Motivational **Video**

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Lesson 7

THE CLOSING
STAGE

2

Purpose
of this Lesson

The purpose of this lesson is to provide instruction concerning various ways to terminate a mediation session as well as the effective structuring of mediated agreements.

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Objectives of this Lesson

After completing this lesson, you should be able to:

- Draft an effective mediation agreement
- Avoid the unauthorized practice of law

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Review of Practical Skills Exercise

Write a paragraph or two describing the difference between a Mediated Agreement and an Agreement to Mediate.

Read the following scenario and answer the following:

- Is this a Mediated Settlement Agreement? Why or Why not?

If it is not a Mediated settlement Agreement please rewrite it in the format of a mediated agreement

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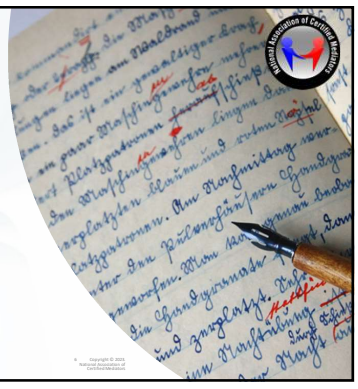
The Closing **Stage**

- As you will remember from lesson 3, the closing stage is the final stage in a mediation session.
- ***Closing means to complete a transaction successfully;*** for example, in mediation to end with a mutually satisfactory written agreement in the parties' own words or the termination of the mediation session.



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The Closing Stage

- If an agreement has been reached, the mediator may put its main provisions in writing with the parties' permission as the parties listen.
- The mediator may ask each side to sign the written summary of agreement or suggest they take it to lawyers for review.
- If the parties prefer, they can write up and sign a legally binding contract by themselves.

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The Closing Stage

- If no agreement was reached, the mediator will review whatever progress has been made
- and advise every one of their options, such as meeting again later, going to arbitration, or going to court.

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The Closing Stage

- The closing stage of mediation, as pointed out above, may not end in a mutually satisfactory agreement, although this is the goal.
- A mediation session can end in one of four ways:
  - Mediator can terminate the mediation session
  - Parties can terminate the mediation session
  - Parties may reach mutual agreement without written agreement.
  - Parties may reach mutual agreement with a written agreement.

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Mediator can terminate the **mediation session**

- A mediator may realize that there are ethical concerns that prevent her from continuing in the process.
- A more in-depth discussion of these types of concerns will be explored in the next lesson.
- However, an example would be a mediator who realizes that he is no longer able to remain impartial/neutral and finds himself acting on a bias that would detrimentally affect the mediation's outcome.
- In this case, it would be wise for the mediator to terminate the mediation process, which may result in referring the matter to another mediator.

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Parties can terminate the **mediation session**

- In line with the concept of self-determination and since mediation is a voluntary process, disputants may terminate the mediation session at any time for any reason.
- However, most parties do not choose to terminate the mediation session due to their investment of time and emotion.

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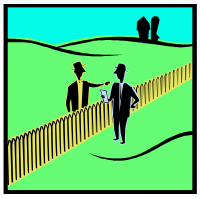
Parties may reach mutual agreement **without written agreement**

- In community disputes or non-court-related cases, many parties choose to end the mediation session with less formality, such as a verbal agreement and/or handshake.
- These disputes are usually small in nature and do not usually involve monetary compensation.
- An example of this type of mediation would be a neighbor-to-neighbor dispute where one party has agreed to turn down a radio after a certain time in the afternoon and the other party agrees in an effort to resolve their dispute.



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Parties may reach mutual agreement **with a written agreement**

- Finally, the parties detail all of the agreements in a document in which the mediator, acting as a scrivener, drafts all of the agreements they have reached throughout the mediation session in the parties' own words.
- A scrivener is somebody whose job involves writing or making handwritten copies of documents.
- The agreements are called mediated agreements, settlement agreements, or Memorandums of Understanding (MOU).

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Note Taking

- **Write legibly—you must be able to read your notes later for them to be useful**
- **Head each mediation note with:**
  - Date
  - Subject of mediation
- **Keep your notes brief**

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Review by **Attorneys**

- Mediators should always inform the parties in writing that mediated agreements should be reviewed by independent counsel before they are signed
- or
- that the parties should waive their opportunity for independent review.

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Signer's **Remorse**

- This is the post-mediation behavior a party experiences when one has doubts as to whether the mediation decision was correct or not.
- It can be overcome by effective decision-making upfront on the part of each party.
- The mediator can help eliminate this by utilizing reality testing and reinforcing the freedom of the parties to make a decision, which they are both satisfied with regardless of how other individuals feel who are not a part of the dispute/conflict.

