ACR 2004 Best Practices in Case Management

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Introduction: Case management begins long before your first mediation appointment. As the field of Alternative Dispute Resolution matures, reflective practitioners will find that willingness to mediate or work collaboratively doesn't necessarily translate into cases that are easy to settle. Sophisticated case management protocols are needed to address the special requirements of more complex and higher conflict cases. This workshop will give practitioners a framework for developing their own Best Practices for the changing families of the 21st Century.

Goals:

- Identify Best Practices in case management
- Develop a checklist of case management issues
- Discuss approaches for practical problems
- Focus on ethical issues within case management

Learning Objectives: Practitioners will use the information in this seminar to develop Best Practices Protocols to use in their internal case management systems to allow them to work with more complex and higher conflict cases in an ethically sound and reflective way.

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- Identifying your Signature Style and the Riskin Grids

IV. How to conceptualize and develop your own protocols to deal with the expanding field of ADR in the 21st Century.

I. What is internal case management, as opposed to management of the case?

Internal Case Management is the thoughtful, detailed work of developing, re-developing and re-visiting your office practices, your thinking about how the external mechanics and internal dynamics of cases work, and whether and how you will handle the variety of types of cases you will come across in your practice.

Case management involves your actual office practices, such as:

- Convening cases (getting clients in the door for the services you offer);
- Case review, both a system for regular review as well as more urgent, unscheduled reviews;
- File organization;
- Returning telephone calls and telephone protocol;
- Defining and articulating the boundaries of your roles and functions as well as what services your office provides and does not provide;
- Incorporating your human touch without jeopardizing the case or your ethics;

- Confidentiality and release of copies and information to clients and others, rules for yourself as well as other professionals and staff;

Case management also involves more internal practices, such as:

- Understanding that as professionals we may be "helpers" or "advocates" or a mix of both. In these kinds of roles we'll encounter a dynamic with the client in which the client is using the professional as an *empathetic guide, i.e.,* the professional is bonded closely enough to access the client's trust and understand the client's situation and needs, yet is a separate and trusted psychic entity able to distance himself or herself to still act as a guide. For example, to each party the message is, "I respect your vulnerabilities and hold both your individual and collective needs in mind. This is distinct from any personal agenda or bias I may have. In providing this function for you, I can help you access the more rational and thoughtful, yet feeling, part of yourself. I work with you individually and collectively to mobilize your enlightened self-interest."
- Helping yourself to recharge your energy, both psychically and physically, as the work can be very draining and challenging, *i.e.,* case management as self-care;
- Regaining your perspective, checking for bias, transference, counter-transference, and your own resistance to change or new ideas in a psychically clean environment, so you can avoid becoming judgmental or evaluative;
- Understanding who you are and where your skills can work, the types of cases you can and will handle, and when to refer elsewhere.

Contrasted with Management of the Case: by doing *internal* case management, the *external* case management tends to fall into place. Cases and situations are less likely to take you by surprise, and you know how you'll handle more challenging cases and situations, and when there are problems or fallout, you'll know how to handle it.

II. Why case management is needed, especially in more complex and higher conflict cases

As mediation becomes more well-known and popular, the range of people wanting to try mediation is much broader, and as a consequence you may find your practice with more challenging cases than ever before. In our family law mediation practice, we're finding an emerging trend toward a cultural norm that divorcing couples, parents, former spouses, and families *prefer* not to litigate. As a result, the cases and personalities involved in the cases are more challenging than just a few years ago, particularly in the self-referred mediation cases. We believe the same trend is true of civil cases as well.

In addition, if as a professional you are taking care of yourself and avoiding burn-out, you need case management in order to help you to do this, whether it's streamlining routine office procedures or developing a protocol, both internal and external, for dealing with difficult cases and participants, *e.g.,* domestic violence cases, narcissist/borderline couples, histrionic/obsessive-compulsive couples, dependent/schizoid couples, passive-aggressive/perfectionistic-caretaking couples as well as clients with little self-awareness. When we mention "couples", this refers also to parents and adult children, family businesses, business partners, and even "strangers" involved in business transactions and personal injury cases. While some of the common pairings of difficult married couples may recur in family cases, these individuals are not immune to civil suits as well.

Good case management also helps you minimize the likelihood of liability and safety issues, insurance concerns, malpractice, and ethical quandaries.

Once you practice good case management, it becomes second nature. You'll begin to use good case management as a preventative measure and regular practice rather than as a rescue effort after trouble has already erupted.

Some examples of case management use in our office:

1. A worried client calls attorney-mediator. Mediator knows that client has no legal basis for worrying, as statute clearly protects client's articulated concern. Mediator suggests client call his or her individual attorney, but client says he/she has already done so and has a copy of statute and legal information, yet client still just as worried. Case management: how to identify the difference between actual legal worry (client's articulated problem) and client's actual worry (reading between the lines) and handle client's fears and concerns without stepping out of mediator role or going beyond professional's skills (mediator is lawyer-mediator, not therapist or individual counsel).

2. Infidelity in a high asset marriage has occurred while the only child of a ten-year marriage is a young infant. This has resulted in the mother/wife immediately filing for a divorce. Each session includes highly emotional outbursts stemming from exploration of painful history, namely that their relationship started as the husband's infidelity with his first wife. This seeming repetition of events potentially overtakes the negotiation. Case management: with consent of both clients, co-mediation is practiced from the introductory session onwards for financial as well as child-related discussions. Private sessions for each party and caucuses within each co-mediation session are added and the mediations take place over several months, rather than the more customary and relatively rapid pace of the legal processing of the divorce. Clients are encouraged to bring their draft agreements into their personal therapy as well as to their

individual lawyers, accountants and the child development specialist whom they have consulted with since the child's birth.

3. Wife seeks divorce after husband of 30 years reveals he is engaged in an extra-marital affair that he would like to pursue for his long-term future. This occurs a few months after the violent death of the adult firstborn child of the marriage. Our office is contacted several weeks prior to the first anniversary of this son's death. Case management: with consent of both clients, co-mediation of all issues from the introductory session onwards. An agreement is made between all parties that the commencement of mediation must wait until after the anniversary date of the son's death, which coincides with his birthday. Until mediation commences, the parties will continue to carry out their informal parenting and financial agreements. The husband/father will continue to attend his individual therapy. Wife/ mother refuses to continue with her individual therapy though she is willing to meet with a career counselor recommended by the mediator. Husband/father agrees that wife/mother can have extra telephone time with therapist/mediator as long as he is aware of those sessions after they occur. After the first session, extra co-parenting sessions with the therapist-mediator are added because the only surviving child of the marriage, a teenage son who is not coping well, refuses psychotherapy for himself, though he is interested in meeting with an educational counselor recommended by the mediator to aid in planning for college. Through questioning of the parents the surviving minor son is determined as not harmful to himself or others at this time.

III. Identification of case management issues:

A. Identifying the professional's role vs. the professional's functions

This section was inspired by reading and discussion of Judith Roth Goldman, Ph.D.'s doctoral dissertation 2003.

