.2.1 Fact gathering and gaining knowledge through linear questioning**

- What has taken place?
- Who did what?
- Where did this take place?
- How did it happen?
- How much (was involved)?
- How often did (it happen)?
- What happened then?
- What does it matter that...?
- Why is it that you don't ...?
- What else is involved?
- Can you elaborate on that?
- Is this something you'd like to go into further?
- You were about to say...?
- When did the problems start?

The following questions are to further approach the core of the conflict

- How would you explain to an imaginary third person what this is really all about?
- What really happened?
- What do you really want?
- What are you suggesting?
- Why you are so convinced that...?
- Can you tell me what brought you to your standpoint?
- What are your motives?
- What is this really all about?

#### **5.2.2 Relational questions: to gain information about the internal relationship**

- How was your relationship in the past?
- How do you want your relationship to be in the future?
- What have you come to agree on/disagree about?
- What is that keeps you divided?

- What is the difference between how you see the problem and how the other sees it?
- What are the differences in your view points?
- What are the differences in your opinions?
- What is it about for both of you?
- Can you still care about each other?
- What do you want from each other?
- What can you offer one another?

#### **5.2.3 Hypothetical questions: asked to stimulate the thinking process**

- Imagine that...
- What if...?

#### **5.2.4 Reflective questions: aimed at increasing clients' awareness**

- How do you view yourself in the current situation?
- Imagine that you could ...together, what changes would first be required?
- Imagine that all conditions are met, would you then want a monthly consultation about...?
- Imagine that you were presenting your case to a judge, what would be your specific demands?

#### **5.2.5 Strategic questions are questions that have already been answered but are repeated for strategic reasons. They are also used for reasons of verification**

- How long did you say, you lived next door to each other in harmony?
- Is it true that what you're saying is that ...?
- How long do you think it would take if you would take this to court?
- Have you considered the alternative if you're not able to work this out?
- What is your main goal: to win the dispute or to get along with your neighbors/colleagues?

#### **5.2.6 Questions by mounting emotions and recognition of emotions**

- You're still angry, is that correct?
- You are feeling very hurt, is that correct?
- I see that you're feeling..., is that correct? (add what's appropriate)
- What are you afraid of?

- How would that make you feel?
- What would you like him to do for you?
- What do you need?
- Can you formulate that as a question?
- Will you ask that of him?
- Did you know that...?
- What does that mean to you?
- Can you understand that of him?
- Have you ever told him that?
- Can you put your self in the other one's place?

#### **5.2.7 Question to ask in case of an impasse**

- Can you explain why you have come here?
- Do you want to continue (together)?
- What happens if you can't work this out?
- Where do we go from here?

#### **5.2.8 Questions about the past**

- Can you explain why you're here?
- How has it been until now?
- How did you used to get along together?
- How did you used to resolve problems?
- How do you normally communicate together?
- How do you usually discuss this kind of issue?

#### **5.2.9 Questions about the future**

- Your goal is to have this resolved, is that right?
- How do imagine the future?
- How do you see your future relationship?
- How will you go on from here?
- How important is it to get along with each other?
- What kind of communication do we want from now on?

#### **5.2.10 Comments and questions for structuring the discussion**

- It's up to you tell me.
- I'll ask you not to interrupt when the other is speaking.
- I'll break in here for just a moment; I'd like to move a bit faster to the heart of the matter.
- You can add your comments to his story later.
- I'll get back to you in a moment so you can add your observations observations to his story.
- We'll add that to the agenda.
- Let's let this rest for a moment until the picture has been completed.

- That's an option; we'll get back to it later on.
- What do you think you'll achieve with this?
- Please stop and think about what you're doing.
- Let's take a break
- Would you like something to drink?
- Is that true?
- Do I understand what you're saying?
- Just to be sure...
- What I'm hearing is that...
- Is that an answer to your question?
- Would you like to consult with each other?
- What are going to work on now?
- If you have the feeling that this isn't working, please let me know.
- Can you please explain?
- What do you mean?
- Please help me to better understand.
- I'm lost, help me out here please.

#### **5.2.11 Goal-oriented questions**

- What actions can you undertake?
- What needs to happen?
- What must change?
- What has to be done to resolve this?
- What has to be done to put this behind you?

