

Mediation Training Program

Welcome to Day 2



Welcome / Introduction of Trainers

- Timothy M. Linnehan, Esq.
 - ADR Coordinator for the Trial Court
 - Executive Office of the Trial Court
- Josh Hoch
- Nnena Odum
- Diana Chiang Cooke



Housekeeping

- Start at 9:00 AM and end at 3:30 PM
- Stay hydrated and comfortable
- Break at 10:45 AM
- Lunch at 12:30 PM
- BIN
- Training Manual, Agenda, and Slides
 - www.mwi.org/tc-mediation-training
- Problems? Text Josh at 857-719-6642



Training Material



Day 2: Mediation Training

- Welcome and Introductions
- You are the Winner – Activity
- Conflict
- Negotiation Concepts and the Mediation Process
- Goals and skills of the
 - early private sessions
 - later private sessions
- Why We Should Mediate / Defining Success as a Mediator
- Cognitive Barriers - Activities
- Role Play II
- Solo Mediation and Co-Mediation
- Notetaking
- Listening Skills – Activity



Group Norms

- Try new things
- Participate
- Support each other
- Don't be shy, find your voice
- Help us manage time
- Create a safe environment
- Confidentiality
- Be open-minded
- Be open to learning new things



Introduction of Participants

- Name
- Location



- Share Something About You People Usually Don't Guess



“You are the Winner!”: Rules

1. You will be randomly paired up with someone in a breakout room.
2. Your goal is to get that person to declare to you: “You are the winner!”
3. If you get the person in your breakout room to declare, “You are the winner!” to you, I will give you \$1,000*. Perhaps more importantly, you will be a winner.
4. You will have 2 minutes. We may play a second time.
5. Be prepared to talk about what happened in your group when we come back to the main room.



“You are the Winner!”: Lessons

- **Redefine Success:** What does “winning” mean in negotiation? Consider how you can do better for yourself by collaborating.
- **Test Assumptions:** Understand and question your assumptions before acting.
- **Build Relationships:** Build trust through communication.
- **Refine Your Approach:** Shift from being reactive to proactive.