Role: The professional's role is the position for which he or she has been hired. Some examples: a professional might be a mediator, therapist for adult or child, therapist-coach, collaborative law therapist-coach, evaluator, collateral contact therapist in an evaluation, litigation attorney, mediation support attorney, collaborative attorney, business valuation expert.

Trouble starts when roles begin to blur within a single case. A therapist-mediator cannot also be a treating therapist for one of the parties or the couple. A lawyer-mediator cannot also be one party's individual attorney. A business valuation expert cannot also give tax strategies and advice. Although some mediators practice an evaluative style, they cannot act as arbitrators or ultimate decision-makers. Although many of us are hired for different roles in different cases, each of us has **only one role for each case**.

Function: Although the professional has been hired for a discrete **role**: his or her position or task in a case (therapist-mediator, litigation attorney), he or

she may also be able to use different skills from his or her professional background and have different **functions**, which are necessary or helpful to the client(s) within that one case, *consistent with his or her role in that case*.

What functions you will be comfortable providing within any given role are discretionary within the ethical boundaries of your underlying profession. The examples we've provided below are guidelines only, and are not necessarily where you'd set your individual boundaries with respect to functions you'd fulfill within any given role.

Example:

Therapist-mediator: Role is mediator.

Appropriate functions for therapist-mediator	**Inappropriate functions**
Taking a detailed family history for the purpose of understanding the circumstances of the children's lives.	Treating the children.
Identifying interpersonal dynamics in the couple's interactions that contribute to the couple's conflict	Exploring the couple's dynamic for the purpose of marital reconciliation
Identifying the consequences of the above as it affects the children in the family system	Treating the children
Translating the parties' individual and collective experiences of the conflict by putting words to feelings.	Interpreting the meaning of such experiences to a generalized context beyond the issue at hand.

Attorney-mediator: Role is mediator

Appropriate functions for attorney-mediator	**Inappropriate functions**
Providing both clients with copies of statutes on a given issue	Giving legal advice to one party
making settlement suggestions	insisting on a settlement option
pointing out where differences of opinion might exist	endorsing one option without acknowledgment others exist

referring both parties to several attorneys if mediation breaks down, and stepping down from case	representing one party if mediation breaks down

Permissible functions are completely dependent on the role for which the professional was hired. You'll note that the "inappropriate functions" in this example are inappropriate for an attorney-mediator, but that many of them would be appropriate if the attorney was hired as a litigation attorney or advocate. Likewise, the "inappropriate functions" for the therapist-mediator would be appropriate for an individual's, couple's and/or child's therapist, depending on how the parties originally contracted for treatment with that therapist.

B. Reconciling the different professional cultures among the other professionals involved in the case (*e.g.,* attorneys, therapists, accountants, coaches, child specialists) and working with other professionals

It's important to recognize and understand the different functions within each professional's role. Depending on your own role, it is appropriate to recognize where the other professionals' boundaries and ethical considerations might lie.

Example: It may be expected for a litigation attorney to attempt to get a therapist acting as a collateral contact in an evaluation to give out more information than the therapist's ethics allow. If the attorney's role is as a mediator, however, the expectation of what he or she might ask of the therapist might be different.

Example: It might be expected for a couple's therapist to explore possibilities for reconciliation of the marriage. If the therapist's role is as a mediator, however, the expectation is that the couple is moving forward with the divorce and any ambivalence over the decision is to be explored in another context. The therapist-mediator may raise the issue of the ambivalence as one worth exploring, but not to be resolved in the context of the mediation.

Think twice about your role and permissible functions before acting. Anticipate what each professional's culture might encourage given his or her role in any particular case.

C. Anticipating racial, ethnic, socio-economic and cultural differences and related planning

Some categories of diversity come to mind easily, *e.g.,* racial, ethnic, religious, gender and nationality issues. Others are not so quickly identified

but can influence the climate in the mediation room as much or more than those which are more obvious. A few examples:

- Individuals from cultures torn by war;
- Individuals from traumatized cultures;
- Persons with a traumatic personal history;
- Geographic differences between regions of one country or state, *e.g.,* New Yorker and Californian, Southerner and Northerner;
- Degree of practice within a religion, or Atheism;
- Political leanings, from Conservative to Liberal, but also lifestyle politics, like a vegan lifestyle;
- Socio-economic class.

This list is by no means exhaustive, but designed to help you think about the different issues that create diversity issues in the mediation room.

Within these diversity categories, other nuances may exist which are influenced by all of the above, for example:

- Mores about openness to therapy and helping professions;
- Trust in the government;
- Trust in lawyers, insurance companies, authority in general;
- Trust in the court system, and justice system;
- Willingness to communicate with persons inside and outside the family about financial or personal matters, physical health or family secrets;
- How trauma is handled;
- Parenting styles, *e.g.,* authoritarian, laissez-faire;
- Acceptable gender roles;
- Tolerance for conflict;
- Negotiating styles.

All of these things (and more) can influence what happens in the mediation room.

As a mediator planning for a mediation session, and using good case management, it helps to anticipate where some of the diversity issues may create conflict or impasses to settlement. To advance-plan a session with new parties based *only* on their anticipated ethnic or cultural backgrounds would likely do more harm than good, making it difficult to abandon pre-conceived notions about who the parties are likely to be as individuals once you've started to work with them. Yet, to completely ignore and fail to anticipate likely diversity issues would be equally as irresponsible.

If you find yourself working with particular groups of people often (whether it's Koreans, union members or Southerners), it would be worthwhile to learn more about that group's culture and their norms and mores. It not only gives you

insight into their culture, but also credibility in the mediation room when you can convey that you understand some of the clients' backgrounds.

This section is only a very brief introduction to a vast opportunity to explore diversity in mediation, but a fascinating line of inquiry and an opportunity to bring a higher level of artistry to your mediation practice.

D. Professional consultation, case conferencing and study groups

Therapists are familiar with the idea of case conferencing, and many lawyers belong to study groups. Since many mediators work alone, it is often helpful to review cases in a confidential way with our colleagues, peers and mentors.

Other examples of professional consultation:

- Continuing education and conferences;
- Case conferencing;
- Study groups;
- Mentoring and professional supervision;
- Participation in a listserv or online discussion group;
- Informal meetings and lunchtime discussions, either at your office or more formally at a meeting such as the Los Angeles Superior Court's brown bag "lunch with a judge" series;
- Case conferencing through professional organizations such as the Los Angeles Collaborative Law Association;
- Self-study and reading journals, articles, books.

E. Children's input as part of a mediation or collaborative case

Although this is an issue which most people think of as a family law issue, it can also come up as part of an accident case, in school peer mediation programs or anti-bullying programs, cases involving adoptions, or victim-offender programs as well.

The threshold question is whether you would consider including the children in a mediation or collaborative case. If you will not include children, consider how you will address the questions of parents asking that the children be included.

If you will include children, good case management practices will mean you've considered in advance how and when you'll include children. For example:

- Would you meet with the children separately, or as part of a mediation session or collaborative meeting with their parents?