### **5.3 Questions for the categorization stage or turning point**

This stage starts the moment that the mediator writes the report about the interests that have been expressed; it ends the moment the parties come up with options to be discussed during the following stage, the negotiation stage.

- Are you prepared to forget your hurt feelings for a moment and put your emotions aside in order to get down to business?
- Are you both prepared to see each other as a negotiating partner?
- Are you both prepared to look for opportunities while considering the ideas of each other?
- To summarize ...is in both your interest. Is this correct?
- Are your interests clear?
- Are you both prepared to look for options with consideration of each other's interests?

### **5.3.1 Questions that are intended to peel the onion in order to reveal both parties' interests**

- Imagine that you get what you aim for: how will that benefit you and what will this resolve for you?
- Imagine that you don't get what you aim for: what will this mean for you and what are the consequences?
- What is it specifically that concerns you?
- What is it you want?
- Can you be more precise?
- Is this the only problem?
- What is this essentially about?

### **5.4 The negotiation stage**

The tasks of the mediator are handed over more and more to the parties themselves in the negotiation stage.

Circular questioning can be used in this stage. These are questions that focus on the relational level and are by definition asked to both parties. There is always a link to the other party within these questions to ensure that both parties are aware of the other.

- What do you need from the other to feel safe? This question is followed by, 'What can you do for the other party so that he or she feels secure and what do you think that the other thinks that you need?'
- What do you need in order to comply with the wishes and interests of the other?'
- What can you do for the other so that he or she can comply with your wishes or interests?
- What is required by both of you to make you feel that the outcome is just?

### **5.5 Options**

The following questions can be used to generate options:

- Are you prepared to work on ideas and come up with suggestions in order to meet both of your needs?
- Is it possible to let the ideas flow freely without commenting on ideas already formulated?
- What are the options according to...?
- What other options have you considered?
- What could you do to simplify matters?

- Could you ask the other what his or her ideas are (and in reverse)?
- What is the alternative?
- If you should do so, what are the consequences?
- How do you think that would work?
- If I understand correctly... is an option.

## 6. THE MEDIATOR'S PITFALLS

### Introduction

The only way to avoid pitfalls is to understand them. And there are a few inherent pitfalls, which exist, in the mediation profession. In addition, the mediator must have adequate self-knowledge, in order to be conscious of his own blind spots and weaknesses.

The following pitfalls will be treated:

- Prejudices and preference
- Assumptions
- Timing
- Allergies
- Difficult behavior

### 6.1 Prejudices and preferences

Neutrality is of primary importance for a mediator. At the same time, every human being has individual prejudices and preferences. Awareness of our own prejudices and preferences helps to keep them under control and to neutralize them. This knowledge enables the mediator to fulfill the role of multipartial intermediary.

The following is a prejudice that could arise at the start of mediation:

The parties, a woman employer and an employee enter the room. The employer is well-cared for and attractively dressed. The employee is wearing T-shirt, an earring and a motorcycle helmet; his arm is covered with tattoos. The mediator makes a mental note of the employee's appearance and instantly thinks: 'He's sure not my type: looks like a Hell's Angel.'

The mediator unconsciously decides to proceed with caution during mediation.

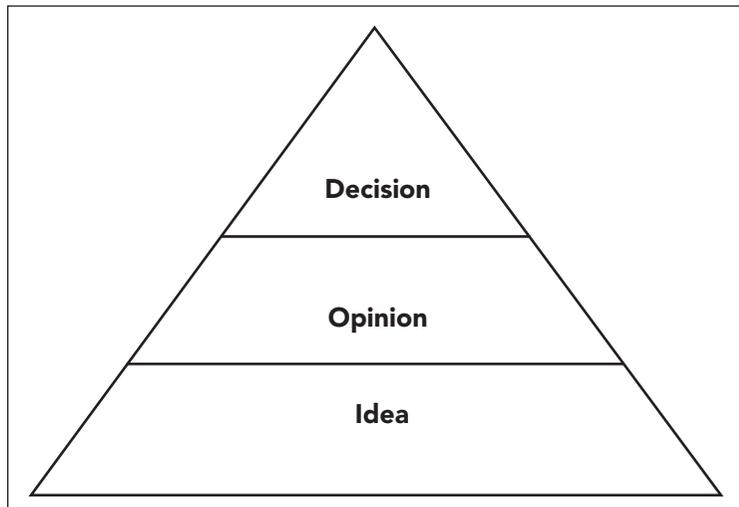
With this first impression the mediator creates an image of the employee in his own mind. This can work counter to the employee's

interests for the remainder of mediation, if the mediator does not become aware of the held prejudice. In other words, Hell's Angel = unsavory character, is an attitude fatal to an impartial attitude on the part of the mediator.