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Should the **mediator sign?**

- Since the mediator plays no role in either the execution of the agreement or the substance of the agreement, it is unnecessary for the mediator to sign the agreement in a private practice.
- The agreement usually involves promises made between the two parties to one another which do not involve the mediator.
- The prudent mediator acting as the scribe would not sign the agreement between the two parties.

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Binding or **non binding**

- Binding means creating a legal or moral obligation to do something, with no possibility of withdrawal or avoidance.
- Non-binding means the participants are not creating a legal or moral obligation to do something and retain the possibility of withdrawal or avoidance.

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Binding or **non binding**

- Negotiations are always non-binding until there is an offer and acceptance; the vast majority of mediations result in binding agreements.
- Therefore, mediation is non-binding throughout the entire process until all participants of a dispute come to an agreement, which immediately becomes a verbal contract.
- In mediation, oftentimes the participants write down the terms of their agreement, and this becomes a binding written contract.
- ***A contract is an arrangement, either written or verbal, that may be enforceable by law, and is normally drafted as a document that records a formal or legally binding agreement.***

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12 Steps to an **Effective Mediated Agreement**

- The following ideas are offered as suggestions when writing agreements.
- The proper structure of the agreement is important because the parties will rely on it if a conflict ensues.
- The agreement should reflect a sense of balance between the parties.
- If successful, everyone should walk away feeling as though they accomplished something, and the written agreement should reflect these feelings of achievement.

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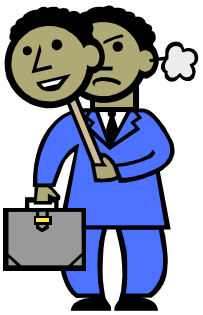
Positive

- Starting the agreement with a positive provision of mutual aspiration sets a tone for cooperation.
- An example of this type of provision would be:
- *Mr. A and Mr. B agree that they both seek to do what is in the best interest of their company, A & B Partnership.*
- *Further, both parties agree that this mediation session is being held in an attempt to work together collaboratively to resolve some internal issues within their company.*



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Balanced

- List first those items which require both parties to do something.
- This encourages a sense of balance and signifies the win-win thrust of mediation.

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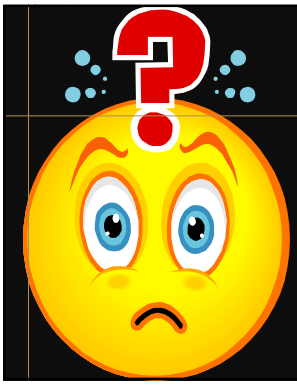

Adverb Free

- Avoid adverbs such as "satisfactorily."
- This adverb is subjective and its definition depends on the party reading it.
- Words such as these are too vague to ensure a mutual understanding of what is expected.
- The mediator should work with the parties to define the terms of the agreement more carefully.

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Fair

- ***Fair is defined as not exhibiting any bias and, therefore, reasonable or impartial or according to the rules.***
- In the vein of self-determination, the parties themselves will determine what this word means to them.
- Some parties will determine that a 50/50 split is fair while others may determine that a 90/10 split may be fair in light of their current circumstances.
- It is not the job of the mediator to determine the meaning of this word for the parties but, rather, to reality test with the parties that they have thoroughly considered how this agreement may appear fair to them.

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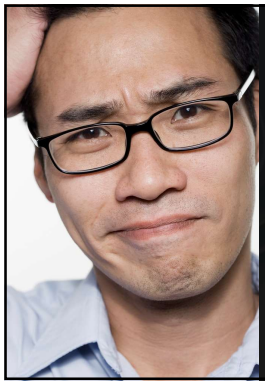

Capable

- To be capable means to possess the qualities needed to do a particular thing.
- In this regard, it important to check with the parties while reality-testing during caucus that they have reviewed the following:
- Will you have any problems carrying out your responsibilities under the agreement?
- Do you have the authority and resources to fulfill any obligations of the agreement?

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Durable

- Durable is defined as lasting for a long time, especially without sustaining damage or wear.
- The following questions should be asked to ensure the durability of the mediated agreement with the parties:
- Can anything go wrong that should be anticipated in the agreement?
- Should there be a conflict-resolution statement contained in the agreement for handling future disputes?