- If you wouldn't meet with the children, what contact, if any, would you have with the children's attorney or guardian *ad litem?*
- If you'd consider meeting with children, what ground would you cover first with the parents, before the children are in the room or contacted in any way?
- Would you limit your discussion with the children in any way?
- How would you conduct your discussion, given the sensitive nature of the topics you'll cover?
- How will you handle the duty of confidentiality you owe to the parents and to the children? How will you explain your confidentiality policy to the parents and children? Will you have a written explanation, in addition to an oral explanation? Do you want or need a waiver to be signed?

In a family law case, one way for the children's wishes to be considered but without the children having to participate in a mediation session is through a Brief Confidential Evaluation.

The Case for Brief Confidential Evaluations In Child Custody Disputes

by Tara Fass, LMFT, Richard Gilbert, Ph.D., and Diana Mercer, J.D.

Court mandated child custody evaluations (CCEs), Civil Code 730, are well-intended investigative instruments designed to aid bench officers in resolving custody issues. They have numerous shortcomings, however. By way of background, in the past, a CCE would start within a few weeks of the original order and take approximately 6-8 weeks to conduct publicly through Family Court Services or through private practitioners, and settle either in or out of court. In Los Angeles, the current wait time varies, but is never less than two, and can be up to, four or more months to commence. Civil Code 1257.3 was adopted in 1999, ushering in the present era of court ordered partial evaluations, which are known in the field by several different names. The court's version is the Fast-Track Evaluation which routinely includes oral testimony, but not a written report, by the evaluator. This quickly replaced the term Mini-Evaluations because the nomenclature was roundly viewed by everyone as having being inferior. Allen Gottfried and Kay Bathurst developed the methodology and coined the term for Focused Issue Evaluations, which generally includes only a written report, while Rapid Response and Limited Scope Evaluations are yet other terms in use.

The idea behinds partial evaluations came into being as a practical and clinical solution to the problem of the overwhelming case load leading to delays

in decision making as well as the fact that some CCE's involved non-clinical parents and specific, time-sensitive issues such as whether or not overnights should be granted to the non-custodial parent of an infant, where a child would go to school or would a child be allowed to move-away from the legal jurisdiction. The goal was for these shorter evaluations to be completed and heard within one or two weeks of the initial court order requesting it. Ironically, these instruments are also in such high demand that the waiting time in court to start the fast-track evaluations is as long, or longer, than what used to be the optimal timeframe for conducting the full CCE. Paradoxically, approximately a quarter of all court generated fast-track evaluations recommend full evaluations as part of the evaluator's testimony and recommendation.

Additionally, for some time now it has been recognized that all too often, an unintended consequence of the full and partial CCEs has been that the evaluative process, in itself, not only prolongs the time and money spent in court, but also adds to the despair and dysfunction families experience as they struggle to heal and regain stability post-separation. The conventional wisdom increasingly is that court-ordered processes have become iatragenic to divided families, meaning that the 'cure' worsens the 'condition.' A by-product, or dual purpose, of the partial CCE's was the hope it would address the harsh reality that the family court system needed to find ways to speed up its work because it could not increase its capacity fast enough to keep up with the burgeoning case load and that many cases bound for a CCE were not clinical type cases. The increasing awareness is that while these newer instruments are clinically and legally interesting in terms of approaching divided family issues, the problem remains that it takes place within the system that appears to be not only iatragenic, but collapsing under its own weight, particularly in light of today's looming budget deficits.

This is why the promise and purpose of mediation, which is to resolve disputes by means other than litigation, has been the best idea in family law for the last twenty years. It is true though, that at times, couples involved in mediation find themselves deadlocked regarding important issues of custody and/or visitation. In response, one or both parties may wonder what the disposition of these issues might be if they were litigated rather than resolved through mediation. Forrest Mosten in his textbook, The Complete Guide to Mediation (1997), proposes the use of a hybrid mini-evaluation, called the Confidential Mini Evaluation. We propose calling this new and promising tool in the field of mediation a Brief Confidential Evaluation (BCE) because it highlights the brevity and confidentiality of this instrument. From an attorney's and a client's perspective a BCE has a number of significant advantages over court-ordered custody evaluations.

First there is the issue of confidentiality: BCEs are private and discreet, whereas, in contrast, court-ordered custody evaluations are conducted in a public forum. Privacy is particularly important if your client has a high-profile or engages in an eccentric or questionable lifestyle. No portion of the BCE would be admissible as evidence in court and the evaluator could never be called as an

expert witness in the case. The BCE could be seen as an excellent discovery technique and could reduce the risk of miscalculating your client's ability to "win."

Second, you and your client define the parameters, the timing, whether or not there is a written report and if collaterals or the children are interviewed. Unless there is a compelling need that is endorsed by both parties, the child or children who are the subject of the dispute are not included in the BCE. While information obtained from the child or children is always included in a court-ordered evaluation, and can be helpful and important, BCEs make every effort to shield the child or children in question from the stress and loyalty issues often generated by a formal custody evaluation.

By having a BCE, conducted by an evaluator with experience in court-ordered evaluations, the parties can learn the process, and likely outcome, of a litigated approach to the contested custody issues without having to go to court or leave the mediation process behind. In many cases, the knowledge derived from the BCE can help break the existing impasse and increase the likelihood of finding a mediated solution to the relevant issues. In this way, the parties can avoid the considerable time commitment, cost, stress and exposure involved in pursuing a court action. If nothing else, perhaps the parties can gain a perspective on their situation that had not previously occurred to them.

Even if the mediator has a sense what the root causes of contested issues might be, in order not to develop and dual relationship and to maintain neutrality, the mediator cannot deliver such insights or information. Besides, most mediators in family law are not child development specialists informed of the current research in child development and divorce-related issues. In choosing an evaluator, the parties must be confident that great value is placed on conducting evaluations which are fair and impartial toward each party, respect the value of both parent-child relationships, and maintain a consistent focus on the best interests of the child or children that are the subject of the evaluation.

Added value to the BCE, and congruent with one of the fundamental values of mediation, is that to the extent possible, the parties should be self-determining. For instance, if one of the recommendations is for one or both parents to have therapy or parenting classes, if the parties can grasp the wisdom of those recommendations they can maintain face and pride by voluntarily entering into treatment, without having to be ordered, and not risking tainting the treatment or the mediation. The attorney has strengthened the case by having more manageable as well as more presentable clients. If the case were to litigate, the evaluative process would have to start over, though there could be an opportunity to mediate after the BCE and before court.

Thirdly, BCEs offer rapid results at a lower cost than a full CCE. The entire BCE, from the initial interviews with each party to the communication of findings and recommendations, can be completed in one to two weeks, based upon the availability of the parties. This is in contrast to court-ordered custody evaluations which often take six months or more from the time the evaluation is ordered to the submission of findings and can be extremely expensive, often costing seven or eight thousand dollars or more, without any guarantee of the

final expense. Because it is customary to bill full evaluation services on an hourly basis, the parties are unaware at the outset what the eventual cost will be.