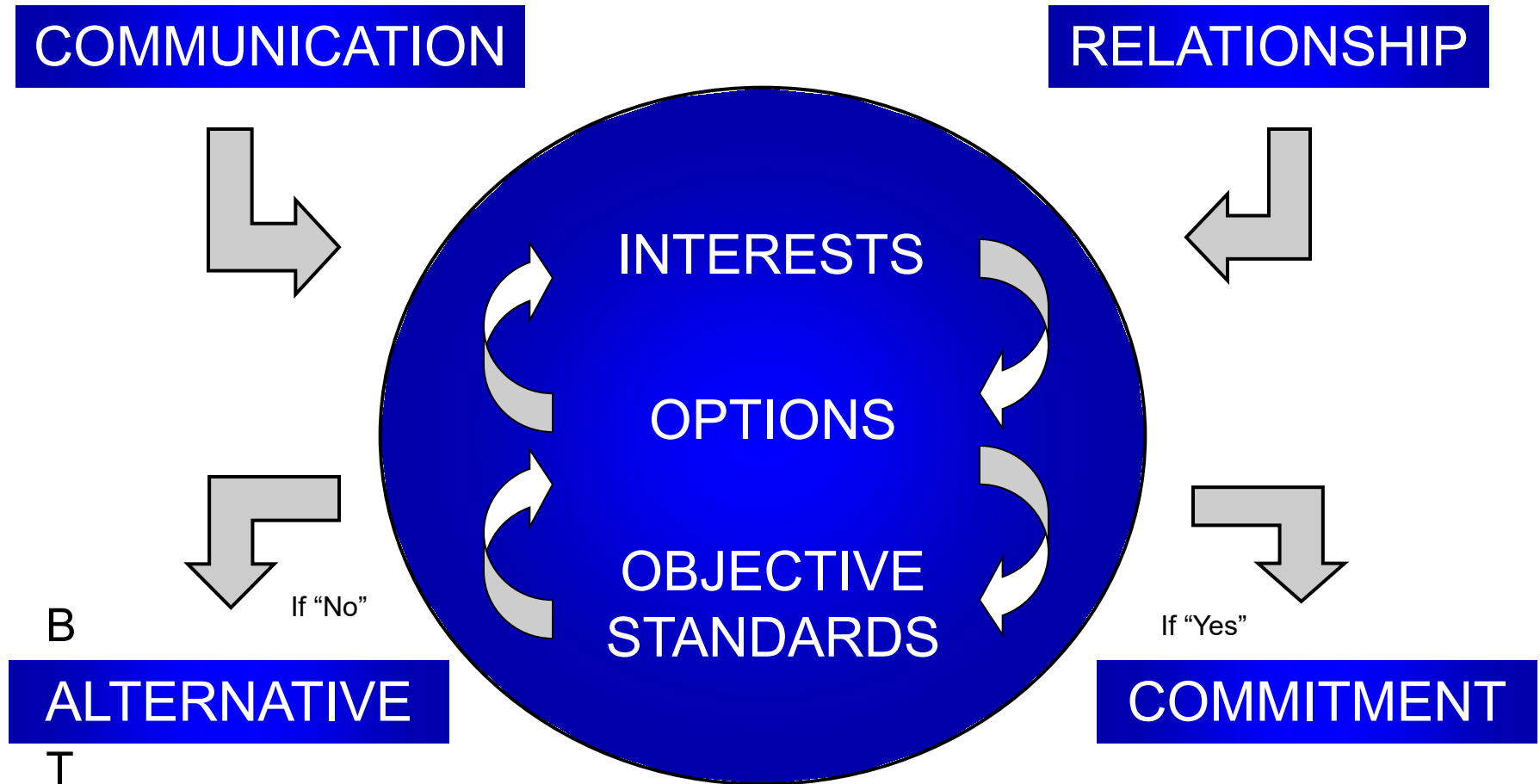
Conflict



CONFLICT



Negotiation Framework for Mediators



T
M
A

Early Private Session Mechanics

- Take a Break – Mediator(s)
- Welcome back
- Confidentiality reminder
 - This session will be as confidential as you want it to be
 - I'll check in with you at the end of this session about what you want me to keep private from the other party, if anything.
- Anything to add? (OEQ)
- Allow for venting
- Summarize / reframe to interests:
 - Ask “Why?” / Follow-up with “Anything else?”
- Ask / listen for options once interests are out
- Wrap-up with summary of interests / options
- Confidentiality check / give homework



Later Private Sessions

- *Goals*
 - Develop / Refine options
 - Evaluate alternatives / Address impasse
 - Prepare to reach agreement or end mediation
- *Mechanics*
 - Welcome back / Begin with confidentiality
 - Ask about homework and explore options
 - Address barriers to agreement
 - Conduct reality testing
 - Examine / Discuss alternatives
 - Prepare for a final joint session
 - Close with confidentiality



Why We Should Mediate

- Help people learn to address future conflicts
- Solve litigants' problems
- Let parties feel heard
- Get parties to agree
- Change and improve the parties' relationships
- Help people communicate better
- Help parties discover and create new options
- Keep people safe
- Help parties make wise choices
- Have a high success rate

WHICH DO YOU FEEL SHOULD NOT BE A GOAL OF A MEDIATOR?

- Groups of 4 - Rank the goals of mediation from highest goal (1) to lowest (10).
- 10 minutes / Be prepared to discuss results in



Cognitive Barriers

Heuristics: A term used to describe decision making strategies people use

- Mental short cuts.
- Not always rationale.



Affect Heuristic

The **affect heuristic** - when our emotional state or mood influences our decisions.

Instead of evaluating the situation objectively, we rely on our “gut feelings” and respond according to how we feel.

Bad weather - the affect heuristic can lead to suboptimal decision-making.



Repetition Bias

Repeated information feels more true than new or unrepeated information.

The more times a message is repeated, and the greater the number of sources repeating the message, the more believable it becomes.

“ I am a fair person”



Selective Perception

- The hammer only sees the nail. Only see the positive or good part of the case supporting your position.
- Only see the positive of their case not the negatives.



It's Not About the Nail



Optimistic Over Confidence

- An inflated view that people have of themselves or a situation.
- Lake Wobegon - That's the news from Lake Wobegon, "where all the women are strong, all the men are good-looking, and all the children are above average."
- Good driving example.



Endowment Effect

- What is mine is more valuable.
- My divorce



Reactive Devaluation

Refers to the fact that the very offer of a particular proposal or concession especially if the offer comes from an adversary – may diminish its apparent value or attractiveness in the eyes of the recipient.



“We should support whatever the enemy opposes and oppose whatever the enemy supports”

Chairman Mao



Exercise

- This is your coffee mug below; How much are you willing to sell it for?



