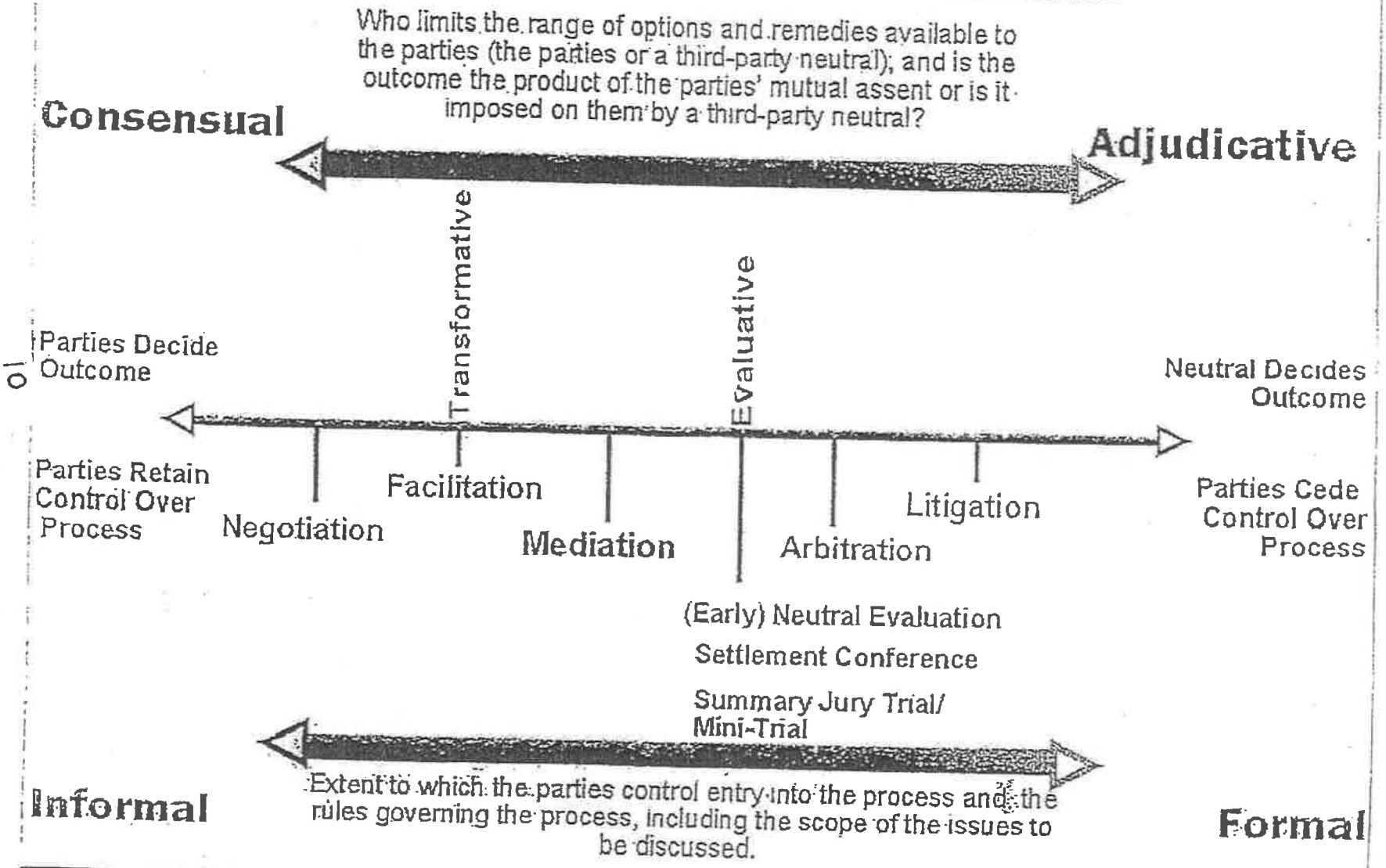
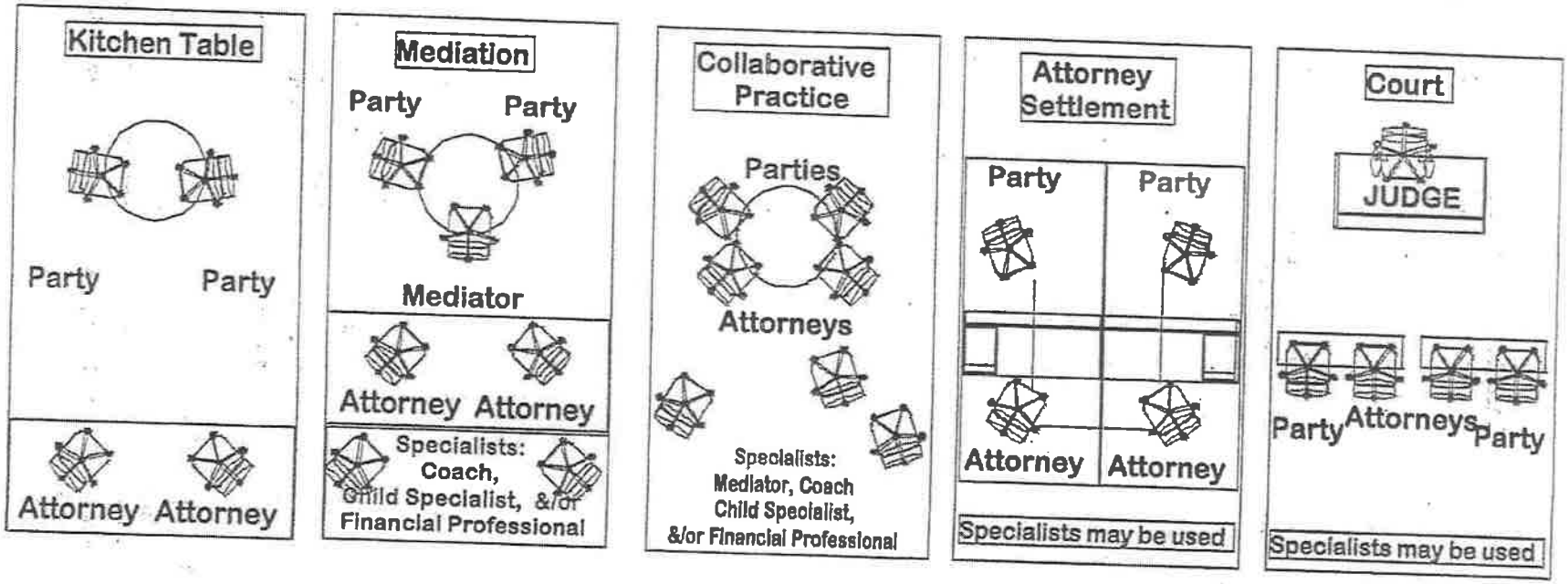
The ADR Continuum