In contrast to the BCE, there is a fixed cost for 10 hours of service, generally in the ballpark of $2750. This cost covers all interviews with the parties and collateral contacts, administrative expenses incurred by the evaluator, time spent reviewing the parties' questionnaires and any written materials, as well as a feedback session to go over the findings and recommendations with their mediation team. Thus, BCEs avoid having the parties go through a protracted period of stress and contention while having the child or children remain in a custody and/or visitation arrangement for an extended time that may not be in their best interests.

The steps leading to a BCE are simple and straightforward. After a divorcing couple decides to initiate a BCE, each party is sent a questionnaire to fill out. The questionnaire asks them to provide information regarding their personal, family, and marital history, their perceptions of the child or children's developmental needs, and their views regarding the most desirable custody or visitation arrangements. In addition, parents are asked to provide contact information for important collateral relationships in the child or children's lives (e.g., a nanny or other important, substitute-care provider; a pediatrician; a teacher; a therapist, etc.) and release granting approval for the evaluator to speak with these individuals.

After completing the questionnaire and collateral contact information, the parties forward their written materials to the evaluator along with full payment for the evaluation. The evaluator will then contact each party and arrange initial, individual meetings. The purpose of the initial interviews is to review, clarify, and expand upon the information provided in the written materials. The initial interviews generally take about 1.5 to 2 hours each. After the initial interviews, the evaluator will conduct telephone interviews with relevant collateral contacts and then arrange an hour-long follow-up interview with each party, including the children, if the parents agree that is necessary. Finally, the evaluator will organize the findings and recommendations of the evaluation and arrange a conjoint meeting with the parties and the mediation team to orally communicate the results.

Time Estimates for Steps in a BCE

TASK	**TIME ESTIMATE**
Reviews Questionnaires/Written Materials	**1 hour**
Initial Interviews with each party	**4 hours**
Telephone Interviews with Collateral Contacts	**1.5 hours**
Telephone Follow-up Interviews with each party	**1.5 hours**

Organization of Findings/Preparation for Feedback Session	**1 hour**
Feedback Session with the Mediation Team	**1 hour**
Total	**10 hours**

F. ADR as a therapeutic process vs. therapy itself

The discussion of the therapeutic elements of mediation *versus* how therapy differs from mediation could be the focus of an entire presentation. What follows is a brief overview.

In the therapeutic literature, one of the hottest topics is that of *inter-subjectivity* and a *relational approach* to understanding therapeutic change. According to Stuart Perlman, Ph.D. (2003):

> "In my view, the terms describe an assumption – that therapeutic interchange occurs within the context that includes two separate, mutually interacting subjectivities. Within the context, I am always interested in the nature of the patient's inner world, but assume my *knowledge* and *feeling* about the patient to be inextricably linked to the patient's experience of me. This mutual embeddedness is so complex that I cannot, in fact, ever "know" that I am "right." My subjectivity describes the omnipresence of my own personal reactions, thoughts, and feeling states. It is inevitably reactive to the patient and also reflective of my own self-state at any particular moment. These concepts are implicit to a variety of relational theories (see, *e.g*. Mitchell, 1988, Hoffman, 1991; Stolorow, Atwood and Brandchaft 1992 Stolorow, 1995)."

Inter-subjectivity speaks to the mutual shaping that transpires in the relational bonds between human beings that is the basis for all outcomes, positive or negative. An example might be that of a distraught infant who, in arching his back and looking away, is communicating very specific information. Instead of attempting to override the behavior and turn the infant back to face the parent by pulling on the baby's arm, the parent able to "read" this infant's disregulated behavior may react very differently. She (or he) would look a quarter turn away from the baby while using a soft tone of voice to calm him down and woo him back, and if possible not touching the infant at all while doing this. Intersubjectivity occurs when the parent's acknowledgment that the child is overwhelmed is counter-balanced with the parent's need for an expedient outcome. The parent's desire for the child to go into the carseat does not override the infant being overwhelmed and the child's need to return to the relationship on a different timeline and in a

different manner than the parent has in mind. It's a way of *cultivating your influence*, rather than imposing your will.

In terms of mediation, it may be that a financial settlement is being discussed and one client develops a lost, faraway, blank look on her face. The mediator notices this non-verbal behavior and comments on it by verbally checking in to see what the client is experiencing before continuing the discussion. Intersubjectivity is the willingness of the mediator to tune into and act upon an understanding which the mediator has formed based on his or her sensitivity to micro-expressions as well as verbal cues in forming a bond with the client as a way of advancing the mediation agenda.

This mutual shaping occurs through the process of developing rapport, understanding, connectivity and empathy. Engaging with our clients in this way we become what we call the *'empathetic guide.'* We attempt to do this while maintaining neutrality and without over-stimulating or further dis-regulating the clients. In the example of the baby above, though we might need to strap the baby into a car seat, the effort should be directed towards calming the baby down first to complete that task without forcing the child so quickly, hoping to distract the infant with a car ride. In so doing, we cultivate an innate understanding with the child that he or she can trust our intentions to meet the his or her needs the next time a situation like this occurs, even if our means of doing so are not obvious to the child. In the case with the mediation client, the idea is to stay on track with the client's individual pace and to understand how and when a client becomes overwhelmed so that we can better address their concerns in order to move through the mediation process and build the foundation for a strong agreement.

This is the standard we strive for in all the various phases of building a relationship with and dealing with mediation clients. While becoming the *'empathetic guide'* is the goal, we also realize the boundaries of that role within the mediation context. It is our responsibility to make the process as therapeutic as possible *without* confusing a therapeutic approach to mediation with therapy itself.

For example, in our work with mediating the entire divorce, a couple might learn how to communicate better, and be given tips directly tailored to their situation to better insure their respective messages are heard. This is where the therapeutic element of mediation would likely end. In therapy, however, a couple with communication problems might also explore how their family of origin dynamics have lead to the problematic behaviors and attitudes that impinge upon their communication.

G. Product vs. process, and pacing a case

Essentially, product vs. process is about giving clients what they ask for *and* what they need in a timely fashion. Oftentimes clients profess they that to work quickly through the agreement without getting into the underlying emotional issues, yet are then uncomfortable if they reach an agreement more quickly than they'd anticipated. Or, more commonly, it becomes

obvious that the impasses are generated precisely by the unexpressed, awkward and often painful material that is imbued with unresolved dramatic, even traumatizing, feelings.

While the application of "product vs. process" is most obvious in a family law case, an individual's unresolved emotional issues surrounding a negotiated agreement aren't limited to family law. Accident cases involving severe, lasting injuries or financial hardship, dissolution of business partnerships, neighbor disputes, malpractice claims, criminal victim/offender matters, and even the shame of being involved in a collections lawsuit can stir feelings in even the most stoic individual.

Often it helps to make the mediator's quandary transparent. For example, the mediator might say, "I've been instructed by you that there are only 3 hours to spend in this session, and you want to leave with an agreement on every issue. I want to help you accomplish what you've set as your goal, yet here we are spending time talking about your interpersonal dynamic and past arguments. I think it might be helpful if we dedicated some time to talking about the emotional issues that are making it hard to get to the business you've told me is important to resolve. What do you think?"

