Layers of Metaphorical Influence: Are We Really Mediating Free of Bias?

Webinar – October 30, 2013 – 1:00 p.m. (ET)

PROGRAM SUMMARY

Speakers: Dr. Rebecca Storrow

This one hour, interactive webinar is based on a two year study of mediators. Research explored mediators’ stated metaphors, resulting in the Theoretical Integrative Model of Systems (TIMS). This new model demonstrates how layers of metaphorical concepts can become accepted reality, producing bias and influencing mediation style. Although we all engage in continued mediation education, results tell us HOW and what types of ADR education can help us improve our quality of practice.

AGENDA

1:00 p.m. Welcome and Introduction of Speakers (5 minutes)

1:05 p.m. Discussion: (50 minutes)
- What do metaphors reveal out how experiences impact how we mediate?
- Review of existing mediation research.
- Results of a two year study of mediators.
- TIMS Model
  - Implications for mediators
  - Bias in mediation.

1:55 p.m. Conclusion and Questions (5 minutes)

2:00 p.m. Evaluation (5 minutes)

2:05 p.m. Adjourn
Biography

Rebecca Storrow, Ph.D.  954-801-8770 storrowr@adr.org

Dr. Rebecca Storrow is the Vice President of the American Arbitration Association (AAA) and former director of the AAA Florida Residential Mortgage Foreclosure Mediation Program. She assists in mediation training with the AAA University. Dr. Storrow has Florida Supreme Court certification in family, dependency, circuit, and county mediation. She joined the AAA from the Fifteenth Judicial Circuit Court of Florida where she was the ADR Director, and from the Nineteenth Judicial Circuit Court where she was the Mediation Services Coordinator. She holds a doctoral degree in Conflict Analysis and Resolution through Nova Southeastern University and a master in science degree in Organizational Leadership from Palm Beach Atlantic University. Her areas of expertise are mediation, organizational conflict management, and indigenous forms of conflict resolution such as Hawaiian Ho’oponopono. Dr. Storrow has been an adjunct professor at several Florida colleges and has presented at numerous national and international conferences. She began a nonprofit community mediation program in 2002. She is a certified Restorative Justice trainer through the University of Minnesota, a certified assistant trainer for the Florida Supreme Court certification program, and was appointed to the Florida Supreme Court Task Force on Foreclosure in 2009.
Mediators and Metaphorical Analysis: Phenomenological Study with Family Court Mediators
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by

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ABSTRACT

Florida family court mediation programs have predominantly been assessed using numerical data. To understand the complexity of mediation, programs might benefit from the systematic use qualitative research. Metaphors are snapshots of the mental models that mediators use. For example, mediation might be defined as a journey or the peeling of layers from an onion. This first part of a two-stage study was a qualitative content analysis of 85 Florida family court mediators. Their conflict metaphors were couched in relevant theories, providing insight into their experiences. A statewide questionnaire resulted in predominantly negative metaphors for conflict and mediation parties, and positive metaphors for mediation and mediators. Meta-metaphors emerged and findings were presented as major categories and subcategories indicating coherence in their metaphors regarding conflict, mediators, mediation, people in conflict, divorce, anger, and forgiveness.

INTRODUCTION

Metaphorical analysis is the systematic, scientific study of mental models expressed through language. The seminal work of Lakoff and Johnson (1980) stated that metaphorical concepts can form coherent patterns in how individuals talk about particular phenomena. Metaphors structure not only perception, but also future action (Lakoff & Johnson, 1980). Since the ethical practice of mediation depends on what mediators deem as important (Fuller, 1971; Folger & Bush, 1994; Bush & Folger, 2005), metaphorical concepts that are institutionalized may have a profound impact (Press, 2003; Press, 1997; Fiss, 1985; Alfini, J., Barkai, J., Bush, R., Hermann, M., Hyman, J., Kovach, K., Bensinger Liebman, C., Press, S., & Riskin, L., 1994).
The State of Florida has a comprehensive system for certifying family mediators for court appointed cases. Rules and model standards for mediation have created an organized system with rigorous statewide quality assurance (Florida Supreme Courts Commission on Trial Courts Performance and Accountability, 2011). In Florida, family divorce cases involving children are predominantly mediated by Florida Supreme Court certified family mediators. Content analysis of a group of 85 family mediators’ conflict metaphors provide insight into their experiences.

Three questions guided this research. The first question began with the mediators themselves, *What metaphors do family court mediators use to describe themselves?* A family mediator, while an individual, is surrounded by culture and systems that may influence their meaning making. A second question was, *What metaphors do family court mediators use to describe mediation concepts?* And finally, it was important to understand how mediators perceive their mediation parties. A third question was *What metaphors do family court mediators use to describe parties in mediation?* The three research questions supported three goals in this study: (1) to learn what metaphors this group of family mediators use to describe their experiences; (2) to identify metaphorical coherence among metaphorical concepts; and (3) to consider the potential impact of these metaphors in mediation.