Conflict Resolution Options



17

Collaborative Law Institute MN 2007

Mediation "Prime Directives"

1. **Mediator Neutrality/Impartiality**

2. **Parties' Self-Determination**
   - **Voluntary, uncoerced decision-making**

3. **Informed Decision-making**

4. **Helping to Empower Parties**
   - **Sense of control over their dispute**
   - **Sense that <u>they</u> have the ability to resolve the dispute**
   - **Sense that they can use these skills to resolve future disputes**

5. **Helping to Create Mutual Understanding**

6. **Ethical behavior**
   - **Confidentiality**
   - **Competence**
   - **Conflicts of Interest**
   - **Quality of the Process**

7. **Safety of Participants**

Steven R. Sugarman 2012
Attorney and Mediator

P. BADGER: Stages of the Mediation Process

The process of mediation is a continuum which begins with at least two participants meeting face-to-face and ends with a resolution of the conflict. There are seven distinct parts to the process which must unfold usually sequentially to lend order, efficiency, and fairness to the overall proceedings. The mediator's responsibility during each part of the process is summarized as follows:

1. **P = Preparation**
   - Initial contact with parties and/or attorneys being mindful of perception of neutrality
   - Conflicts of interest check
   - Choosing venue
   - Considering who should be at table—main disputants and someone with settlement authority
   - Having confidentiality and fee agreement ready
   - Setting up room—considerations of size of room, shape of table, seating, water, sometimes food, comfort
   - Preparing mentally to mediate and reviewing and trying to stay true to the "prime directives" or values of mediation

2. **B = Beginning the Mediation**
   - Greet the participants and make them feel at home
   - Identify yourself and the participants; fund out how each person wishes to be addressed
   - Establish an informal, relaxed atmosphere; provide each person with pencil and paper
   - Explain the purpose of mediation and determine the willingness and capacity of the parties to participate
   - Clarify the ground rules of the mediation process
   - Assess the participants' readiness to begin

