Mediator Skills Training Outline

California Conference on Self-Represented Litigants - April 27, 2010
Presenter: Ron Kelly

1. Why Do We Fight When Talking Works Better? Using the Research Findings to Successfully Manage Conflict

- **Blocks to Objective Negotiating, Understanding Systems that Promote Conflict**
- **Demonizing the Other, Conflict Blinders**
- **Discount of Offers by Opponents, Overvalue of Own Assets**
- **Shaping Expectation, Pessimism - Optimism**

2. Major Conflict Management Strategies

- **Moving Contest to Problem-Solving, Taking Responsibility for Solution**
- **Bringing Extremes Toward the Middle vs. Jointly Constructing Best Outcome**
- **Converting Positions to Interests, Satisfying Interests**

3. Important Conflict Management Tools and Approaches

- **Information Gathering, Identifying Problems, Issues, Categories, Evidence**
- **Preparing Participants for Successful Meetings**
- **Physical Layout of Meeting Rooms**
- **Continual Monitoring of:**
  - **Contest vs. Cooperation**
  - **Blaming vs. Problem Solving**
  - **Past vs. Future**
- **Probing For and Handling Emotion - Normalizing, Active Listening**
- **Reframing and Neutral Language, Questions, Body Language, Voice Tone**
- **Disassociation - Changing Perceptual Frameworks**
- **Handling Factual Disputes - "Lying" vs. "Different Honestly-Held Views"**
- **Recognizing and Defusing Potentially Explosive Situations**
- **Comparing Best Real Option with Ideal, or with Next Best Real Alternative**
- **Reinforcing Agreements Made and Cooperation - Managing Continuing Conflict**

TIPS and TECHNIQUES FOR HELPING PARTIES MOVE AHEAD and OVERCOME ROADBLOCKS

By John Settle

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BEFORE YOU USE THIS LIST, REFLECT ON THESE THREE BASIC RULES:

- Never forget that you, the mediator, are a facilitator of the parties' own journey to their own resolution. The parties have the right and responsibility of self-determination – use the tools below only to assist. In particular, the early stages of mediation involve critical elements such as: introducing the parties to this very different process; developing their trust in you and in mediation; helping them hear and be heard in new ways; helping them begin to feel the power of this process to resolve their issues; and helping them obtain new perspectives on each other's situation. ***Take time to build a relationship at the table which will help them work on the issues.*** Until you have achieved a good start in the basics, you are not ready to start using most of the techniques below.

- The most powerful "tool" is your ***intuition*** about what the parties' may benefit from at any given moment, based on your understanding of the process of mediation. Reliance on tools, rather than the basics of good mediation, is wrong.

- **Avoid becoming part of the problem.** Sometimes, the parties may get stuck because they are consciously or unconsciously resisting doing something that was more *your* idea than theirs. Always check in with yourself: are you contributing to an impasse without realizing it? Do you find yourself resisting or reacting to one party differently? Are you truly being impartial? Are you telegraphing to the parties an "answer" to the problem which is more yours than theirs? Are you violating the prime directive of the parties' self-determination? *Follow the parties.* It's their dispute, and your job is to help them negotiate and communicate, not develop a solution for them. If you find yourself frustrated because the parties don't seem to be going in the direction you think would be best, you shouldn't try to go there!

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1. Once you begin to move from convening into engaging the problem, **start gently and with generalities** - don't get too specific too early. Use your listening skills and build into problem-solving through linking to issue identification. For example: ***"It sounds like you need a redefinition of the job and a fresh start. Do you want to work on those goals now, or is there something else we need to talk about first?"*** At the beginning of problem-solving, you are still in the mode of listening much and saying little.

2. As you begin to get into problem-solving, look for opportunities to **emphasize the future and de-emphasize the past.** This provides a nice transition for the parties into more active problem-solving, and allows the parties to recognize and affirm the change. Examples:

   - At some convenient point, perhaps after a break, say something like: ***"We've spent a lot of time exploring where we are and how we got here, and that's important to help you - and me as well - understand what the problems and concerns are.*** [Shift your physical position slightly].

I'd like to ask if you would now like to begin to focus on the future: where you'd like to be six months from now and how we can get there. Is that something you'd like to do?"

