

Maryland Program for Mediator Excellence
Mediation Descriptions

Mediation is a process for people in conflict which includes two or more participants and one or two mediators. The trained impartial mediator(s) helps people in conflict to communicate with one another, understand each other, explore options for mutual gain, and if possible, reach agreements that satisfy the participants' needs. A mediator(s) does not provide legal advice or recommend the terms of any agreements. Instead, the mediator(s) helps people reach their own decisions which may include agreements, may rebuild their relationship, and if possible, find lasting solutions to their disputes. Mediation is a process that lets people speak for themselves and make their own decisions.

There are a variety of mediation frameworks. Below is a description of the predominant frameworks practiced in Maryland.

1. Facilitative Mediation Framework: The goal of facilitative mediation is to support the participants in conversing constructively and reaching a solution acceptable and satisfactory to all.

In facilitative mediation, the mediator helps people in a dispute to communicate with one another, to understand each other, and if it is possible and desired, to reach satisfactory agreements.

Facilitative mediators use a variety of strategies, including reflecting, reframing, asking open-ended questions, focusing on the future, acknowledging feelings, mutualizing and focusing the participants on option building. Some mediators would talk about ground rules at the beginning of the mediation. For the most part, participants stay all together in session with the mediator, but mediators may use caucus on occasion, for the purpose of supporting each participant to communicate directly with the others. Facilitative mediators would not give advice or opinions, or pressure the participants to reach agreement. Facilitative mediators would highlight common ground, and on occasion might offer possible options not already considered by the parties.

If agreement is reached, it is written by the mediator at the direction of the participants and reviewed and confirmed by all participants to the mediation. In facilitative mediation, the mediator manages the process, and the participants are in control of whether agreement or any other outcome is reached.

One way to divide mediator techniques is listening, reflecting, reframing, summarizing, providing information, making suggestions, and persuading. **Facilitative mediators would use listening, reflecting, reframing, and summarizing, with minimal providing information, making suggestions, or persuading.**

One way to divide mediator techniques is listening, reflecting, reframing, summarizing, providing information, making suggestions, and persuading. **Analytical mediators use all of these techniques.**

2. Inclusive Mediation Framework: The goal of inclusive mediation is to support the participants in having difficult conversations and to guide a problem solving process to develop solutions that meet everyone's needs, with all content decisions made by the participants.

In the Inclusive Framework, co-mediation is almost always used. Inclusive mediators do not set ground rules. Mediators focus on strategically listening for values, feelings, and topics and reflect these back to the participants using language that captures the intensity the participants expressed. Mediators check to make sure that the participants feel the reflection is accurate. The mediators attempt to understand each participant, thus making it more possible for them to understand each other. Mediators follow a defined process that includes time for participants to talk about whatever they chose, build clarity as to what is important, identify topics participants want to resolve, identify the goals each participant has for each topic, brainstorm options, consider each of the generated options in terms of which would meet all participants' goals, and determine areas of agreement, if any.

Inclusive mediators rarely use caucuses. They might do so in situations where mediators need to check if mediation is a good fit for the conflict. If agreement is reached, it can be written by the mediator based on the direction of the participants, and it is reviewed and confirmed by all participants in the mediation. In inclusive mediation, the mediators guide the process and the participants are in charge of whether agreement or any other outcome is reached.

One way to divide mediator techniques is listening, reflecting, reframing, summarizing, providing information, making suggestions, and persuading. **Inclusive mediators would use listening, reflecting, and some summarizing, and do not use reframing, providing information, making suggestions, or persuading strategies.**

3. Transformative Mediation Framework: The goal of transformative mediation is to work with people in conflict to help them change the quality of their conflict interactions from negative and destructive to positive and constructive as they discuss and explore various topics and possibilities for resolution.

Transformative mediators look for barriers to effective interactions and assist the participants in dealing with and removing them. The mediators look for and affirm shifts in empowerment (i.e., addressing each other more directly, growing more articulate and fluent, and showing more confidence and self-reliance) and recognition (i.e., talking to rather than about each other, acknowledging new information, and becoming more able to see the other's point of view), which are achieved by the participants themselves. Mediators reflect back, using insofar as possible the same words and emotional expression used by the participants, highlighting differences as well as commonalities between the participants and ask open-ended questions to aid in broader understanding and quality decision making.

If agreement is reached, it is written by the mediator at the direction of the participants, and then reviewed and confirmed by all participants to the mediation. In transformative mediation, for the most part, mediation occurs with everyone in the same room relying minimally on caucus, which may be requested by the participants or the mediator. In transformative mediation, the participants help shape the process with the mediator. The mediator's goals are to assist with removing the barriers and fostering quality interaction and decision making from which agreement and other outcomes chosen by the participants emerge.