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Specific

- When referring to matters involving the exchange of money, indicate the incident or date on which the action occurred for which the money is being paid.
- Also, note the form of payment and to whom payment is made.
- *For example: Michael Mitchell agrees to pay Tyra Ranks Seventy-Five Dollars ($75.00) in cash for the VS wings damaged on March 5, 2023, and presently in Tyra's possession. Payment will be mailed to the Brand New Mediation Center, 123 Main Street, Prosperous, CA 90201 on or before May 16, 2023.*

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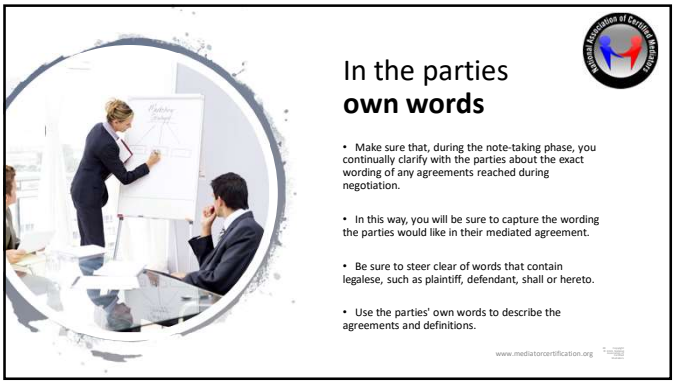
In the parties
own words
• Make sure that, during the note-taking phase, you continually clarify with the parties about the exact wording of any agreements reached during negotiation.
• In this way, you will be sure to capture the wording the parties would like in their mediated agreement.
• Be sure to steer clear of words that contain legalese, such as plaintiff, defendant, shall or hereto.
• Use the parties' own words to describe the agreements and definitions.
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Meeting the
satisfaction of the
parties
• Questioning the parties during the closing stage of a caucus may assist in this process.
• These questions may include:
• Why is this agreement acceptable to you?
• Why is this agreement in your best interest to sign?
• If you look back several years from now, what will you think and feel about this agreement?
• Is there anyone else that you will be explaining this agreement to?
• What will you tell them about the agreement and why it is good, fair, or wise?
• Conducting a post-mediation survey
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Legal
• Make sure that the parties are not making provisions that are contrary to the law.
• If a party makes a suggestion about something that may be illegal, it would be wise to "reality test" with the parties about such a decision.
• The below is an example of the type of statement not to include in a mediation agreement.
• Mr. Claus agrees to give Mr. Rudolph Fifty Dollars (fifty dollars) in marijuana for replacement of back-rent payments.
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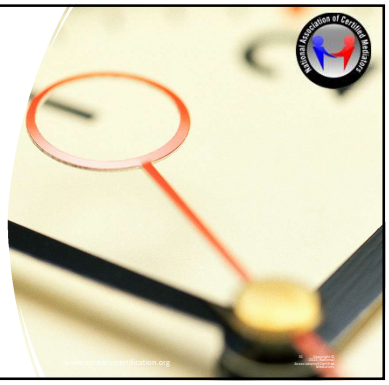
Numbered for **each element**

- After listing elements which require both parties to do something, then list individual obligations incurred by respective individuals.
- Remember to categorize the elements, listing first those categories that appear least threatening to the party undertaking the action.
- This is done to cushion some of the painful issues (i.e., payment of money, return of valuable property, etc.) that are placed at the end of the agreement.



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Numbered for **each element (cont'd)**

- Separate the elements of the agreement; assign a different number or letter to each.
- Do not write a narrative.
- **Example:**
  - *Ms. Greenthumb agrees to mow the lawn when Mr. Sleep is at work.*
  - *Mr. Sleep agrees to wear earphones when Ms. Greenthumb uses her weed whacker when he is at home.*
  - *Ms. Greenthumb agrees to contact Mr. Sleep directly prior to planting flowers on their property line.*
  - *Mr. Sleep agrees to allow Ms. Greenthumb to cut branches from his rose bush that extend beyond her property line.*

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Blame-free

- Do not make criminals out of the parties.
- For example, you would not want to include a statement like, "Mr. Brown will give back the $400.00 (four hundred dollars) that he owes Mrs. Parks for illegally running on her lawn with his vehicle causing tremendous damage."
- Instead this should be worded, "Mr. Brown will pay to Mrs. Parks Four Hundred Dollars ($400.00) in cash or money order for replacement of the sod that was damaged on March 14, 2023."

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Review of key documents

- Mediated agreement
- Survey

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Question & Answer

GET IN TOUCH

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