Prejudice can also occur during the mediation process:

A man leans towards the other party for the fifth time, leaving little space between them. In addition, he pounds with his fist on the table, while loudly raising his voice in an effort to make her understand how right he is. In the meantime, the mediator has been carefully registering this behavior. The mediator decides that this behavior is aggravating and labels it (in his own mind) as demanding. The mediator realizes that he has to act on his judgment. He explicitly mentions the man's behavior and asks him what the effect is that he is looking to reach with this behavior. He then asks the woman if the effect that the man is aiming for is working.

Figure 9 illustrates the model, Idea Opinion Decision. An idea is almost always followed by a judgment. This consequently becomes a decision.



**Figure 9 Idea / Opinion / Decision**  
(Source: Unknown)

## 6.2 Assumptions

Subjective interpretation of someone else's words is as common as it is human.

References to generalizations or principles by one person particularly tend to lead to assumptions on the part of the other. Consider the following example:

Two neighbors (not next-door neighbors) are disputing about a property fence. The other neighbors are not involved. One of the parties wants an open garden and has no fence. The other party feels this is unacceptable: there is a pond in the garden in question and the other neighbor insists that a fence is necessary to avoid the risk of small children drowning.

A mediator, mediating in a case as described above, who also assumes that the pond poses a real danger, will not continue questioning the one worried about the drowning risk, that is, the one in favor of the fence. A relevant question, however, is the reason why this person has chosen to confront the question of the unprotected pond and the other neighbors have not taken a position on the issue.

A mediator, who had taken the opportunity to keep questioning the neighbor (concerned about the danger), would have discovered that she had almost drowned as a child. If this fact would have come to light during mediation, her attitude would have been much more understandable to the party opposed to the fence.

The communication wall, illustrating that parties often lack understanding towards one another, has been pointed out in chapter 3. The mediator must be alert to the risk of not falling into the pattern of assumption and one-sided interpretation. Every mediator should always apply the essential tools of checking and verification. The acronym, ANCE is a helpful memory aid. Assume Nothing Check Everything.

IOD for Idea Opinion Decision is another acronym, which is a helpful memory aid. IOD and ANCE (Assume Nothing Check Everything) are two concepts that always go hand-in-hand with Listening, Summarizing and Continuing to Question.

### 6.3 Timing

Timing is a critical factor in mediation. Timing can be such that the process moves along quickly, though there are other cases which take (too) much time.

#### 6.3.1 Rushing things

'Haste makes waste,' is a saying appropriate to mediation. Mediators and or parties who want to rush through mediation are often headed for disappointment. The purpose of mediation is for parties to find solutions to their problems. The risk of moving too fast is that solutions can be presented before the problems have been adequately addressed. Rushing things results in consenting to solutions before the essential issues are allowed the time they really need. A mediator that has hurried into the resolution stage is usually faced with this reality during negotiations. Parties revert to their old positions because the emotional aspects of the question have not been given the necessary attention. Patience, for a mediator, is a valuable trait and a useful tool.

#### 6.3.2 Moving too slow

In some cases, parties spend too much time - and are too intent - on probing into the pain and emotion of a conflict. The situation deteriorates because parties are caught-up in their feelings of frustration. The theory that attention stimulates growth also applies to conflicts, but then in a negative sense. Parties are too focused on the conflict instead of finding a resolution. The mediator must have the ability to guide the parties, in such a way that they are able to let go of the past and refocus on the future. If this fails to work, the parties can end up in a deadlock.

