

# Basic





# Mediation

A Play in Five Acts

# Training

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BASIC MEDIATION TRAINING AT THE LAW SCHOOL  
THIS PAST SUMMER. THIS IS HER REPORT.

ILLUSTRATIONS BY JULIETTE BORDA

## ACT I

It's a beautiful morning in June, and I'm sitting at the dean's conference table at the J. Reuben Clark Law School eyeing the 14 other mediation trainees. We'll be sitting at this table for 32 hours over the next four days listening to lectures, entering into discussions, and role-playing our way to CLE credit and a chance to participate as mediators on the court-annexed roster. The Schooley Mediation Program through BYU's LAWHELP sponsors this training for anyone interested. In other words, you don't have to be a lawyer.

Our group consists of five lawyers, three schoolteachers, two paralegals, a construction worker, two stay-at-home moms, and assorted others. A few of us are wearing tee shirts and jeans, but most of the trainees look like they are on their way to an office. It also looks like I am the only one who has been out of high school for more than 30 years.

Remember *A Civil Action*? It's a John Travolta movie about a cocky attorney who tries to take on giant industrial polluters on behalf of a small town where cancer-causing chemicals have been discharged into the water supply. The movie is based on a true story where the actual attorney ended up in personal bankruptcy because of the enormous costs of discovery in the nine-year, multimillion-dollar lawsuit he brought against the polluters.

Yes, he lost that one. But he is back representing small towns in polluted areas with a completely different approach to environmental law: he now mediates solutions between contending parties—no more expensive, time-consuming litigation for him. Negotiations take months instead of years, and settlements can be arranged without anyone admitting liability. His new theory is that aggressive litigation doesn't bring about the kind of dialogue that can solve problems. He is one of the many attorneys converted to mediation.

I became interested in mediation when my physician husband learned that “alternative dispute resolution” is being used by many health-maintenance organizations to resolve benefits disputes and improve services for its members. It seems that better solutions to health-care problems result when patients and providers work out their differences face-to-face in a nonadversarial forum. Patients feel they have more influence over the health-care system, and providers come out with a stronger commitment to making it work.

Picture this: Sitting eyeball-to-eyeball, a patient recounts the trying events that brought her to mediation while the physician listens intently. This, in and of itself, is a miracle. The physician apologizes and tries to resolve the problem within the safe and encouraging environment created by mediation, where new ideas can be fostered and attention is focused on feasible solutions. The benefits? This process is geared to fixing what is broken, and it's much cheaper than litigation.



## ACT II

Our group is subdivided so that we can play a game entitled “Win as Much as You Can!” The object is to earn as many points as you can without hindering or helping the other group. We make our decisions based on what we think the other side will do, and we earn points by correctly second-guessing them. After several rounds we have an opportunity to talk to each other. Each side makes some representations to the other. We rely in good faith on the other group’s representations and follow to the letter what we said we’d do.

They withhold information and lie. We lose. “But we trusted you!” we shout. “We believed what you said!” “Better luck next time,” say the prevaricators.

Mediation, on the other hand, can combine conflict and trust and achieve positive results. In the *lingua franca* of specialists, conflict can be “constructive” rather than “destructive” if it involves “empowerment” and “forward movement.”

“The goal of mediation,” we are told, “is to use the conflict as a springboard for opportunity.” Constructive conflict (view-

ing conflict in a positive way) can lead to open dialogue, communication, and respect. It can lift morale.

This course of events only happens if the participants enter mediation in good faith—that means they are willing to work toward a resolution of their problem and lay all their cards on the table. If these ground rules are set, mediation offers things litigation can’t, such as the following:

**1** Conflicting parties work “in the shadow of the law” (knowing what could occur if they went to court), but they are not necessarily bound by the law. They can work creatively towards solutions that would be impossible in a litigated courtroom setting. I saw this in a small claims court mediation where an auto glass installer promised to install a new windshield and take the other parties to dinner if they dropped their \$1,000 claim against him. It was the dinner that put that settlement over the top.

**2** Opponents communicate directly rather than rely on attorneys. On the one hand, this discourse can foster feelings of amicability and empathy; on the other, it can result in a loss of good faith, which can quickly sink the ship. Mediators are prepared for this scenario. “Shuttle” negotiation allows a mediator to shuttle back and forth between unamicable and unempathetic parties with offers for settlement. All that is necessary is two separate rooms and a handy hallway.

**3** All information gathered in the process is off-limits in any subsequent adversarial litigation. Mediation is a confidential process in which the mediator is not permitted to disclose information about the parties in dispute. This condition allows parties to take risks and consider creative alternatives without fear that the discussions may later be used against them. Paper shredders are a must for the well-equipped mediation office.

**4** Finally, mediation can be conducted at a fraction of the cost of litigation and in much less time. To the contending parties, saving money and time seem to be the biggest selling points.

## ACT III

Michael McLean, the singer/songwriter, makes a surprise visit to sing "Happy Birthday" to one of the instructors. He tells the story of a "play doctor" in New York who gave advice about *Fiddler on the Roof* before it was mounted and staged. The composer and the lyricist spent an hour telling the story of "Fiddler," jumping and dancing around with short bursts of music from the piano. They began: "There is this man named Tevye who lives in a small Jewish settlement in Russia." They finished telling the story and waited expectantly for the play doctor's opinion.