- Sometimes one or both parties seem stuck in the past like a broken record notwithstanding your active listening. Remember that **repetition** may signal that the repeater feels unheard so far, or that the subject is exceptionally important. Thus, your first step is to do a "self-check" to make sure you're not getting ahead of the parties. Then, you might pause, lean forward, look directly at your parties and use a different tone of voice (to signal a change in direction), and say something like -- ***"It's clear how strongly you feel about what happened. I think I've got a pretty good understanding of the problem, and I get the sense that [party A, etc.] does too. At this point in a mediation, some folks like to kind of change direction and commit to finding ways to solve the problem. And what this means is that we would need to keep focused on the future -- not the past. That may not always be easy. Would you like to try it this way?"***

- If a party committed in principle to "the future" but continues reflexively to wallow in the past, you might remind him/her of the agreement reached above, and suggest a **"ground rule"** that will allow you to bring them back to the future. Unlike behavioral ground-rules to deal with abusive situations, this kind of "ground rule" frequently becomes self-enforcing, as the party's own return to the past will trigger his/her own immediate recognition about the "violation."

- If all else fails, you might take ownership of the process: ***"I want to spend the rest of our time today talking about where we go from here."***

3. A variation of "future focusing" is to invite the parties focus on ***"solutions"*** **rather than** ***"the problem."*** Explain that the "problem" is a narrow focus, while "solutions" are a very much broader focus and therefore more likely to produce resolution.

4. Remember that parties will resist moving to closure too fast, and that parties faced with a settlement option reasonably may display discomfort about details and the unknown, although the *core idea* is good. One option is to use the **"in principle"** technique, by saying something like: "I *know there's a lot of important considerations and details to work through, but IN PRINCIPLE, if Bob could get a good job for you in the other division, do you think that might work for you?"*

5. Also, you can help the parties resolve issues involving complex details "in principle" and move on. For example, the parties might agree in principle that an employer will issue a reference letter to be attached to the settlement agreement; you can suggest that they come back to the exact wording of the letter later (so as not to get bogged down in secondary details and build on the affirmative positive movement of the core agreement).

6. Don't go to **caucus** too soon just to deal with a perceived impasse – it may become a "ping-pong" match where the parties merely conduct a debate through you as intermediary. Stay in joint session and deal with the debate there!

7. Help the parties **convert their statements** of interests and their ideas, and even their objections, into things that everyone can work with. To do this, look for opportunities to use transformations like the following:

   - *"Would you like to propose that idea as a solution?"* or. *"can I take that to [other party] as an offer?"*

- *"So you would like [x]. Is there a way we can develop that into a plan?"* or *"How can we get from here to there?"*

- *I see you have reservations about that option. What would it take to make it work?"*

8. Help a party focus on and work through his/her discomfort or caution in reacting to a proposal. Make sure the problem isn't that *you,* the trusted intermediary, appear to be promoting the idea. After you've talked about it for awhile, you might try the technique mentioned above: *"I see you have some concerns about how the proposal will meet your needs, but let me ask:* ***what would it take*** *to make that proposal into something you <u>could</u> accept?"*

9. Use the opposite of 8 above to help a party reality-check his/her own idea and convert it into something more acceptable to the other side (generally in caucus):

   - *"What do you think it will take for [other party] to accept your proposal?"*

   - *"Let's spend some time on how to sell your solution to [other party]."*

10. Where there's an absence of ideas, consider leading the parties in **brainstorming.** This means the parties are encouraged to suggest as many ideas as they can create, *without evaluation or criticism;* later, they return to the ideas and eliminate or develop them. This works particularly well with parties who have had experience with brainstorming in organizations.

11. **An easel or blackboard** is a powerful tool -- a way to display information and options visually and to organize and simplify them. Many people benefit from hearing *and* seeing information. Also, an easel achieves the important psychological purpose of having the parties *jointly focus* on the same "page." The easel lets you decide how to most positively display and translate the information, too – but be careful that what is translated and displayed is the *parties',* not yours. One way to do this is to try to use the parties' own words or phraseology, although it differs from how you would express the subject.

12. Hypotheticals can be a non-threatening and non-coercive way for you to introduce ideas for parties to consider, and can be an entry to informal brainstorming. A classic hypothetical is the **"what-if."** Say something like, *"I was just wondering – what if they were to provide a retroactive QSI – might that help since they can't seem to see their way clear to a promotion?"* While "what-ifs" are an important mediator tool, be careful of two things: (1) don't become so aggressive in "what if-ing" that the parties stop being creative themselves and look only to you; and (2) don't cross the line between merely tossing ideas out to be developed or rejected (assisting creativity) and pushing your own particular ideas (coercion).