In a counter-intuitive fashion, slowing the discussion down to talk about these "non-business" issues actually speeds up the process, eliminating some of the checkmates and standoffs, arguments and outbursts and the more subtle forms of sabotage that can derail a mediation session. It's a version of "taking the temperature" in the mediation room. Being transparent about the mediation process, checking with each of the clients (and representatives) about the pacing of the case, and articulating deadlines (both real and self-imposed) can help keep the psychological agreement process from being de-railed by the legal agreement process, and *vice versa.*

It is the job of the seasoned mediator through case management to regulate the flow of difficult subject matter to know when to slow down to attend to the process that then clears the path to proceed in a sound way with the task-oriented business of building the agreement.

H. Maintaining confidentiality and other ethical pitfalls

Confidentiality protocols that are unique to your profession or office need to be articulated to the clients. This should be done clearly, and in writing.

For example, in our practice, we maintain that all caucuses are confidential unless we are permitted by the party in the caucus to reveal information to the other party. The opposite policy may be just as useful and valid (*i.e.,* caucuses are not confidential), but whatever policy you establish must be discussed with the clients before confidentiality becomes an issue.

Mandatory reporters also need to be clear, even if they think clients already understand, about their requirements to report suspected child, elder or dependent adult abuse, clear and present danger to another person, and so forth.

As part of our opening session, we also discuss what documents that we anticipate that clients will share with other persons, and with whom. Typically, clients will want to take their mediation summary letters and any legal papers we've prepared to their attorneys, therapists or accountants. As part of our initial discussion, we'll articulate that we anticipate this. But do clients want to share information with others, such as family and friends? Dealing with these questions in advance is important.

In order for our office to send copies of mediation summary letters to anyone other than the parties or their attorneys who are present at the session, or court papers, we require a release:

Date: October _____ 2004

Client Client

RE: Release of Information

We hereby grant permission for our mediators, Tara Fass, LMFT, and Diana Mercer, Esq., of Peace Talks Mediation Services, to discuss our mediation sessions, positions, the mediator's opinion, our discussions and issues with our lawyers, and to release any and all documents in their files to:

Attorney for _____:

Name: _____

Address: _____

Telephone/Fax: _____

Attorney for _____:

Name: _____

Address: _____

Telephone/Fax: _____

We realize that this Release means that the content of our mediation sessions is no longer confidential between ourselves and our mediator, and that we are

waiving the confidentiality provided by law to the mediation process as it may otherwise have applied to our attorneys. We realize that the information revealed by our mediator may concern both ourselves as well as the other party in mediation, as well as the dynamics between us. Failure of one party to sign this release means that the mediator may not discuss our case with either of our attorneys, for we both must waive the privilege in order to permit our mediator to discuss our case with our attorneys.

We agree to indemnify and hold our mediator harmless on any damages of any nature, which result due to this release of information, which we are permitting. We agree that we are jointly and severally liable for the charges for the mediator's time which result based on these discussions, and agree that these charges will be billed according to our Agreement to Mediate.

_____	_____
Client Name	Client Name
Date:	Date:

OR:

Date: _____

Client Client

RE: Release of Information

We hereby grant permission for our mediators, Tara Fass, LMFT, and Diana Mercer, Esq., of Peace Talks Mediation Services, to request copies of the court papers which have been filed in court on our behalf, as well as financial disclosures which have been or will be exchanged as part of the disclosure process in our divorce.

Attorney for _____:

Name: _____

Address: _____

Telephone/Fax: _____

Attorney for _____:

Name: _____

Address: _____

Telephone/Fax: _____

_____	_____
Client	Client
Date:	Date:

I. Using caucuses and separate appointments

There are pros and cons to using caucuses and separate appointments as part of your case management.

Whether and when to use caucuses is the subject of much discussion among mediators. Some mediators use only joint sessions, some begin in joint session but leave the option of caucusing open, and other mediators begin mediations with individual sessions/separate appointments (like a caucus) and only after the mediator has met with all parties individually will the parties and mediator meet in joint sessions.

The civil mediation model typically uses caucuses either from the beginning, with the parties always separated, or after a very short joint session that simply outlines the facts of the case. Family mediations often minimize the use of caucuses, yet caucuses can be a very useful part of the family mediation process as well.

For the purposes of this section, we'll use the word "caucus" to mean both an individual session within a joint mediation session as well as an individual appointment scheduled by a client when no joint session is scheduled.

Christopher Moore has articulated some of the reasons and benefits of using caucuses as outlined in his book, *The Mediation Process* (Wiley/Jossey-Bass, 2003):

Caucuses Adapted from Christopher Moore's *The Mediation Process* (Wiley-Jossey Bass 2003)

Internal dynamics, which may make caucuses helpful:
- Problems with the relationships between the parties or within a team
- Problems with the negotiation process
- Problems with the substantive issues under discussion

Other useful features of caucusing:
- Provides parties with a break if joint session is too intense

- Refocus the motivation of the parties on why a settlement is important and the alternatives to a negotiated settlement (you can ask a lawyer in front of the client what the weak parts of the case are)
- Reality testing
- Act as a sounding board
- BATNA
- Uncover confidential information that may not be revealed in joint sessions
- Control communications of parties and help them focus, helps eliminate emotions when you separate them
- Educate an inexperienced disputant about negotiation procedures or dynamics
- Prevent a party from making premature concessions or commitments
- Moving a party off an untenable or hard-line position
- Develop a single-text negotiating document when parties too numerous, issues too complex, or emotions too heated for face-to-face encounters
- Develop settlement alternatives in an environment that separates the process of generating options from that of evaluation
- Determine if an acceptable bargaining range has been established (or create one)
- Design proposals or offers that will be later brought to joint session
- Test the acceptability of one party's proposal by presenting the offer to the other party as an option generated by the mediator rather than opposing party
- Make appeals to common principles or goals
- Express your own perceptions of the situation and maybe make settlement suggestions

Timing, location are both important. Explain at beginning of mediation whether you may use a caucus, and under what circumstances.

If you caucus with one party, always caucus with the other party, too, even if it's short.

Protocol—up to the mediator to do:
- Educating the parties about the technique
- Overcoming resistance of the parties to separate meetings
- Making the transition to the caucus
- Deciding who to caucus with first
- Determining the duration of the caucus
- Determining what is said in the caucus
- Facilitating the return to the joint session

Despite the benefits to be gained from a caucus, however, many family mediators prefer to work without them, or mostly without them. As a family mediator, it's easy for parties to develop a "conspiracy theory" about what is

happening in a room from which they've been excluded. Using or not using caucuses is not only a matter of the mediator's preference, but also the perceived needs of the parties, and the parties' tolerance for individual appointments, knowing that there will be a time when the mediator is meeting alone with the other party.

Deciding when and how to use caucuses is part of good case management.