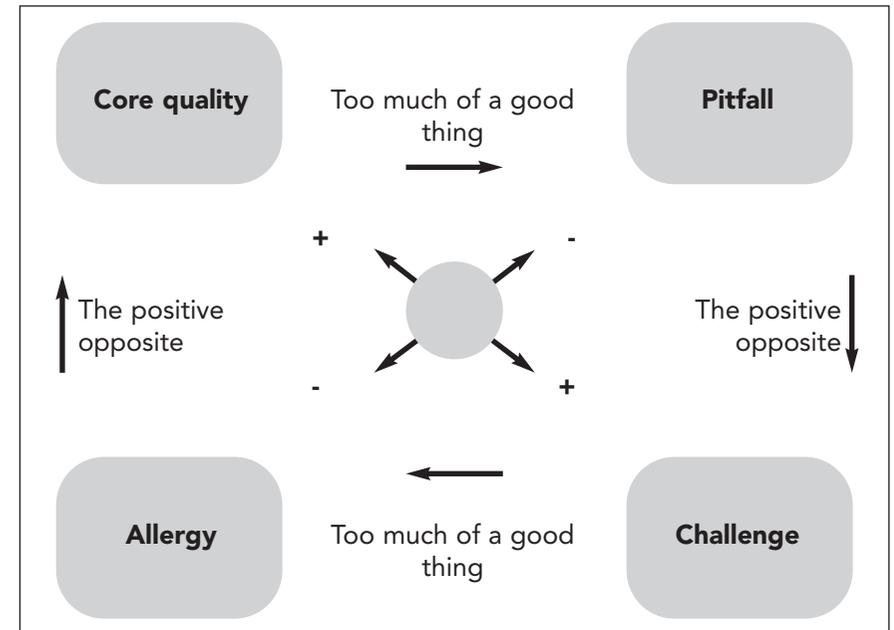
### 6.4 Allergies

Mediators are known for their aversion to people with dominating personalities. The following example illustrates: An extremely bossy individual is at the mediation table. The other party barely gets a chance to say a word. The mediator is having a hard time controlling and concealing his own feelings of aggravation.

A mediator needs to have insight into his 'allergies' and the quadrant methodology – also known as, core quality principles -

developed by Daniel Ofman, can aid understanding of this phenomenon (Figure 10). By applying Ofman's model, an individual can discover his own allergies (as well as pitfalls and challenges). For instance, if a core quality of an individual happens to be patience, then passivity is a pitfall for that person – in other words, an excess of a good thing. The positive opposite of passivity is activity; an allergy consequently stems from an excess of the positive opposite: in this instance, demanding and domineering behavior.

This model can also be used in reverse: if you have an outspoken aversion (allergy) to dominant behavior, then dominant behavior is an excess of a positive quality that you have yourself, that is, a strong-presence. The negative opposite of a strong-presence is a weak-presence and a weak-presence is the pitfall of the core quality, modesty.



**Figure 10 Quadrant methodology from Ofman**  
(Source: Ofman, Daniel, 2006)

Ofman's model can also facilitate reformulating. The model clearly shows that an allergy (in this case dominance) is an excess of a positive trait, (strong-presence). This is a trait, which can

compliment the trait, modesty. The mediator can point to the behavior (triggering the allergy) via a positive reformulation. This is possible when the mediator recognizes his or own allergy and understands that the behavior in question can be traced to a different positive behavior.

Looking at the example above, this could be done in the following manner:

Making your position and views clear is a good thing. And you have a real talent for doing this. At the same time, it's important that the other party is able to have room for expression. And up until now, this has not been the case. Maybe you can help each other out to make this work.

### 6.5 Difficult behavior

If a person is withdrawn; very upset; aggressive; repetitive; bullying; or disruptive, this person is demonstrating difficult behavior and can be dealt with best as follows: explicitly mentioning it, asking that it be recognized and finally making it a point of discussion. The question, if other behavior is preferable or feasible during the mediation sessions, could then be addressed.

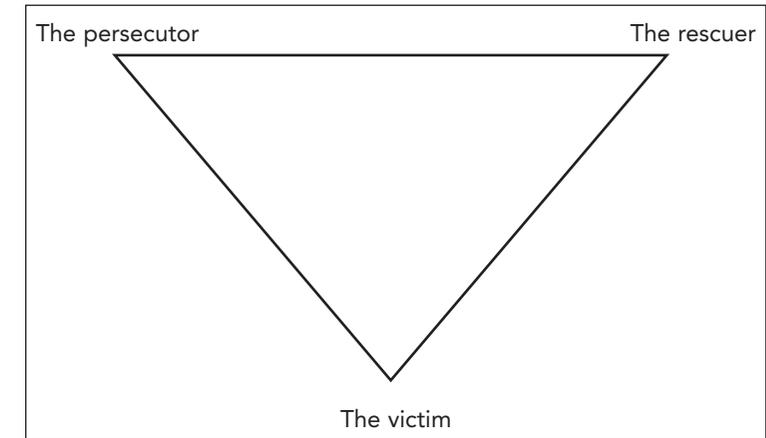
Victimization behavior is treated here separately because it involves an extra risk: the mediator can be drawn into the pattern that is created by parties playing the roles of persecutor and victim.