13. A variation of the hypothetical is the **"some folks."** *"I've seen some folks in child custody cases like yours exchange Thanksgiving for Easter. Would you like to explore an approach like that?"* Here, you are offering a *model* to prompt discussion as part of the creative process -- be careful not to use this device coercively.
14. A party may be anxious about displaying an offer in development to the other side, but it would be nice to know whether it is remotely possible. Generally, you should help the parties develop enough trust in each other that they are willing to take some risks in exploring options. In exceptional cases, however, you might offer to **relieve a party of ownership** of the idea by offering it as a "what if" to test with the other party.

15. Particularly in cases where the issue is money and valuation is imprecise, parties may be anxious about **"going first"** with an offer or other perceived dangers of disclosure. You might offer both parties the opportunity to use you to help:

    · The parties might authorize you to simultaneously disclose a mid-point or range between them.

    · Ask both parties if they would like to try this: they will write their "real" final offer on a piece of paper, fold it, and give it to you. You will step out of the room, review the two pieces of paper, and then advise the parties of [as authorized]: (a) whether the parties are reasonably close, (b) a settlement point or range between them, (c) whatever else the parties invent.

    · If the parties agree, try the following or a variation: identify an agreed-upon mid-point value between the parties. Each party will submit a "bid" and the bid closest to the mid-point will be accepted by both parties – and if the parties are equi-distant, the mid-point will be accepted. *(Attributed to John Wagner, FMCS).*

16. A more formal and structured way of dealing with substantial differences between the parties' demands or lack of clarity about valuation is **"decision analysis."** Although details of this technique are beyond the scope of this list, briefly it works this way: In caucus, emphasizing confidentiality, you work with each party to develop their "best case" and "worst case" scenarios, both in terms of dollar valuations and percentage likelihoods of outcomes on motions for summary judgment, etc. These extremes will bracket reality. Generally, the analysis will cause the parties' positional demands to move toward each other, sometimes substantially. Then, discuss with the parties how they would like to use or share the information developed (for example, by allowing you to disclose overlapping valuations or a mid-point). For more information, see Aaron and Hoffer, "Decision Analysis as a Method of Evaluating the Trial Alternative" in Golan, *Mediating Legal Disputes,* Little, Brown & Co., 1996).

17. Try reflecting with the parties on the **"bargaining model"** that the parties are using (particularly if it is an "offer-counteroffer" model), to get outside their mental "set." For example, describe a "zone" model in which you display a Bell Curve and suggest that cases generally don't settle at the margins, but more likely within a "zone of settlement" between the two ends of the curve. Together or in caucus, help them eliminate the end zones, and this becomes their "zone of settlement." A variation is to treat the first, broader zone identified as a "zone of negotiation" which everyone will then try to whittle down to a "zone of settlement."

18. **Test the margins** of positions to introduce flexibility. If someone demands $5,000, ask *"Does that mean you wouldn't take, say, $4,750?"* Do something similar with the other party. **Get back to interests** by, for example, asking *"how would your life change if you got that $5,000 and not the $4500 they offered?"* or *"What does that extra $500 you're demanding mean to you?"*

19. If facing a rigid demand in caucus, suggest that it would be best for **the *party* to take the position to the other side**, and then help him/her develop a plan for justifying the position. Compelling the party to take personal ownership, and responsibility for justifying the position, may encourage them to consider other options.

20. **Avoid "nickel-and-diming" and "auctions."** For example, if you suspect these tactics, you might say, *"I'll be glad to take that offer to the other side if you can tell me that it will very likely be acceptable to them and that it will settle the case for you."*

21. **Precedents:** Sometimes, one party (typically an employer) is concerned about setting a precedent.

While mediation does not set court-type precedent, it may establish practical expectations. Some options to explore: a clause specifying the agreement's non-precedential nature; a confidential agreement (but be aware that these are difficult to develop and enforce); narrowing/isolating/removing a particular issue from the agreement; writing the agreement to make the case unique (or helping the parties see that it is); reality-testing with questions to help parties think through whether a precedent is really such a big deal; contrasting the risk of no agreement.