3. **A = Accumulating Information**
   - Ask the first party to begin by describing the dispute and any relevant background information you should know
   - Listen attentively; take notes if you find it helpful
   - Ask questions in a neutral voice; form your questions to get focused, persistent information on the background and issues of the dispute
   - Maintain the information flow by focusing the participants' narration. Check with the participant to make sure you understand what she/he is saying
   - Be aware of statements that are repeated during this presentation, as these often hold the key to underlying issues and eventual resolution
   - Ask each party to identify the precipitating problem in their dispute

- Look for any underlying fundamental issues which may be at the root of the complaint
- Pay close attention to the behavior and body language of both participants.
- Handle emotions and disruptive behavior calmly but authoritatively
- Summarize the first participant's story as objectively as possible; identify the key issues which the first participant's story has brought firm in his/her description of the situation
- Repeat these steps with the second party

4. **D = Developing the Agenda**
   - Define the problem by restating and summarizing each participant's statements
   - Summarize areas of agreement and disagreement on the issues involved in the dispute
   - Assist the participants in prioritizing the issues and their demands

5. **G = Generating Options**
   - Inquire if either party has any suggestions for resolving the conflict
   - Restate and summarize each alternative
   - Assist the participant in evaluating the fairness and workability of each proposed solution
   - Suggest other possible alternatives in general terms if an impasse is reached
   - Encourage the participants to select the alternatives which they believe to be the most workable
   - If needed, restate the alternatives selected to ensure that both parties understand them
   - Assist the parties in selecting objective criteria for proposed solutions

6. **E = Escaping to Caucus (if necessary)**
   - Always caucus with both sides; mediator or parties can ask for caucus
   - Promise confidentiality unless allow you to use the information

7. **R = Resolving the Dispute**
   - Summarize agreement terms
   - Check with each participant regarding the workability of the resolution and their confirmation of the terms
   - Establish a follow-up procedure with each party for signing the agreement and checking to see if its terms have been carried out
   - Emphasize the agreement is the result of their cooperative efforts and that they both have a stake in making it work
   - Congratulate the participants on their successful resolution of the dispute

Original Source: Michigan Mediator Skill-Building Manual, Michigan Supreme Court, 1997, by Lela P. Love and Joseph B. Stulberg

Tom Arnold, 20 COMMON ERRORS IN MEDIATION ADVOCACY

13 Alternatives to High Cost Litig. 69, 69-71 (1995)

Trial lawyers who are unaccustomed to being mediation advocates often miss important arguments. Here are . . . common errors, and ways to correct them.

WRONG CLIENT IN THE ROOM

CEOs settle more cases than vice presidents, house counsel or other agents. Why? For one thing, they don't need to worry about criticism back at the office. Any lesser agent, even with explicit "authority," typically must please a constituency which was not a participant in the give and take of the mediation. That makes it hard to settle cases.

A client's personality also can be a factor. A "Rambo," who is aggressive, critical, unforgiving, or self-righteous doesn't tend to be conciliatory. The best peace-makers show creativity, and tolerance for the mistakes of others. Of course, it also helps to know the subject. . .

WRONG MEDIATOR IN THE ROOM

Some mediators are generous about lending their conference rooms but bring nothing to the table. Some of them determine their view of the case and urge the parties to accept that view without exploring likely win-win alternatives.

The best mediators can work within a range of styles . . . on a continuum, from being totally facilitative, to offering an evaluation of the case. Ideally, mediators should fit the mediation style to the case and the parties before them, often moving from style to style as a mediation progresses. . . . It may not always be possible to know and evaluate a mediator and fit the choice of mediator to your case. But the wrong mediator may fail to get a settlement another mediator might have finessed.

OMITTING CLIENT PREPARATION

Lawyers should educate their clients about the process. Clients need to know the answers to the types of questions the mediator is likely to ask. At the same time, they

need to understand that the other party (rather than the mediator) should be the focus of each side's presentation.

In addition, lawyers should interview clients about the client's and the adversary's "best alternative to negotiated agreement," and "worst alternative to negotiated agreement." . . . A party should accept any offer better than his perceived BATNA and reject any offer seen as worse than his perceived WATNA. So the BATNAs and WATNAs are critical frames of reference for accepting offers and for determining what offers to propose to the other parties. A weak or false understanding of either party's BATNA or WATNA obstructs settlements and begets bad settlements. Other topics to cover with the client: the difference between their interests and their legal positions; the variety of options that might settle the case; the strengths and weaknesses of their case; objective independent standards of evaluation; the importance of apology and empathy.