#### 6.5.1 Victimization behavior

It is not unusual to observe two singular roles in a conflict: one person appears to play the part of the aggressor while the other is the victim. When this type of relationship exists between parties, it creates a potential danger for the mediator. This is due to the fact that the mediator can become an element of the pattern. Victims have the tendency to appeal strongly to the psyche of others and to trigger certain reactions. These are usually either feelings of aggression towards or the urge to rescue the victim.

An accusatory mediator might say, 'Can't you understand that every time you repeat that you don't know what you want, can't do anything, or are afraid to act, this makes the other party angry?' On the other hand, a mediator, who pities the victim, needs to be alert not to take responsibility for or to try to speak in that person's place. A mediator in the role of rescuer might say to the (other) party, 'Can you imagine how he feels if he never gets the chance to say anything?'

The drama triangle, based on transactional analysis, is a pointed illustration of the interaction that the mediator and parties can get caught up in.



**Figure 11 The drama triangle**

(Source: Berne, Eric, 1996)

If a mediator should happen to become part of the drama triangle, an obvious and rapid shifting of the following roles can come into play: the rescuer, persecutor and victim. Thus, if the mediator acts in a way that doesn't meet (the 'victim's') expectations, the victim is transformed into the persecutor. The mediator then becomes the bad guy in the eyes of the former victim and the role of the mediator shifts to that of victim. The original persecutor then becomes the rescuer, which is expressed by defence of the mediator, with words like, 'That's not what the mediator meant to say.' And this pattern goes on and on, ad infinitum. This should leave no doubt that a mediator, who is caught up in a drama triangle, can not do the job as required. When the situation calls for it, mediators are advised to point out the persecutor-victim pattern and inform if parties recognize this pattern.

## 7. THE NETHERLANDS MEDIATION INSTITUTE (NMI)

The NMI serves as the independent umbrella organization for mediation practitioners and organizations in the Netherlands. Through its activities the NMI aims to structurally position the field and function of mediation within the social structure of the Netherlands. The NMI thus serves, first and foremost, within an autonomous quality framework for Mediation in the Netherlands.

The aims of the NMI are as follows:

- stimulating the application of mediation in the Netherlands
- the promotion and guarantee of the quality of mediation and mediators
- providing independent information about mediation
- quantifying and researching in the field of mediation
- providing a structure for consultation in the field of mediation

The NMI carries out these aims as follows:

- providing for a concrete system of quality
- providing accreditation and registration of mediators (NMI Mediator Register)
- maintaining contact with institutes, businesses and governmental institutions
- developing and distributing documentation and information material
- selecting mediators from the NMI Register, on request
- stimulating adequate educational opportunities for mediators

For further information see: [www.nmi-mediation.nl](http://www.nmi-mediation.nl)

# APPENDIX 1

## SAMPLE MEDIAITON AGREEMENT

(This is a sample agreement designed for two parties. If more than two parties should be involved in the mediation, the opening words in points 6.1 and 8.3 and the contract's closing words serve to be adapted to the actual situation.)

The Undersigned

....., Mediator, .....

And Parties

A: .....

.....

Hereby represented by:

.....

B: .....

Hereby represented by:

.....

Hereby Agree that:

### Article 1

1.1 Parties and the mediator jointly agree to make every effort to resolve the dispute, as stated in article 2, between Parties through mediation in accordance with the regulations of the Dutch Mediation Institute (hereafter named the Regulations) effective as of the date of this agreement.

1.2 Parties and the Mediator agree to commit to each other in accordance with the terms as stated in the Regulations.

1.3 The acting Mediator is registered with the aforementioned Nederlands Mediation Instituut NMI (Netherlands Mediation Institute)].