22. Psychologists say that people tend to react negatively to any offer or information presented by an adversary (**"reactive devaluation"**). Couple this with "selective perception" (the tendency to screen out data which do not fit preconceived views) and you can see why disputants need mediators. You, as the trusted neutral, can carry exactly the same messages without the same negative burden. In practical terms, it means you can *carefully* reintroduce and examine ideas that the parties rejected earlier on their own. Occasionally, you may find it useful to help a party understand this principle when they feel bleak about resolution.

23. **Impatience** is always your enemy. In fact, as you grow more experienced as a mediator and become more able to predict outcomes (or so you may think), impatience becomes an ever more subtle enemy. Be on guard.

24. Generally, **maintaining momentum** is important. Keep a positive outlook and future focus, and look for opportunities to remind the parties (particularly when things look bleak) of their interest in resolution, how far they have come, the things they have agreed on, the importance of "keeping at it," etc. The overall mediation should be a potential **"settlement event,"** meaning that ideally, everyone has or develops a sense that the dispute can be resolved, that they are headed in a positive direction, and that if they persevere, resolution *can* happen. Reinforce the psychology of the "settlement event" by helping continue the momentum, keeping things positive, reflecting on their hard and good work, reminding them of time constraints, and reinforcing agreements and positive developments as you go along. However, do not cross the line from being positive to becoming an aggressive salesperson for a particular resolution.

25. Get the parties to **focus on relative priorities** of what they want/need, and do so visually with your easel paper. One model is to draw two visual pie charts that show the relative priorities each side assigns to things. Or, you might ask both parties to assign a "1 to 5" priority. *See* Robert A. Creo, "A Pie Chart Tool" in *Alternatives,* CPR Institute for Dispute Resolution, May, 2000.

26. Remember that your goal isn't to overcome a roadblock per se, but to help the parties analyze and negotiate constructively. The parties **are free to stick with a position** -- they have a right to act on their own choices, and you have no business coercing the parties into a settlement! Sometimes, paradoxically, reminding the parties that "it's OK not to settle" *gives them freedom to take a fresh look.*

27. Perhaps the single most useful technique in the face of resistance is to ask the parties if they would like to **set the issue aside** temporarily and go on to something else -- preferably an easier issue. When you settle minor issues you build momentum toward resolution of other issues. Getting agreement on something (anything!) creates positive psychological ambiance.

28. A simple and very effective technique is to *take a **break.*** Tensions may be reduced, and often, things just have a way of looking different when you return.

29. **Change something:** move to another room, or rearrange the room you're in during a break. Take your coat off or roll your sleeves up. Provide food, candy or soft drinks.

30. **Ask the parties** to describe their perspectives on why they appear to be stalemated. The parties need to internalize and focus consciously on their deadlock, and both you and they also may need a reminder that it is *their* dispute. Also, this provides a psychological time-out and change of pace which may lead to new insights about the dispute.

31. **Refocus** the parties on something else:

- Ask them to describe how they would feel at the end of the day if they had come to some kind of resolution. Occasionally, they may disclose an ambivalence or unacknowledged fear that will give you a new avenue of inquiry.

- Ask them each to say something good about the other.

- Ask them to talk about their power: *"Do you have the power to resolve the issues in front of us? Do you WANT to resolve the issues in front of us?"*

- Ask the parties to put aside everything for the moment and refocus on the ideal future; for example, ask each: "where would you like to be [concerning the matter in impasse] a year from now?" Follow the answers with questions about how they might try to get there.

32. Ask each party to **describe his/her fears** about proceeding (but don't appear condescending and don't make them defensive).

33. You can sometimes assuage fears about resolution of one of several issues by making it clear to both parties that **no issue is finally settled until there is resolution of all issues.** This will manage expectations and avoid perceptions of bad faith, etc. A party may fairly need to reconsider a settled issue in light of proposed resolution of a later one. *Generally, however,* don't make it easy to re-open settled issues.

34**.** **Try a global summary** of both parties' sides and what they've said so far, telescoping the case and the mediation so that the parties can see the part they're stuck on in overall context. Sometimes, the tough issue will seem less important. The global summary can be part of a "content free challenge" as described in Item 43 below.