NOT LETTING A CLIENT OPEN FOR HERSELF

At least as often as not, letting the properly coached client do most, or even all, of the opening and tell the story in her own words works much better than lengthy openings by the lawyer.

ADDRESSING THE MEDIATOR INSTEAD OF THE OTHER SIDE

Most lawyers open the mediation with a statement directed at the mediator, comparable to opening statements to a judge or jury. Highly adversarial in tone, it overlooks the interests of the other side that gave rise to the dispute.

Why is this strategy a mistake? The "judge or jury" you should be trying to persuade in a mediation is not the mediator, but the adversary. If you want to make the other party sympathetic to your cause, don't hurt him. . . .

MAKING THE LAWYER THE CENTER OF THE PROCESS

Unless the client is highly unappealing or inarticulate, the client should be the center of the process. The company representative for the other side may not have attended depositions, so is unaware of the impact your client could have on a judge or jury if the mediation fails. People pay more attention to appealing plaintiffs, so show them off.

Prepare the client to speak and be spoken to by the mediator and the adversary. He should be able to explain why he feels the way he does, why he is or is not responsible, and why any damages he caused are great or only peanuts. But he should also extend empathy to the other party.

FAILURE TO USE ADVOCACY TOOLS EFFECTIVELY

You'll want to prepare your materials for maximum persuasive impact. Exhibits, charts, and copies of relevant cases or contracts with key phrases highlighted can be valuable visual aids. A 90-second video showing key witnesses in depositions making important admissions, followed by a readable size copy of an important document with some relevant language underlined, can pack a punch.

TIMING MISTAKES

Get and give critical discovery, but don't spend exorbitant time or sums in discovery and trial prep before seeking mediation.

Mediation can identify what's truly necessary discovery and avoid unnecessary discovery. One of my own war stories: With a mediation under way and both parties relying on their perception of the views of a certain vice president, I leaned over, picked up the phone, called the vice president, introduced myself as the mediator, and asked whether he could give us a deposition the following morning. "No," said he, "I've got a Board meeting at 10:00." "How about 7:30 A.M., with a one-hour limit?" I asked. "It really is pretty important that this decision not be delayed." The parties took the deposition and settled the case before the 10:00 board meeting.

FAILURE TO LISTEN TO THE OTHER SIDE

Many lawyers and clients seem incapable of giving open-minded attention to what the other side is saying. That could cost a settlement.

FAILURE TO IDENTIFY PERCEPTIONS AND MOTIVATIONS

Seek first to understand, only then to be understood

HURTING, HUMILIATING, THREATENING, OR COMMANDING

Don't poison the well from which you must drink to get a settlement. That means you don't hurt, humiliate or ridicule the other folks Avoid pejoratives like "malingerer," "fraud," "cheat," "crook," or "liar" You can be strong on what your evidence will be and still be a decent human being

All settlements are based upon trust to some degree. If you anger the other side, they won't trust you. This inhibits settlement.

The same can be said for threats, like a threat to get the other lawyer's license revoked for pursuing such a frivolous cause, or for his grossly inaccurate pleadings.

Ultimatums destroy the process, and destroy credibility Yes, there is a time in mediation to walk out—whether or not you plan to return. But a series of ultimatums, or even one ultimatum, most often is very counterproductive.

FAILURE TO TRULY CLOSE

Unless parties have strong reasons to "sleep on" their agreement, to further evaluate the deal, or to check on possibly forgotten details, it is better to get some sort of enforceable contract written and signed before the parties separate. Too often, when left to think overnight and draft tomorrow, the parties think of new ideas that delay or prevent closing.

LACK OF PATIENCE AND PERSEVERANCE

The mediation "dance" takes time. Good mediation advocates have patience and perseverance.

MISUNDERSTANDING CONFLICT

A dispute is a problem to be solved together, not a combat to be won. To prepare for mediation, rehearse answers to the following questions, which the mediator is likely to ask:

- How do you feel about this dispute? Or about the other party?
- What do you really want in the resolution of this dispute?
- What are your expectations from a trial? Are they realistic?
- What are the weaknesses in your case?
- What law or fact in your case would you like to change?
- What scares you most?
- What would it feel like to be in your adversary's shoes?
- What specific evidence do you have to support each element of your case?
- What will the jury charge and interrogatories probably be?
- What is the probability of a verdict your way on liability?
- What is the range of damages you think a jury would return in his case if it found liability?
- What are the likely settlement structures, from among the following possibilities: terms, dollars, injunction, services, performance, product, recision, apology, costs, attorney fees, releases?
- What constituency pressures burden the other party? Which ones burden you?