J. Protocols for domestic violence

Before deciding whether you'll take domestic violence cases, or victim/offender cases, or any cases involving volatile individuals, for mediation, ask yourself:

- What is "domestic violence" (or other safety-related concerns) and where will you draw the line?
- How will you know when you've got a domestic violence (or safety-related concern) issue in a mediation case?

You'll need to develop your own **Screening Procedures** to make sure you take cases only within your realm of expertise and professional comfort.

We'll use the term "domestic violence" in these materials, but the same screening protocols also apply to any situation involving safety issues or volatile individuals.

There is a wealth of information on how to screen for domestic violence, and this section clearly provides *only* some cursory food for thought on the subject. Be sure you have an adequate screening protocol in place before even considering accepting a domestic violence case, however.

Ways to ask about domestic abuse:

- Tell me about your situation
- Do you feel you can tell the other party what you really want?
- Is there any reason why you and the other party should not sit down to try and work out [any issue]?
- Do you feel comfortable meeting with the other party to discuss these issues?
- Do you have concerns about sitting in the same room as the other party?
- Do you have concerns for your safety?
- Do you have any orders for protection in effect? Have you ever gotten an order of protection?
- Are you afraid of the other party?
- Has the other party ever threatened or hurt you?
- Have you been abused?

For more screening suggestions, there's a great article on www.mediate.com. Search the subject line "domestic violence" for their very thorough article on domestic violence screening.

"Red Flags" That Abuse has Occurred in a Relationship

1. Observation of threatening, controlling, intimidating behavior toward one party to the mediation by the other;
2. The report or observation of obsessively jealous, possessive, suspicious or accusatory behavior toward one party to the mediation by the other;
3. Unusual timidity or fearfulness of a party in mediation. Efforts by a party in mediation to avoid any conflict with the other party, the potential abuser. The party may also dismiss what sounds to you as abusive behavior;
4. References to the other party's "anger problem". A suspected victim says that the children don't like to visit the other party;
5. A party, the suspected victim, assumes responsibility for the other party's problems, behavior, etc.;
6. Physical, social and/or financial isolation of one party by the other (e.g., limiting phone use, travel, contact with friends or family, or access to money);
7. Unusual history of injuries—frequency or severity. Often injuries are attributed to "accidents" or "clumsiness";
8. Unstable job history of a suspected victim—possibly due to injury or harassment at the workplace by the potential abuser;
9. The suspected victim moved out of the house in a hurry, is staying with a friend, has no personal belongings;
10. A party is very concerned about confidentiality;
11. A party seems anxious or in a hurry;
12. Alcohol or drug abuse, along with other red flags.

Adapted from "Recognizing and Working with Domestic Abuse" by Denise Wilder, MSBA Family Law Forum, March 1996, Vol. 8, No. 1

Before you consider taking a domestic violence case for mediation, also consider: What are the risks in mediations where there has been domestic violence between the parties?

- For you – lack of sufficient security, personally and for staff in and out of the office before during and after the mediation;
- For them – same;
- For the mediation process.

Will you handle mediations in which there has been domestic violence? And, will you have a choice? What will you do if you end up with a case in mediation, realizing too late that there has been domestic violence, or more domestic violence than you'd anticipated, based on your initial screening?

There are pros and cons to accepting such cases. But what's in between? And where will your office policy fall?

- No—never appropriate;
- Yes—if the abused party is clear about wanting to mediate;
- Yes—if screening and you feel the abuse wasn't that severe;
- Yes—always, with safeguards.

Also, understand what saying "no" to handling those kinds of mediations may mean:

- For you and your practice
- For the participants

If you decide to handle mediations in which there's been domestic violence between the parties, what are some of the issues?

Safety Planning

Before Mediation

- Use screening techniques;
- Be prepared to make referrals if mediation isn't appropriate;
- Make sure mediation session won't violate TRO or Domestic Abuse orders---if the parties still wish to mediate, enter into written agreement & file with court that mediation will not violate "no contact" orders. This agreement protects both sides.

During Mediation

- Only mediate if you're experienced, or better yet, co-mediate with an experienced mediator;
- Use separate waiting areas and stagger arrival and departure times;
- Use an escort or an advocate for the abused party to/from/during the mediation session;
- Invite both parties' attorneys to attend the mediation;
- Use caucuses—and perhaps use them exclusively, never meeting with the parties in the same room;

- Use ground rules, and let the parties know you can terminate the mediation at any time at your discretion. Put this in your Mediation Agreement;
- Be alert for signs of intimidation;
- Plan the room set up and seating arrangement;
- When you terminate the mediation, stagger departure times; let the abused person leave first, provide an escort;
- Mediate when other people are around in the building;
- Have an "emergency" plan in case abuse arises during the mediation or your physical safety is threatened.

In the Agreement

- No provisions that require contact between the parties;
- Consider using trial or temporary agreements to see if workable (e.g., supervised visitation with neutral 3rd party) with report back time frame to neutrals.

Adapted from Family Law Mediation Training (Summer 2001) Domestic Abuse Supplement

K. Dealing with high conflict cases – as opposed to domestic violence?

There is a difference between high conflict cases and domestic violence cases. Most domestic violence cases are high conflict, but not every high conflict case involves domestic violence.

Many of the domestic violence protocols may also be useful in high conflict cases. For instance, in cases that involve intense verbal dynamics and emotional manipulation, caucuses and separate appointments may be the best way to manage the tension between the parties as well as to keep to the mediation agenda. Too much conflict in the room may derail even the most settlement-motivated parties.

Be ready to set clear ground rules, and be ready to enforce them. Give the parties input into the ground rules. One example from a previous case: both parties agreed to avoid "mind reading" and putting words in the other party's mouth. A way to phrase this positively would be that everyone speaks for themselves, not the other party, and the mediator will insure that both parties get a chance to speak.

Also be ready with specific interventions in mind. For example, you may wish to set aside time for an Opening Statement or another forum for venting prior to getting started with the session. One way to start without using an opening statement is to take some basic background information from the parties to get them started talking about their situation but in a neutral way. Some

mediators might restrict the discussion to legal divorce topics only, and stay ready to enforce that restriction.

If the parties won't stop arguing, the mediator might say, "I've been instructed by you both that there are only 3 hours to spend in this session, and you want to leave with an agreement on every issue. I want to help you accomplish what you've set as your goal, yet we're spending most of our time talking about 'he said, she said' issues from past arguments. Would it be useful to dedicate some time to talking about the emotional issues, or would you prefer to stick with the original agenda?"

These are only a few examples of interventions, but good case management means that you will have anticipated the dynamics in the room in advance based on your intake procedure, and you will have suitable interventions ready. Even if you don't end up using the planned interventions, being prepared will help you stay relaxed and confident in the room when the parties are having trouble getting through the discussion.

L. Convening

Convening Mediations: Turning Calls into Clients

By Forrest S. Mosten and Diana Mercer, Attorney-Mediators, copyright 2002. Forrest S. Mosten is the author of the *Mediation Career Guide* (Wiley/Jossey-Bass 2001). He is a full-time attorney-mediator in Los Angeles, California.