Exercise

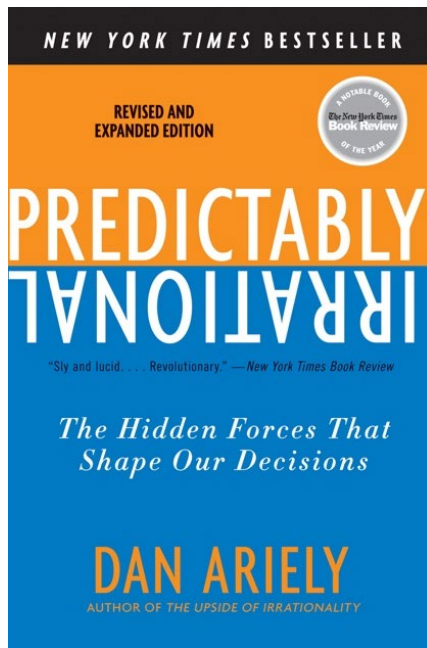
- This is NOT your coffee mug below; How much are you willing to buy it for?



Exercise

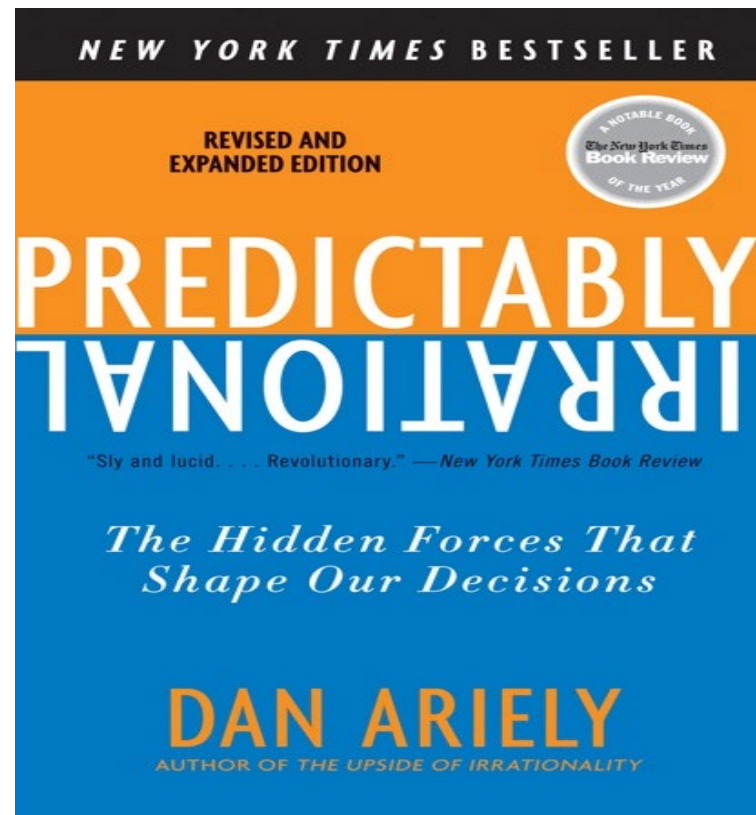
On average,

- **Seller** would accept/sell for \$7.12,
- **Buyer** would buy/pay \$2.88



Exercise

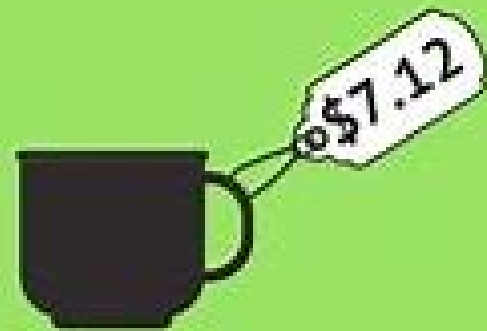
Dan Ariely, MIT Professor



The Endowment Effect



Not mine



Mine



Anchor

- Last two digits of your social security number
 - 0 – 49
 - 50 – 99
- How much would you pay for this watch?



- SS#'s of 50 to 99 paid on average 346% more than 0-49 SS #'s,
- SS#'s of 80 to 99 paid on average \$26 compared to SS# of 00-99, who paid \$9.



Anchoring Effect



When decisions are influenced by a particular reference point or 'anchor'.



Anchoring

- An opening position or reference point that effects further negotiation.
- An unreasonable offer may weigh down, the conciliation process as the parties concentrate or “anchor” on the position.
- Limits discussion of realistic options. As parties will not bid against themselves.
- Mediators must try to expand the conversation beyond the specific reference point.