## Article 2 Brief Description of the Dispute

.....

## Article 3 Mediation is Voluntary

Mediation takes place on a voluntary basis. It is, however, understood that each of the Parties and the Mediator are free to terminate the Mediation at any given time.

## Article 4 Confidentiality

4.1 To the extent that this agreement, in concurrence with the Regulations Parties, demands confidentiality, it is thus valid as proof of agreement for further legal proceedings.

4.2 The Mediator, ensures, that all those third parties, referred to in article 7 participating by way of the Mediator, or those who are informed of the proceedings by the Mediator, comply with the confidentiality as stated in the Regulations.

## Article 5 Other Obligations Pertaining to Parties

In addition to that which is stated in the Regulations, Parties are mutually committed to each other and to the Mediator to:

- refrain from actions or behavior which can seriously interfere or obstruct the Mediation;
- be willing and prepared to listen to each other's arguments and to aim to find compromises;

## Article 6 Representation

6.1 During the course of the Mediation procedure each of the Parties will be actually present or will be represented in person by another appointed by said Parties.

(If and when applicable)

Party A will be represented by:

.....

Party B will be represented by:

.....

6.2 Each Party guarantees that his or her representative is authorized to conduct officially sanctioned actions, required in the framework of Mediation; it is understood as intended

in point 9.1, that a settlement agreement has been entered into and that the representative will comply with the in the regulations aforementioned confidentiality.  
6.3 At the request of the Mediator a written authorization will be provided, in which the aforementioned authority of the representative is established.

**Article 7 Third Parties**

7.1 The Mediator may make use of secretarial support by a person appointed by the Mediator for that reason.  
7.2 The Mediator may, in the case of obtaining Parties' permission, admit to or involve other parties in the Mediation, henceforth referred to as Support Persons in the context of the Regulations.

**Article 8 Mediation Fees and Costs**

8.1 The Mediator's fee is ..., in words, ...  
8.2 Regardless of the outcome, Parties will be held to payment of the Mediation fee in excess of all costs encountered by the Mediator. Furthermore, this includes all other direct and indirect costs incurred through Mediation, such as, room rent, telephone, fax, postal, traveling costs, fees and costs of involved third parties under article 7; in addition, these will be increased by the lawfully due sales tax.  
8.3 Aforementioned fees and costs under point 8.2 will be shared accordingly: Party A ...% Party B...%  
8.4 Each Party bears his or her own individual costs.

**Article 9 Settlement Agreement, Interim Agreements**

9.1 In the event of resolution of a dispute by mutual agreement resulting from Mediation, it will be recorded in writing in a settlement agreement between Parties.  
9.2 During the course of the Mediation, agreements made between parties are binding insofar as these have been established in writing. Parties may determine in such an agreement that said agreements are not binding in the case of the termination of Mediation and in the absence of a settlement agreement as referred to under the previous point.

**Article 10 Disputes**

10.1 In the case of disputes, resulting from agreements as referred to in article 9 or from thereupon resulting agreements, Parties will attempt to resolve these with the help of Mediation in accordance with the Regulations, such as stated on the start date of that Mediation.  
10.2 Should the resolution of said dispute prove to be unattainable as referred to in point 10.1, this dispute will subsequently be settled through the following means:

(WHEN DRAFTING THE AGREEMENT CHOOSE EITHER A OR B)

(A)  
Arbitrage in accordance with the rules of  
.....  
(Fill-in the name/location of the appropriate arbitration institution), which apply, and as are stated on the date of the request by the most willing Party for arbitration.

(B)  
The legal authority [(judge, court, etc), (fill-in precise location)]  
.....

**Article 11 Applicable by Law**

This agreement only applies to Dutch law.

It is so agreed

Dated and signed this day of .....20... Place..... in ...fold

The Mediator:  
.....

Party A:  
.....

Party B:  
.....

## APPENDIX 2

### Code of Conduct for the NMI-Registered Mediator

Whenever the Regulations appear in this Code of Conduct, the NMI Regulations are referred to.

#### Article 1 General

1.  
The mediator serves to conduct him or herself at all times and in such a manner that is in no way detrimental to the credibility of the NMI.