As you just read, Tom Arnold encourages an approach that avoids hurting or humiliating the other side. There is considerable evidence that apologies can be very valuable, in dollar terms, to disputing parties (recall the barrier to negotiation in Chapter 2 of "justice seeking"). If this is true, it follows that attorneys may best serve their clients by encouraging civility, acknowledgment, and perhaps apology in mediation, where appropriate. What follows is the advice of a seasoned mediator, professor, and mediation trainer regarding civility, thoughtfulness, and apologies in mediation.

From Advocate to Advisor: The Role of the Lawyer in Mediation

by Michael Lang

The Judiciary of Trinidad and Tobago recently initiated a Court-Annexed Mediation Pilot Project, managed by the Dispute Resolution Centre. It involved 60 non-family civil disputes. The objectives of the Pilot Project included learning whether mediation of such disputes is an efficient, cost-effective adjunct to the judicial process and what types of disputes are most likely to be resolved by mediation.

For many of the attorneys, participating in the Pilot Project was their first direct experience with mediation. They quickly became aware that the mediation process required a modified skill set. To assist their clients and advance the goals of mediation, it is often useful for attorneys to shift gears, adopt different strategies and emphasize skills which may lean more heavily towards being an advisor than an advocate.

How then, can attorneys, trained and experienced in trial advocacy, tailor their skills for mediation? Let us first distinguish between mediation and litigation or arbitration.

Mediation vs. Litigation and Arbitration

Mediation is a confidential, private process in which a neutral third-party guides disputing parties in a constructive conversation—essentially an assisted negotiation. The mediator helps the parties express their positions and proposals, listens thoughtfully to each, clarifies issues in dispute, searches for solutions that address the needs of all and works toward a fair, workable settlement to the dispute. The parties themselves are the decision-makers. This attribute, known among professional mediators as self-determination, is what makes mediation unique.

Arbitration and litigation also involve a neutral third-party, but can be distinguished from mediation in several respects. They are more formal and structured processes involving the presentation of testimony and production of documents. Generally, court proceedings are conducted in public and strictly according to sets of rules and procedures that can be enforced by the judge. The third-party neutral is also responsible for determining the final outcome of the dispute.

Mediation, by contrast, is a less formal and relatively uncomplicated process involving the disputants in discussions directly and indirectly with one another and empowering them with the responsibility for the outcome.

Given the more central role of disputants, what then, are the tasks and responsibilities of attorneys in mediation? To answer this question, it is necessary to examine the role of attorneys in two phases—pre-mediation and during mediation.

Pre-Mediation

As with litigation and arbitration, adequate preparation is vital to a successful mediation, and attorneys can prepare their clients by discussing the following:

What is mediation and how the process is conducted. They may contrast mediation with other processes familiar to the client. They should point out that mediation is essentially a problem-solving process that has as its goals a thorough discussion of all issues in dispute, the exchange of information, ideas and proposals and the opportunity to seek creative solutions to the dispute.

The differences between mediation, litigation or unassisted negotiations, and attorneys may explore whether participating in mediation is likely to be a positive and fruitful exercise.

The role of the mediator, as a manager of the process, a facilitator of negotiations and a guide in the effort to secure a full settlement. In particular, attorneys emphasize that, in mediation, clients usually speak on their own behalf and are directly involved in making decisions with respect to the dispute. However, the value of attorneys at mediations should not be discounted as they often assist in moving the process forward.

Attorneys should also inform their clients of the opportunity for private discussions either with the mediator or with the attorney and client only.

With respect to the issues in dispute, attorneys and clients should discuss opportunities for resolving the dispute, the range of possible outcomes, the issues on which the client may have greater or lesser flexibility for settlement and the minimum terms

and conditions the client will accept. Attorneys should also have a frank discussion of the alternative to settlement and, in particular, the cost, time and risks of litigation.

As they would in litigation or arbitration, attorneys must ensure that all documents and other materials essential to a complete discussion and resolution of the issues are prepared, reviewed and available at (or sometimes exchanged prior to) mediation. Resolving the dispute will depend in significant measure on the completeness of information available.