Fairness - Exercise

- Pairs of two
- One person is the Proposer
- The other person is the Responder
- Proposer has been given you a \$100 and to keep it you must offer Responder some portion of the \$100 AND the Responder must accept it.
- The Proposer makes an offer to the Responder and the Responder must accept or reject the offer as given, no discussion (Yes or No)
- If the offer is not accepted by the Responder, no one gets to keep the money.



Results of Fairness Exercise

Fairness is subjective.

- Why would you not accept any amount, you started with nothing! Offered something for free.
- Not fair, Proposer did not offer more, so rejected it in spite
- On average most Responders in US accepted \$24 but in Philippine's they accepted \$12!



THINKING,
FAST AND SLOW



DANIEL

KAHNEMAN

WINNER OF THE NOBEL PRIZE IN ECONOMICS

READ BY PATRICK EGAN • AN UNABRIDGED PRODUCTION



FAST AND SLOW

Thinking Fast and Slow

- Psychologist **Daniel Kahneman** explains how two systems of the human mind constantly fight over control of our behavior and actions.
- **System 1** is fast, intuitive, and emotional, while **System 2** is slow, rational, and logical.
- The book shows how these 2 systems leads to errors in memory, judgment and decisions, and what we can do about it.



Fast - Bat & Ball

A baseball bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost?



Fast - Bat & Ball

5 cents.

For the bat to cost \$1 more than the ball, the ball must cost 5 cents and the bat \$1.05.



Divorce Mediation: 12 Year Study

https://emeryondivorce.com/divorce_mediation_study.php

- Used a high conflict group – families who had filed for a contested custody hearing
- Flip of a coin determined whether families went to mediation or adversary settlement
- Young and low-income parents
- Mediation time averaged 5 hours
- Families were followed for 12 years



Divorce Mediation: 12 Year Study

Other Results:

- 5 hours of mediation caused nonresidential parents to see their children much more often 12 years later
 - 28% of nonresident parents who mediated saw their children weekly 12 years later compared to 9% who litigated and 11% in the national averages
- 52% of nonresident parents who mediated talked with their children weekly 12 years later
 - This compares with 14% of nonresident parents who went to court and 18% in the national averages
- Because of the random assignment, proved 5 hours of mediation caused these differences



Divorce Mediation: 12 Year Study

https://emeryondivorce.com/divorce_mediation_study.php

Mediation Kept Most Families Out of Court

- If the coin came up tails and they stayed in the adversary system, 75% of families appeared before a judge
- But if the coin came up heads, less than 20% appeared before a judge
- Even when mediation failed, parents tended to settle out of court with the help of lawyers



When to Encourage Mediation?

- Parties want control over the outcome
- Parties want a confidential process
- Parties willing to try to work out an agreement with assistance from a neutral
- Parties can be pro se or represented
- Parties have a child or children and need to work together in the future



Role-Play 2

- Homeowner
- Home inspector from Andrews Inspection Services
- General information
- Confidential information
- 1:00 PM to 2:15 PM



Role-Play 2 – Debrief



Co-Mediation: Benefits and Drawbacks

Benefits

- Model effective communication
- Provides a check on mediator bias
- Helps in establishing rapport and trust with parties
- Decreases mediator fatigue
- Perception of neutrality
- Debriefing and feedback

Drawbacks

- Imbalance of teamwork can confuse parties
- Different styles
- Co-mediator disagreement / incompatibility
- Perception of neutrality, if not mirrored



Tips for Successful Co-Mediation

- Prior to the start of the mediation
 - Allow sufficient time to meet, to discuss mediation styles and how best to work together
 - Divide responsibilities (mediators opening)
- Model effective communication
- Make time to check in with your co-mediator privately **during** the mediation
- See co-mediation as an opportunity to learn and gain insights
- Make time to debrief at the conclusion of the mediation.
 - What worked well?
 - What might we have done differently?



Note-Taking

Why?

What do you do that works well for note-taking?

What do you do with your notes after the mediation?



Notes – To keep or not to Keep?

Destroy:

- Protects the confidentiality of mediation
- Eliminates the burden on the mediator to store and secure notes
- Reduces the risk that the parties will subpoena the mediator later if negotiations fail, particularly if the mediator informs the parties in the agreement to mediate that he or she routinely destroys notes as a matter of practice



Notes – To keep or not to Keep?

Keep:

- If follow-up sessions - refresh the mediator's recollection of the case
- Notes can be used to create case studies
- Insurance coverage says to do so
- A mediator could conceivably be charged with destruction of evidence in a criminal or federal investigation
- Because you always keep notes



Listening Handout

- Groups of 4 – 10 minutes



Wrap Up

Lessons Learned from day 2