The key step in building a mediation practice is bringing in clients. When we think of generating business our minds naturally turn toward external marketing: speaking engagements, writing articles, networking, playing golf. We sometimes forget that our most valuable marketing contact—the client who actually telephones our office—is our most viable marketing prospect.

Consider how much time, effort, and money that it took to have that person actually contact your office. Every networking luncheon, paid advertisement, volunteer mediation and Yellow Pages ad is designed to make the telephone ring. Yet when it does, few of us are as prepared as we need to be to turn that interested caller into a paying client. To ruin that golden opportunity by stammering on the phone, unprepared to discuss the concept of mediation and your particular type of practice, means that the rest of your marketing efforts are nearly wasted. So let's focus on what you do when the telephone rings.

That ringing telephone signals the beginning of a process called *convening*, or getting both sides to the table. Do you know what your call-to-client ratio is, *i.e,* how many times does it take the telephone to ring until a call turns into a paying client? Knowing your call-to-client ratio from each of your sources of referrals, as well as your overall ratio, is important in order to know which of your marketing plans is working, and which is cost-effective.

Who will take your telephone calls? Is it a receptionist, unskilled at mediation and unable to answer even the most basic questions about your services? Is it a Dispute Resolution Associate, trained in mediation and in convening? Will you take the calls yourself? A general receptionist is fine if you're taking the calls yourself to do the intake, but you may want to rethink the strategy of having your first line marketing person be someone who knows little or nothing about you or the mediation process. A Dispute Resolution Associate is a helpful addition to your staff (the general receptionist, with a 40-hour training course, also enhances your ability to convene cases) because he or she can answer many of the client's questions, assist with or independently handle the intake, and send out marketing materials. For beginning mediators and new practitioners, finances may dictate that you're doing your own intakes, but plenty of seasoned professionals choose to do so as well, because they feel they do their best selling themselves.

After you've decide who's doing the intake, what model will you use? Will you spend a few minutes taking down basic information, off the clock, and then send out your brochure, marketing materials, or a follow-up letter? Will you then schedule an orientation session? Or will you combine the orientation session with the intake session, with the telephone call lasting 15 minutes or half an hour with each party? Many lawyer-mediators prefer the short intake, coupled with an orientation session (either free, or for a modest charge), and many therapist-mediators prefer the long intake. Both work, and both have pros and cons. Have a plan for your intake so you handle it consistently, and you know what works for you.

You'll want to have an intake form handy for each call. You can combine prompts for yourself, such as concise ways to describe your background and services, as well as mediation in general, with blanks for basic information such as name and address of the parties. A critical part of the intake form is where the client heard about your services. You'll use this information to track the efficacy of your marketing efforts.

The next piece of information you need from the caller is whether or not the other party is aware of the first party's desire to mediate. Is the other party even aware that the call is being placed? How you handle the call from there will be based on whether or not the other party has already agreed to mediate.

For cases in which the parties have already agreed to mediate, your intake is then geared toward selling the potential client on your services. What do you offer that other mediators do not? Why should the client choose your services above someone else's? You may wish to write a short script or series of sentences, which you keep by the telephone in case you get tongue-tied on the phone.

Many mediators offer a free orientation session (or session for a fraction of their usual hourly rate) in order to supplement the intake. It allows the parties to meet you together, and to see how all of you interact. At Mosten Mediation Centers, these orientation sessions are conducted by Dispute Resolution Associates, trained mediators who convene cases for other mediators. The orientation session is free of cost. A distinct advantage of this model is that the

clients may ask as many questions as they want, choose their mediator and pay the mediation fees without fear of biasing the mediator. The mediator meets the client for the first time at the first mediation session, eliminating any "conspiracy theories" about mediator favoritism of the party who called first, or who paid the bill. At Peace Talks, the mediator conducts the orientation, and uses that time to build trust with the parties, let them know about common obstacles to reaching an agreement and to gather information for later planning prior to the session.

Once the orientation is complete, a mediation session is scheduled for another day. Although you could schedule the mediation to begin directly after the orientation session, if the clients have decided not to use your services, you then have several hours of empty time in your calendar. If you go directly into a mediation session from the orientation, it can put people under pressure to stay when they hadn't planned to do so.

If the other party has not agreed to mediation, or is unaware that the telephoning party is interested in mediation, you will handle the intake process differently. The first hurdle is how to contact the other party. Is it best if the telephoning party does it? Or should the initial call come from your office? Will you place the call yourself, or have someone else on your staff make the contact? Is it advisable to do it by telephone at all, or would a letter be more appropriate? These are issues, which you can discuss with the caller to determine the most appropriate way to proceed. If the parties are represented by attorneys, you can contact the attorney who represents the other party easily enough, but make sure that your caller understands what you'll be doing, and agrees with your approach.

Once a call has come into our offices, an information package is sent to the caller, and the other side as well, provided the other side is aware of the mediation request. If the other side is unaware, discuss with the caller whether to send him or her 2 information packages, so that one might be shared with the other side via the caller, or whether it would be appropriate to send a package to the other side directly from your office, either before or after the desire to mediate has been communicated. Our policy is to never send an unsolicited package of information, which may give an unsuspecting adverse party an unnecessary shock.

Our information packages are made up of pre-printed brochures for our different services, as well as folders of information, which are pertinent to the particular type of case involved. You may wish to include your business card, copies of articles you've written, your firm newsletter, articles on mediation, your mission statement, your fee agreement, Association for Conflict Resolution brochures, copies of the Professional Standards for mediators, a short biography of yourself and your experience, pointers on how clients can prepare for their mediation session, and anything else which will differentiate your services in the marketplace as well as help gain the clients' confidence that you can help them settle their dispute. The advantage of using a folder is that you can mix and match your materials for different types of cases. It's hard to cover all the bases in just one brochure, and even if you do, will the client have confidence that you have enough experience in his or her area of dispute to be of assistance?

Thoughtful convening is the bridge between marketing and building a practice. By determining in advance the procedures you'll use, what you'll say to clients, and how you'll cultivate those calls into paying clients is the key to developing a profitable practice.

M. Handling follow-up

There are several aspects to handling follow-up which you will want to consider. This list is by no means exhaustive, but provides a starting point for post-case case management:

- Will you accept telephone calls from each party individually in between sessions? Or only conference calls? If so, how many calls, and how long may they last? Will you charge for the in-between calls, or will some or all of them be free of charge? What will you do if one party calls repeatedly, but the other party doesn't call at all? Are there any limits on what subjects you'll discuss with the parties in between sessions?
- Will you do a mediation summary letter or deal memo between sessions, or at the end? Will you provide the clients with anything in writing generated by your office memorializing their agreements?
- Will you do any or all of the legal paperwork required to complete the legal proceedings? If not, will you make suggestions as to how it can be completed, or guide the parties if they wish to do it themselves?
- How strongly will you advise the parties to consult with an attorney if they aren't represented? Will you insist? From the beginning, or by a certain point in the negotiations? And when will you *recommend* that they do so, but not *insist*? Will you provide referrals to specific attorneys? How may referrals to each party? The same referrals, or different referrals? Will you insist that the parties bring their attorneys to the mediation session? Will you exclude attorneys from the mediation room?
- How strongly will you advise the parties to engage in individual therapy, or therapy for their child(ren)?
- What will you do if one party wants to return to mediation, but the other party does not want to continue? How hard will you push, and what steps will you take, to re-convene the mediation?