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One way to divide mediator techniques is listening, reflecting, reframing, summarizing, providing information, making suggestions, and persuading. **Transformative mediators rely primarily on listening, reflecting, and summarizing, with minimal providing information and do not rely on reframing, persuading or making suggestions.**

4. Analytical Mediation Framework: The goal of analytical mediation is to support the participants in reaching a solution acceptable and satisfactory to all.

The analytical mediator will draw on a variety of styles as the circumstances require, including facilitative and evaluative techniques where appropriate. The analytical mediator adjusts the process to meet the parties' needs, even if the needs change during the mediation. Analytical mediators are expected by the parties to analyze the situation and adjust their styles and the process to the needs of the participants at any given time in the process. Analytical mediators are expected to understand the substance of the dispute, the legal process, and the risks and rewards each party will face if there is not a settlement.

Analytical mediators are frequently knowledgeable about specific areas of law, science and technology, or policy. As circumstances dictate, these mediators may analyze the strength and weaknesses of the law, facts and other circumstances that could affect an outcome of a dispute if it is not resolved. Analytical mediators may use reflection, reframing, open- and closed-ended questions. They may attend to the feelings of participants, give multiple suggestions for a particular item, generate options, provide information, engage in reality checking, share how others in similar situations have resolved similar issues, weigh the pros and cons of positions, offers and demands, discuss with participants the consequences of their choices, and may give their evaluation of the case, if asked, and if they feel it would be helpful.

Analytical mediators frequently use caucuses and often mediate with attorneys present. With the parties' consent, analytical mediators may meet with just the attorneys for part of the time. They may also meet with the parties without their attorneys. If agreement is reached, often analytical mediators will document points of agreement that will be used by the attorneys to draft the final settlement documents. It is uncommon for mediators to draft the final agreement.

5. Other Mediation Frameworks: In addition to the mediation frameworks listed above there are other mediation frameworks (e.g. Narrative, Understanding-Based, Therapeutic, etc.) which are not included here because they are not widely used in Maryland.

This work was done primarily by the Maryland Program for Mediator Excellence's Definitions Task Group and approved by the Mediator Excellence Council on May 19, 2010.

Committee Notes:

1) “Evaluative Mediation” is not defined here because we believe it is a misnomer. Evaluation is a technique, not a mediation framework. If a process consists solely of an evaluation and attempts to get participants to settle in line with the evaluation, then that process is not mediation, it is more likely a settlement conference. In a survey asking Maryland mediators how they define their practice, no mediator responded that they define their practice with the term “Evaluative.”

2) A Settlement Conference is not mediation, although the two are often confused. We define settlement conferences here in order to try to clarify the distinction. Settlement conferences are ordered by the courts in a wide range of civil cases and attendance is mandatory. The conferences usually take place 30-days prior to trial.

Settlement conference neutrals are judges or lawyers who are familiar with the decisions of the particular court in which the case is filed. The conferences are focused on settling the lawsuit. The neutrals discuss with the participants the value range of their case and attempt to get the participants to reach an agreement, which may be a compromise. The conferences usually operate with attorneys present, and the entire process may consist of the neutral meeting solely with the attorneys. The process may take place in separate meetings with each side, as the neutral uses persuasive arguments, and attempts to encourage the parties to come to an agreement within a range of settlement options.

SETTLEMENT CONFERENCE

“a conference at which the parties, their attorneys, or both appear before an impartial individual to discuss the issues and positions of the parties in an attempt to agree on a resolution of all or part of the dispute by means other than trial. A settlement conference may include neutral case evaluation¹ and neutral fact-finding², and the impartial person may recommend the terms of an agreement.” Md. Rule 17-102(1) (emphasis added).

¹**Neutral Case Evaluation** - “means a process in which (1) the parties, their attorneys, or both appear before an impartial evaluator and present in summary fashion the evidence and arguments to support their respective positions, and (2) the evaluator renders an evaluation of their positions and an opinion as to the likely outcome of the litigation.” Md. Rule 17-102(i) (emphasis added).

²**Neutral Fact-Finding** - “a process in which (1) the parties, their attorneys, or both appear before an impartial individual and present evidence and arguments to support their respective positions as to disputed factual issues, and (2) the individual makes findings of fact as to those issues that are not binding unless the parties agree otherwise in writing.” Md. Rule 17-102(k) emphasis added).