35. State all the **areas they have agreed to** so far, praise them for their work and accomplishments, and validate that they've come a long way. Then, ask something like: "do you want to let all that get away from you?"

36. One of the most commonly used techniques is to suggest a **trial period or plan;** e.g., "what if you tried this approach for three or six months or so, and then met again to discuss how it's working?" This helps relieve the fear of commitment and the unknown. Also, you can link a desired outcome (like changing a performance rating) to successful performance for X months. You can offer your help in reconvening with the parties, at their option, or in identifying some other trusted intermediary they might use.

37. Creatively explore **enforcement/resolution options,** if a party is anxious about compliance. For example, the parties might be interested in designating a mutually-trusted third party (e.g., an employer Ombuds or central office manager) as a resolver or party to assist with future disputes. For example, if an employee reevaluation is part of a deal, the employee might like the idea of a different manager doing the evaluation. You also can explore typical provisions included in agreements which void the

agreement if one party doesn't perform.

38. **Translate options** into a party's *personal language.* For example, if dealing with someone in the insurance business: *"in effect, this settlement represents a 'premium' you would pay to avoid a 'loss' in court later."* You can see how a similar approach might work for a roofer, an auto mechanic, or a health care professional.

39. Sometimes it is helpful to take a "time-out" from developing options *per se* and help the parties define what they need by developing **criteria for an acceptable outcome.** Say "before we focus on options for settling this matter, would you like to try to define the *qualities* that you feel any good outcome should have?" Usually, these general criteria will disclose interests (sometimes joint interests), and may include things like fairness, acceptability to ratifiers, etc. They give the parties something positive to work on. Later, you can test options against the criteria.

40. Be a **catalyst**, and be creative: Offer a "what if" that is only marginally realistic or even a little wild, just to see if the parties' reactions gets them unstuck.

41. Ease the tension with **humor** -- but be careful, as the parties might misinterpret. Generally, self-deprecating humor is safest.

42. **Homilies** may help: ***"****As long as you stay flexible, you can't get bent out of shape!" If there is a will, there is a way****."*** *"Keep in mind: courts produce decisions, which may or may not be justice!" "All polishing is done by friction." "Let's keep our eyes on the donut and not on the hole!"* Some mediators provide parties with a written list of homilies, *bon mots,* or quotes from famous people that describe the wisdom of resolving conflict.

43. A curious psychological phenomenon is called the "persuasive power of nothing," or a **"content-free challenge." ("think again").** Simply asking people to re-examine their views sometimes results in a change in those views, *even if nothing else has really changed.* Stated another way, the implied "challenge" of a question about prior views, *in and of itself,* may lead to a modification of the prior views. Naturally, this is most true for positions in which the person is not greatly invested. The practical application of this for mediators is use of the *global summary* (see Item 34 above) and broad questions like, *"considering everything we've heard and talked about so far, do you want to revisit [a particular position or demand]?"*

44. Try **role-reversal.** Say: "if you were [the other party], why do you think your proposal [would] [wouldn't] be workable?" or "if you were [the other party], would you accept your proposal?" Follow up as appropriate with questions about how the proposal might be modified to be acceptable. Be careful that your parties are flexible enough to be able to engage in this exercise – some people aren't.

45. **Another role-reversal** technique is to ask each party to briefly assume the other's role and then react to the impasse issue. You also can ask each party to be a "Devil's advocate" and argue against his/her own position.

46. Use a **"time-out" mini-intervention.** When it is clear that the parties are talking past one another or not listening, or when one of the parties has a way of provoking the other through certain comments or styles of expression, you can say: *"Time out. I wonder if it would be good to focus for a minute on what just happened here. Bob, when you said [x], Jane, you appeared to react like [y]. Frankly, I think I've seen this happen a couple of times, and it seems to get in the way of things. Can we talk about it for a minute?"* You can ask Jane to talk about her reaction, clarify with Bob what his message content was

meant to be, discuss how Jane might have been willing to listen to such message content if stated differently, ask Bob to try the different approach, etc. Sometimes, you can use the football "T" sign with your hands to signal the time-out.

47. A variation of Item 46 is to ask party A to state or restate his/her situation, **ask party B to repeat what B heard, and then ask A if B's repetition is accurate.** Repeat for B. Listen and look for opportunities to help them clarify or learn insights about communication styles or other dynamics of their interaction.