N. Billing management

How will you handle your billing? And what types of services will trigger additional charges beyond the hourly fees for mediations?

Some examples are:

- Hourly rate, pay by the hour, either with a retainer or payable contemporaneously as hours are used;
- Flat fee for ½ day or full day;
- Retainer for a specific number of hours, to be replenished when those hours are used up;
- Flat fees for certain services, like paper preparation, and hourly fees for others, like mediation time;
- One inter-session telephone call up to 15 minutes free of charge for each client, all other telephone calls billed at hourly rate;
- Flat fee for file set-up or convening.

Payment plans can vary, and may include:

- Accepting credit cards for payment;
- Accepting post-dated checks;
- Using a retainer;
- Using a replenishable retainer (client pays retainer *and* by the hour, each month's bill is to be paid by client, not taken from retainer, and retainer is refunded after client pays in full for hourly charges after case is completed);
- Having clients pay as they go only, with no retainer;
- Committing to taking a specific number of *pro bono* cases;
- Using a sliding scale based on client's ability to pay.

O. Making referrals to other professionals

When clients need services outside your role as mediator it is time to make a referral to another professional. In the examples given earlier, the client and her son who were opposed to psychotherapeutic counseling were open to occupational and educational counseling, respectively. In other situations it may be obvious when a client needs a referral, such as when a client needs tax advice or a business valuation.

Keep a list of qualified professionals who are truly supportive of the mediation process on hand and up-to-date. Clients appreciate having a good referral, as do the professionals.

Keep in mind, however, your ethical duties with respect to referrals. Some legal malpractice policies require lawyers to affirmatively state that the other attorneys to whom they make referrals also have malpractice insurance, and therapists are required to make at least 3 referrals when referring to other therapists.

P. When to let clients go, both temporarily and permanently

Not every client is worth working with. Seasoned practitioners have their own boundaries (and horror stories) about what clients are worth working with and which are best refused. Our rule of thumb is that the cases which are too difficult to convene are that way for a reason; we could spend as much time trying to get some parties to agree to mediate as they spend mediating their case. As the demand for mediation grows, and our practices grow, it's natural to stop trying to convene these more reluctant cases sooner and sooner into the convening process.

By setting limits on how hard you'll work at convening cases, you also regulate your office workflow. Resources are dedicated to convening cases. Could they be better allocated toward providing better, speedier, more thorough service to existing clients, or in cultivating new clients or referral sources?

Setting limits on the *types* of cases you'll take is also important: will attorney-mediators handle any litigation cases in the "non-mediation" portion of their practices? Will therapist-mediators have any individual therapy clients?

You may also put limits on the types of mediation cases you will take. For example, if you're a family law mediator, will you handle cases that have domestic violence issues, or emotional abuse claims? Will you handle same-sex union cases, or just divorces? As an attorney-mediator, how deeply will you delve into hotly contested custody disputes? As a therapist-mediator, how deeply will delve into the financial issues?

And, at what point will you give up on cases that seem to be falling out of mediation? How hard will you—or should you--push clients to come back into mediation? What are some of the strategies you will use to encourage clients to come back?

As we work our way through this particular issue in our own practice, we use varying degrees of follow up with clients whose cases are becoming more contentious rather than moving toward resolution. Much of our effort depends on the mindset of the clients themselves, and our own assessment of the likelihood of success in mediation if the clients are convinced to come back to mediation. At what point are you wasting a client's time and money mediating a case that the client swears cannot be resolved? How do you promote mediation, when resolution looks very far away to the client, in way that doesn't make you look like you're simply a fee-hungry professional?

Q. Developing Your Signature Style and the New – New Riskin Grid

Developing your signature style is a component of your internal case management, and an important part of your maturation as a mediator. Learning

who you are, defining your strengths as a mediator, and understanding why you do what you do in the mediation room helps you to focus and build on your best qualities as a mediator. This in turn helps you to define your practice. In addition to the positive attributes, it also helps you to identify where you may need more training, to keep your personal biases in check, and to find ways to expand your range of skills. Understanding what you offer to clients, and what you do not offer to clients, is also an integral part of self-identification and defining the scope of your services.

In hearing Professor Leonard L. Riskin speak at the 2004 Spring ABA DRS conference in New York City about his Grid System, and "New New Grid System" I realized that Professor Riskin's grids and self-evaluation system was actually a way to quantify where you place yourself in terms of a signature style. It's a component of internal case management.

Some of you may be familiar with Leonard L. Riskin's work with the "Riskin Grid". Prof. Riskin has revised his grid to go from being one-dimensional to becoming two-dimensional in his recent Notre Dame Law Review article (79 Notre Dame Law Review 1-53 (2003). For more than just this brief overview, take a look at the full article. Taking the time to do the self-evaluation as part of developing your signature style is certainly worthwhile. In addition, you can plot out where you felt the participants in a recent case landed on the grids to help you to de-brief after a mediation and to plan for the next session.

The basic premise of Professor Riskin's grid system is to provide the ADR practitioner with a set of measuring tools to make a private assessment of his or her orientation in different facets of mediation: *e.g.,* evaluative vs. facilitative, narrow problem definition vs. broad problem definition. Figuring out where you fall on the continuum between these problem-solving approaches helps you to understand who you are as a mediator and to develop your signature style.

Just as mediators work to find the parties' underlying interests, rather than relying on labels, Professor Riskin found that affixing the labels of "evaluative" and "facilitative" was problematic in determining mediators' signature styles, and that the labels had unintended interpretations. As in mediation, the labels in the old grid system became too confining. It was time to get to the underlying interests involved, and hence the new grid system.

The New-New Grid developed by Professor Riskin adds new dimensions: more mediator orientations, influence continuums, expanded types of decision making grids, recognition that the procedures in place in the mediator's office can influence the outcome, and it also includes more ways to define of the types of problems experienced by the participants. One purpose of the New New Grid is to point out that each of these elements can be issues.

Using Professor Riskin's grid systems can be helpful in understanding where you are in terms of cultivating your skills and orientation as a mediator, in defining your services through your signature style, and determining where the next expansion in your skills should begin. In *The Reflective Practitioner,* Donald Schoen outlines the continuum of becoming a mediator: unconscious incompetence, unconscious competence, conscious competence, and artistry. (*The Reflective Practitioner,* Perseus/Basic Books, 1983). As we move along Dr. Schoen's spectrum, Professor Riskin's grid system provides measuring tools for self-assessment.

IV. How to conceptualize and develop your own protocols to deal with the expanding Art and Practice of Conflict Resolution in the 21st Century

Conceptualizing and developing your own protocols for case management is a daunting task, but one, which can start with small steps in the case management direction and building with experience.