During Mediation

The greatest shift in the attorney's role and responsibilities arises once mediation begins. During mediation, attorneys typically assist their clients in some of the following ways:

- They acknowledge the client's central role and, in particular, do not speak for the client; instead, attorneys offer advice, guidance and information.
- They do not challenge or cross-examine the other party, spar with the other attorney or, in other ways, treat mediation like litigation.
- Attorneys maintain a supportive, cooperative demeanor and demonstrate commitment to the mediation process by words and behavior. They do not treat mediation as an adversarial process or as a means for finding the truth; instead, they acknowledge the importance of searching for solutions. Attorneys assist in defining the issues to be resolved.
- They provide normative information, usually in private, about the benefits and risks of specific proposals.
- They act as an agent of reality, helping the client to balance the risks of accepting or rejecting settlement offers and the potential complications of presenting the case to a third party for decision as well as the time, stress and expense of a trial.
- Attorneys help manage the process by asking for breaks, for opportunities to speak privately with the client or for a private meeting with the mediator.
- They assist clients to communicate by summarizing discussions or clarifying matters that are confusing or where miscommunication is preventing constructive problem-solving, or worse, leading to increased conflict.
- They help clients stay focused on the issues at hand, the information presented and options for settlement as well as remain calm as they deal with frustration over the pace of progress or feeling overwhelmed by direct confrontation with the other party.
- Attorneys encourage clients to find creative solutions that will resolve the dispute.
- They draft documents as required.

Those attorneys who view mediation genuinely as an opportunity for their clients to participate actively in discussions about, and settlement of, their own disputes are valued allies in the process.

This view is expressed repeatedly in comments from parties and mediators in the Court-Annexed Mediation Pilot Project. In discussing the role of the attorneys, one mediator notes:

> *I used the attorneys a lot. I spoke to them separately,...I didn't give an opinion, but did a lot of talking about risk...Generally I worked with the attorneys and then sometimes left them to sell an idea to their clients, or sometimes sat in with them.*

Another mediator expresses appreciation for the attorneys in helping to resolve a very contentious mediation, in this way:

> *...the attorneys from both sides were very helpful in bringing clarity regarding their legal positions. It was very fruitful and they were able to settle everything.*

At times, the shift from advocacy to advice collaboration can be awkward and unsettling for many attorneys. Recognizing that their clients benefit from this collaborative role, and that mediators appreciate their constructive participation, attorneys should utilize mediation as they would any other dispute resolution process—wisely and with due regard for their particular role in making the most of its unique attributes. In managing the transition to mediation advocacy, attorneys may benefit from additional educational programs and seminars where they can learn to use their knowledge, experience and skills in support of their clients' participation in this helpful and constructive process.

The transition from trial advocacy to mediation advocacy may be challenging, but the rewards are worth the investment of time and energy.

Michael Lang biography and additional articles: http://www.mediate.com/people/personprofile.cfm?auid=19

10 N.Y.3d 923 (2008)
892 N.E.2d 849
862 N.Y.S.2d 456

RICHARD M. HAUZINGER, Respondent,
v.
AURELA G. HAUZINGER, Respondent.
CARL R. VAHL, ESQ., Appellant.

Court of Appeals of the State of New York.

Decided June 26, 2008.

924 924 *Abel & Brustein-Kampel, P.C.,* New City (*Steven L. Abel* and *Robert S. Thaler* of counsel), for appellant.

Moriarty & Grocott, Buffalo (*Steven H. Grocott* of counsel), for Aurela G. Hauzinger, respondent.

Uncyk, Borenkind & Nadler, L.L.P., New York City (*Matthew B. Millman* and *Eli Uncyk* of counsel), for Association for Conflict Resolution and others, amici curiae.

Chief Judge KAYE and Judges CIPARICK, GRAFFEO, READ, SMITH, PIGOTT and JONES concur in memorandum.

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

Plaintiff husband executed a signed waiver releasing the nonparty mediator from maintaining mediation confidentiality, and insofar as defendant wife seeks disclosure of matters pertaining to the mediation, she too is deemed to have waived mediation confidentiality. Further, the mediation agreement provided that if both parties consent, the mediator may communicate with an attorney for either party and release documents to third parties. The mediator's claim that a qualified privilege exists, pursuant to CPLR 3101 (b), in maintaining mediation confidentiality is without merit where the privilege has been waived. Under these circumstances, the courts below did not abuse their discretion by ordering disclosure. We do not address what, if any, mediation confidentiality privilege exists under CPLR 3101 (b).

On review of submissions pursuant to section 500.11 of the Rules of the Court of Appeals (22 NYCRR 500.11), order affirmed, etc.