48. If the parties continue to engage in non-productive patterns of behavior (snipping, insults, non-interest-based approaches), **be blunt about their choices:** for example: *"You have a choice. You can choose the same old [bleep] that hasn't worked so far, or you can try to do something that's more productive. What do you want to do?"*

49. Use **reality-checking** questions**.** For example, "what do you think will happen if this goes to court?" Draw out, through questions, the emotional, financial, and other costs and risks of litigation and delay. If an answer is "I don't know what would happen" you might ask, "would you like to check with an attorney before our next session?" *CAVEAT:* if a party appears knowledgeable and confident about next steps, trying to persuade them otherwise for the sake of settlement may backfire on you.

50. Consider whether the problem is the **absence of someone** from the mediation – a family member, a trusted advisor, someone with more authority to create options, etc.

51. If one of the problems is an **attorney or other representative** who dominates the conversation, try attending the *client* frequently to give him/her a full opportunity to speak – look at the client with an inquiring facial expression occasionally while the representative is speaking, or ask occasionally of the client: "is that the way you see it?" or "do you have anything to add?" If the representative is impairing the mediation, take a break and ask to speak with the representative one-on-one (explore how the dynamics are unfolding, how the other side is responding, and how things might be improved). Remember, however, that it is up to the client and the representative to work out who speaks. It also is important not to humiliate or threaten the attorney's perception of his/her power in the setting.

52. If both parties are represented in the mediation, and there appears to be resistance linked to different views of the merits or worth of the case, consider a caucus with **just the representatives.** Given the representatives' considerable influence with their clients, the session may prepare the representatives to "reality-check" with their clients after they frankly reflect on the merits of the case without the clients present. You might ask each to summarize the relative strengths and weaknesses of the case, and facilitate a discussion of a fresh perspective on what the clients need to come to resolution. Sometimes, there will be frank discussion of how to deal with a client's perspectives, and new opportunities for creativity may be presented. Don't be surprised if one or the other attorney asks your *assistance* in reality-checking with his/her client!

53. People generally prefer to **maximize their gains and minimize their losses.** Therefore, it can be useful to *disaggregate* (split up) gains, to make them look more substantial, and *aggregate* (join) losses, to make them look less substantial. For example, if a disgruntled employee seeks four objectives (including a new job in another organization) and management will provide the new job but not the other three items, it may be useful to present the package to the employee by breaking down the benefits of the new job – its benefits, salary, location, hours, etc. – while weaving the "other items" into a single whole.

54. Keep in mind the potential for varying **perceptions on valuation – money is not merely money.** Be

prepared to consider the perceptional and emotional connections related to the meaning of money. A university professor selling off-duty training, who meets resistance to a price of $4000 for a day's training for 20 business executives, may have an easier time selling training for $200 per person (20-person minimum). 41 cents a day may be more palatable than $145 a year. A package of products or services worth $4000 may be easier to obtain than an equivalent or lesser amount of cash. Money may represent retribution, respect, guilt and other factors.

55. **Accentuate the positive.** Studies show (and common sense might indicate) that when faced with two options which actually involve identical outcomes, one of which is phrased positively ("vaccine A should save the lives of 200 of the 600 people in this village if this fatal disease hits") and the other negatively ("vaccine B should hold deaths down to 400 of the 600 people in this village if this fatal disease hits"), people will choose the positive.

56. Use **parallel option development** to help parties substantially develop multiple options on separate tracks (particularly mutually exclusive options). This can improve the efficiency of how the parties organize, develop, clarify, and evaluate each option. Each option can be developed on its own track, and eventually weighed more knowledgeably against other options. For example, in an employment dispute, label the Charging Party's possibility of leaving the organization as "option A" and the possibility of staying at the organization in a reorganized job as "option B," and then spend time developing each. Help the parties remain open in principle to both "A" and "B" and variations that may develop.

57. If a party seems a bit inarticulate, fearful, or confused, consider suggesting a "time out" opportunity for them to **write down** what they would like to say.

58. Studies show that most people have a subjective emotional preference for **an appearance of fairness** – to be fair and to be treated fairly – that can complicate a purely economic transaction (*e.g.,* people may think it fairer to suspend a $500 rebate program for a hot product than to add a $500 surcharge for the same product; people may tip higher for good service even in a restaurant they will never return to). A Rose Bowl-area hotel dealt with this perception, as well as the aggregating principles discussed above, by offering a "package" of a room, transportation, tickets, trinkets, etc. for $999 rather than merely raising room rates.