He pulled at his beard awhile and then asked, "So, what's it all about?" A little discomposed, the composer and the lyricist again started an explanation of the play. "There is this man named Tevye who lives in a small Jewish settlement in Russia."

Ten minutes into the story they were interrupted again. "So, what's it all about?" Once again they tried: "It's about this man named Tevye."

"No! What are you trying to say in this play? What's it all about?" The composer and lyricist stopped to think. "The play is about a family's traditions."

"Traditions!" yelled the play doctor. "Now, that's your beginning!"

# Schooley Mediation Program

In July 1997 Gerald R. Williams, J. Reuben Clark Law School's "Mr. Negotiations," left to preside over the France Bordeaux Mission. His departure left an irreplaceable space in the alternative dispute resolution (ADR) efforts at the Law School. In response to Professor Williams' absence and growing student interest in the theory and practice of negotiation and mediation, the Schooley Mediation Program (SMP) was established in November of 1998 with the support of the Law School and funding received from the Schooley Trust. Designed initially to coordinate student training and existing legal externships in the local small claims court, the SMP has expanded to provide opportunities in the training of professionals as well as law students' participation in victim-offender, domestic, and school mediations.

The SMP's goal is to promote peaceful conflict resolution through community outreach, certification, coordination of training, and actual client experiences for law students and professionals. At a law school sponsored by The Church of Jesus Christ of Latter-day Saints, a good "fit" for the teaching of nonadversarial means for resolving disputes has always seemed appropriate. Thus, the SMP has allowed the Law School to take such scholarly work and simulated training and put them into practical use in serving the members of the local community.

When Professor Williams returns during the summer of 2001, he will see the fruition of the significant ADR "seeds" he planted. In addition to an expanded curriculum in this area of study and an active ADR extra-curricular student group, he will encounter a growing number of students who are actively pursuing ADR-related externships administered through the Schooley Mediation Program.

With the addition of Professor Williams' vast ADR experience and scholarly ability, the Schooley Mediation Program is destined for even greater things.

The beginning of any mediation is identifying the problem that brought the parties to the table, and that is done by listening carefully to their stories, the "What's it all about?" part.

The parties must agree before the stories begin that they will be civil, that they won't interrupt, that there won't be any name calling or fighting, that they will tell the truth, and that they will work together to solve the problem. It's best if the parties will actually sign a contract to this effect. A signed contract in the hand is worth two or three or four reminders to an oral agreement.

## ACT IV

Mediation role-play is hungry, thirsty work. Each day we break midmorning and refuel with fresh fruit and muffins; midafternoon it's corn chips and taco dip, with all the soda pop and juice we can drink. During these break times we find ourselves using the listening and reframing skills we've been practicing in class.

"My jerky brother-in-law hasn't paid me back what he owes me for a trip last year, and he just bought a new boat!"

"You are upset that he has not paid you the money he owes you and feels unshackled enough from your debt to incur this large expense."

"He took my mother's china to the cabin!"

"The china has sentimental value to you because it originated in your family."

Mediators call restating what has been said by the parties "reframing." Reframing occurs when the mediator substitutes "neutral" words for the parties' biased or judgmental words. It's amazing how once insults and emotion are edited out of statements they can be restated concisely and effectively.

Demonstrating "active listening," a mediator begins by having the parties take turns telling stories. Through nodding your head and keeping eye contact, you demonstrate to the speaker that his or her message has been heard and that you are interested in the information given. You may also ask occasional questions for clarification. These polite questions and your reframing are the only interruption allowed during their monologues.

## ACT V

The room is darkened and a tv with a vcr is rolled in. The screen flickers as an old copy of Disney's *Pollyanna* comes to life. Aunt Polly's house servants are complaining about their grim, no-joy Sundays. Pollyanna chirps that they should play the "glad game" to feel better. "What is there to be 'glad' about on Sunday?" they grump. "Well," intones the cheery miss, "it will be seven whole days until another Sunday rolls around."

Mediation strives for a win/win situation for the parties: all interests satisfied in the best of all possible options, an outcome objectively fair and sensible, and commitments well planned and realistic. To reach the best alternative, parties must be tolerant and willing to compromise when they disagree. When the process begins with each side telling his or her story, the mediator writes down the issues and decides how to proceed on those issues (with the parties' help). This step is called "brainstorming": discussing and evaluating the options, discussing interests, running "reality checks" for the parties (which means bringing them back to objective criteria, especially the criteria the courts would use). Is their position reasonable? Can they see the other party's point of view? What are the long-term consequences of their choices?

We didn't just talk about the "how" of negotiation in mediation training; we played at negotiation over and over again. Sometimes we were parties, sometimes we were negotiators. It was amazing how we kept coming together, even when some of us were typecast to be difficult. There was excitement in the air—mediation does work!

## EPILOGUE

At small claims court my fellow trainees and I scramble to amass the 10 hours of experience the court requires before we can be put on its list of qualified mediators. A man relates to me that he is now less adversarial in his law practice. A woman tells me it has been the best training she has ever received. Another man says he uses active listening and reframing every day with his three young children. One trainee has already started mediating with real-estate practitioners in political action committees. He has been able to diffuse emotionally charged meetings by drawing on his mediation training, dragging them back to the possible and the practical. And me? I have my 10 hours and am waiting for the court to call.

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