2.  
The Mediator acts in accordance with the Regulations.

#### Article 2 Autonomy

1.  
A Mediator with any interest in the outcome of the Mediation declines to accept his or her appointment

2.  
The Mediator may not act in a dispute in which he or she has advised any of the Parties beforehand. The aforesaid does not apply in the case that he or she has made this clearly understood and the Parties despite this request that he or she acts as Mediator.

3.  
The Mediator serves to provide transparency to all Parties in regard to any relationship that he or she or one of his/her fellow workers has had with one or more of the Parties.

4.  
The Mediator serves to withdraw if as he or she sees it the Code of Conduct or Regulations are not being or can not be complied with.

5.  
The Mediator will not be influenced by interests outside of the Mediation, when exercising his or her tasks.

6.  
The Mediator serves to adopt an autonomous position. The Mediator may not make any assertion over the dispute or an element of the dispute, unless both Parties jointly and expressly request the Mediator to do so.

#### Article 3 Mediation agreement

The mediator has the obligation, prior to the Mediation, to enter into a Mediation agreement, explain the Mediation process, the content and the Regulations with all Parties.

#### Article 4 Mediator's work method

1.  
The Mediator serves to approach and guide the Mediation with the necessary vigor.

2.  
The Mediator expects of Parties that they provide the information essential to reaching a proper decision.

3.  
The Mediator ensures a fair and balanced treatment of the Dispute and stimulates, as much as possible, each party to have an equally opportunity.

#### Article 5 Confidentiality

1.  
The Mediator does not involve nor provides information about the Mediation to third parties, without permission from the Parties.

2.  
The Mediator serves to impose confidentiality in writing on any third parties that the Mediator involves or informs about the Mediation.

#### Article 6 Mediation Fees

1.

The Mediator serves to make an appointment to meet with Parties regarding his or her fees and to have included in the Mediation agreement.

2.

The Mediator establishes his or her fee exclusively on an hourly basis and irrespective of the outcome of the result of the Mediation.

3.

The Mediator serves to submit a transparent specified expense declaration, in which all tasks that have been performed and which costs been made for which tasks are clear.

The Mediator serves to keep an updated list of performed services and to confer about this list, on request.

4.

The Mediator may make the start of the Mediation and the continuation of his or her services dependent on the condition of certainty by Parties that the Mediator's declaration of expenses is paid.

#### **Article 7 Collegiality**

1.

The mediator that takes over Mediation from another mediator has the obligation to inform his or her predecessor.

2.

In the case of the replacement of a Mediator, the new Mediator will not start with his or her tasks until the declaration of expenses of his or her predecessor and those of the Support Persons, involved up until that point, have been paid in full.

3.

The Mediator can nonetheless commence with his or her tasks when he or she receives permission from the board of NMI.

#### **Article 8 Disciplinary rules**

The Mediator is subjected to the disciplinary rules in accordance with the Regulations of the Foundation for Disciplinary Rules for Mediators, which functions for Mediators.

## **APPENDIX 3**

### **(Sample) CONFIDENTIALITY AGREEMENT**

The following (sample) written confidentiality agreement has been drafted in a correspondence format as a letter of correspondence from the mediator to the individual who is serving in the capacity of support person in the mediation. This has been done for practical reasons.

The incentive behind this procedure is as follows: the mediator ensures that the support person confirms his or her obligation of confidentiality and returns the agreement to the mediator after he or she has signed it.

To: ..... (Addressee)

Concerns: confirmation of the oral agreement of obligation of confidentiality.

..... (Place, date)

Dear .....,

As earlier discussed, I hereby confirm the following: In your capacity as ... (the function of the individual is filled-in here, e.g., as expert) in the mediation between the following parties concerning the following dispute:

Parties: ..... (The information regarding parties is filled-in here, in accordance with the mediation agreement)

Dispute: ..... (A brief description of the dispute is filled-in here, in accordance with the mediation agreement)

Please find enclosed the NMI Mediation Regulations 1995 that pertain to this mediation. I hereby confirm your oral agreement to confidentiality on ... (date) as is intended in the last sentence of article 6 and in article 7 of the regulations. You hereby agree to be bound by this same pledge of confidentiality as the involved parties and I, as mediator. This pledge of confidentiality extends beyond the finalization of this mediation and is of unlimited duration.

Please kindly sign and return the agreement to me.

Your cooperation is greatly appreciated.

Sincerely,

.....

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