59. **Break a whole problem into parts.** *"A journey of a thousand miles begins with a single step."* See if the parties can agree to take a piece of a difficult whole problem – <u>any</u> part, just start somewhere – and work it. Even a small victory can yield results.

60. When faced with resistance, ask the parties, **"'what would you like to do next?"** and pause expectantly. Or, say "frankly, it looks like we're really stuck on this issue. What do you think we should do?" These questions help the parties actively share the burden of the impasse.

61. **Ask one or both parties if they want to end the mediation.** Parties who have invested in the mediation often don't want it to fail, and may suddenly become more motivated to find ways to come unstuck. This approach is particularly useful where one party may unconsciously enjoy the attention the process provides, or enjoy the other party's discomfort. On the other hand, it is the parties' right to end the mediation, and sometimes they need to be reminded of that – so *don't fight the parties*.

62. Sophisticated negotiators will believe they **"know when not to settle" –** *i.e.,* when the better strategy is to let things stew awhile. They have learned to resist psychological pressure to settle now lest the deal get away, as "another deal is always around the corner." If you appear to these kind of negotiators to be promoting the value of resolving now *vs.* waiting, they may loose respect (and trust) for you and the

mediation process. Offer these negotiators an opportunity to reflect on options, but do not try to "sell" resolution.

63. You can always **propose ending the mediation yourself** if things don't change. Or, you might add, *"As long as you are willing to consider movement, I'll stay."*

64. Ask each side to stretch themselves to develop a **"best and final"** offer as a very last step before mediation is ended.

65. If the parties **decide to end** the mediation, suggest that before you end you do a summary and overview so everyone understands where they are. Then, do just that – a global summary. Focus on the positives of anything they did accomplish. Be clear about the issue/s that separate them, but don't dwell on negatives. Offer to "keep the door open" and suggest they do so too. End on as pleasant and positive a note as you can, and try to keep them on a friendly and respectful footing with each other. If they don't burn their bridges, they may well settle later, with or without your further help.

What are some other ideas?

(Version May '02)

Summary of California Mediation Confidentiality Law

To promote communication in mediation, California Evidence Code sections 703.5 and 1115–1128 establish the confidentiality and limit the disclosure, admissibility, and court's consideration of communications, writings, and conduct in connection with a mediation. In general, they provide:

a. All communications, negotiations, or settlement offers in the course of a mediation must remain confidential;

b. Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings;

c. A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body; and

d. A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at or in connection with a mediation.

This summary was part of proposed draft Judicial Council form ADR-108, Information and Agreement for Court-Program Mediation of Civil Case, which was circulated for public comment in 2005 but not adopted. It is not approved by the Judicial Council, the California Administrative Office of the Courts, or any other group. Ron Kelly believes it is the best short summary of California mediation law he has seen, and that it is in the public domain.

Mediation Confidentiality
Samples of California Statutes, Case Law, and Court Rules Defining the Boundaries Between Judges and Mediators

1. California Supreme Court's unanimous decision in Foxgate v. Bramalea (S087319, 2001)

"We conclude that there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports. **Neither a mediator nor a party may reveal communications made during mediation**...We also conclude that, while a party may do so, **a mediator may not report to the court about the conduct of participants in a mediation session**."(pg. 2)

"Section 1121 prohibits the submission by anyone to a court and consideration by the court of 'any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator.' Plaintiff violated this section as did the court...**The court violated subdivision (a) of section 1119 when it admitted in evidence at the sanctions hearing 'anything said . . . in the course of . . . mediation.'**

"The remedy for violation of the confidentiality of mediation is that stated in section 1128: '... **Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision** in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.' " (pg. 27)

2. Evidence Code Section 703.5 providing that mediators may not testify in later civil trials:

"...**no...mediator shall be competent to testify, in any subsequent civil proceeding**, as to any statement, conduct, decision or ruling, occurring at or in conjunction with the prior proceeding...

("except as to [one]...that could...give rise to...contempt,...constitute a crime,... be the subject of investigation by the State Bar or Commission on Judicial Performance,...or give rise to disqualification...")

3. Evidence Code Section 1117 (b)(2) providing that settlement conferences are not mediations under California's Confidentiality Statutes (Ev. C. 1115-1128):

"This chapter does not apply to...A settlement conference pursuant to Rule 222 of the California Rules of Court."

Legislative Intent Statement. "Section 1117(b)(2) establishes that **a court settlement conference is not a mediation within the scope of this chapter.** A settlement conference is conducted under the aura of the court and is subject to special rules." (California Law Revision Commission Reports 407, 1996)

4. California Rules of Court (revised, effective July 1, 2001) providing that judges must separate the role of special master/referee from that of mediator:

"244.1...A court must not use the reference procedure under Code of Civil Procedure section 638 to appoint a person to conduct a mediation." "244.2...A court must not use the reference procedure under Code of Civil Procedure section 639 to appoint a person to conduct a mediation."

Judicial Council Purpose Statement: "...concerns have been raised recently about using the reference procedure to appoint a person to conduct a mediation. **Such a dual appointment creates an inherent conflict for the appointee because, by statute, referees report back to the court (see [CCP] sec. 643) while mediators are prohibited from reporting to the court (see Evid. Code, sec. 1121)**"

"...In order to prevent mediators from exerting inappropriate pressure on disputants to settle, these statutes specifically prohibit mediators from reporting back to the court on any substantive issue other than whether or not the case was resolved in mediation (Evid. Code, sec. 1121)."

"The... important distinctions between mediation and settlement conferences...lie not in the types of techniques used by the neutral but in the confidentiality requirements that are associated with these two processes. The applicability of these confidentiality requirements depends upon whether a particular process is labeled as a settlement conference under Rule 222 or as mediation." (April 17, 2001 Judicial Council Report)

Simmons v. Ghaderi - Supreme Court's Clear Statements Regarding California's Mediation Confidentiality Laws - Ron Kelly

On July 21, 2008 the California Supreme Court upheld for the fourth time the state's mediation confidentiality statutes. It unanimously reversed the Court of Appeal decision in Simmons v Ghaderi.

Summary quote:

"We conclude that the Court of Appeal improperly relied on the doctrine of estoppel to create a judicial exception to the comprehensive statutory scheme of mediation confidentiality and that the evidence relating to the mediation proceedings should not have been admitted at trial."

URL: http://www.courtinfo.ca.gov/opinions/documents/S147848.PDF

The Court made clear statements on three important issues:

1. **Unknowing Waiver by Conduct.**

"The facts of this case reveal that the real issue is whether a party can impliedly waive mediation confidentiality through litigation conduct."

"Because the language of section 1122 unambiguously requires express waiver, judicial construction is not permitted unless the statutes cannot be applied according to their terms or doing so would lead to absurd results, thereby violating the presumed intent of the Legislature. (Foxgate, supra, 26 Cal.4th at p. 14.)"

2. **Exclusion for Public Policy Reasons Is Not "Privilege".**

"Unlike the privileges subject to implied waiver that are found in division 8, entitled 'Privileges,' the Legislature placed section 1115 et seq. in division 9, entitled 'Evidence Affected or Excluded by Extrinsic Policies.' This placement reflects that the Legislature considered the specific limitations placed on the admissibility of evidence by the mediation confidentiality statutes and endorsed those limitations to encourage mediation as a matter of public policy."

"Recognizing both the breadth and clarity of the mediation confidentiality statutes, we have concluded that the legislative scheme is clear and unambiguous, and that the Legislature intended for mediation confidentiality to apply according to the statutory rules."

3. **"Good Faith".**

"...with the enactment of the mediation confidentiality statutes, the Legislature contemplated that some behavior during mediation would go unpunished. (Foxgate, supra, 26 Cal.4th at p. 17.) The Legislature was also presumably aware that general sanctions statutes permit punishing bad faith conduct. Considering this, we reasoned we were bound to respect the Legislature's policy choice to protect mediation confidentiality rather than create a procedure that encouraged good faith participation in mediation. Thus, we held that evidence of a party's bad faith during the mediation may not be admitted or considered."

"The Legislature chose to promote mediation by ensuring confidentiality rather than adopt a scheme to ensure good behavior in the mediation and litigation process. The mediation statutes provide clear and comprehensive rules reflecting that policy choice."

Ron initiated and guided the formation of Evidence Code Sections 1115-1128.