We conducted a statewide questionnaire of 85 Florida Supreme Court family mediators. This paper presents the first stage of a two-stage complementary qualitative study. The reader is encouraged to review the second complementary study as it directly built upon this first phase questionnaire (Storrow & Georgakopoulos, 2012). The Stage Two phase of the study was comprised of phenomenological, in depth interviews that spawned rich descriptive data about the personal perspectives of family mediators so as to explore the lived experiences of a set of Florida family mediators in greater depth and breadth.
Metaphorical Coherence

The metaphor is a fundamental way of making sense of life (Lawley & Tompkins, 2000). It consists of the projection of one schema, considered the source domain of the metaphor, onto another schema or the target domain of the metaphor (Lakoff & Johnson, 1980; Moser, 2000; Gentner, 1983 and 1989). For example, *war* is a source domain that may be used to explain *divorce*, the target domain (Freeman, 1995; Lakoff & Turner, 1989). Metaphorical coherence is defined as perceptions that fit into existing metaphorical concepts, supporting what we deem as significant (Lakoff & Johnson, 1980). Shen and Balaban (1999) demonstrated that in natural language there is little apparent coherence, but metaphorical coherence may exist within a single discussion topic such as mediation.

Metaphorical analyses have popularly been conducted to understand and describe significant topics such as relationships, (Metts, 1993), psychology (Blashfield & Livesley, 1991), organizational leadership (Bryant, 2003), healthcare (Huttlinger, Baca, Benally, Drevdahl, Krefting, & Tree, 1992), and organizational management, (Keys, 1991). Metaphors generally are presented as descriptions that have either positive or negative valences. There is a literal understanding of words, and there is a deeper underlying meaning that comes from the context in which one sees the world. Metaphors are symbolic meaning relationships that help individuals construct meaning. For example, as a young child or infant sees liquid poured into a bottle, they may associate the rising level of liquid as being good (Lakoff & Johnson, 1980). Association is continually reaffirmed each time an increase is seen and is then associated with a good result. Eventually, this association develops circuitry in the brain. This meta-metaphor is applied to a variety of areas such as emotions, as in feeling *on top of the world* or being *down in the dumps*,

...
living the high life or being down and out. Mediators use metaphors as they try to help one party understand the positions, interests, and feelings of the other (Cohen, 2003).

**RATIONALE FOR QUALITATIVE RESEARCH**

Buber (1970) cautioned that modern life may be submerged in the *It-world*. The *It-world* is a non-relational concept of the world, a lifeless system of acquisitions and objectives. Reliance solely upon quantitative data may reduce focus on the human factors in mediation programs to numbers (Firestone, 1987; Creswell, 1998 Denzin & Lincoln, 2003). Indications of an *It-world* may be the occasional discussions between attorneys in the family mediation waiting room prior to the session. They discuss the attributes of a case in legal language with a focus on financial settlement. Without mediator awareness, this language and metaphorical “world” might have unseen influences. As mediation becomes further institutionalized, it is more crucial to consider the complex nature of mediation practice and its place within systems (Alfini, et al., 1994).

Divorce is an emotionally complex process, and mediation should effectively address the range of issues that can arise. There has been research done to compare these stages to the Kubler-Ross (1969) stages of grief, but no processes or psycho-social stages of divorce recovery have been confirmed by current research (Gastil, 1996). At best, factors such as gender, locus of control, and social involvement have been identified as having an impact in divorce (Amato, 2000). Qualitative research supported our investigation of these complex concepts.
PREFACE TO RESEARCH

Since mediation practice has become a valued resource for court systems and business, it is timely to revisit how mediation is practiced and those who practice it (Lande, 2002; Moore, 2003). Mediation’s alternative nature and flexibility stand in stark contrast with initiatives to regulate, systematize, and utilize its resource saving attributes (Fiss, 1985; Alfini, 1994; Bush & Folger, 2005; Press, 1997; Welsh, 2004). Mass mediation systems without reflection can produce gatekeepers that reaffirm the values of a dominant culture (McEwen & Milburn, 2007). This can be seen in language that is legalistic, challenging diverse participants or those without legal training. To make fair and cost effective decisions, the Florida State Courts system must often make programmatic decisions based on evidence based practice and quantitative information (Florida State Courts Statistics, 2011) which may not fully capture the complex needs of diverse participants. Qualitative research using metaphorical analysis has unearthed ethical implications regarding how mediators perceive conflict concepts. And, a review of the extant literature on the subject shows further study in this topic is merited.

LITERATURE REVIEW

Institutionalized forms of mediation have been criticized for fostering a less personal approach which can potentially dehumanize the process (Fiss, 1985; Alfini, et al., 1994). Metaphors reinforce these processes and include an analogy made up of two parts. There is the target domain to be explained such as *divorce*, and the base domain that serves as a source of knowledge such as *war* (Gentner, 1983, 1989). New metaphorical concepts may logically fit, furthering coherence to a dehumanizing process or they may be contrary like a *dance*, creating cognitive dissonance.
The first research question introduced in this study began with the mediators: RQ1: *What are the perceptions of the family court mediators?* Mediator experiences and self-concepts were revealed through stated metaphors since perception of the world is structured by metaphorical concepts (Lakoff & Johnson, 1980). Mediator self-concepts may then be reinforced through repeated processes. Florida has an organized mediation system documented in the Florida Dispute Resolution Center’s Compendium of Standards of Operation and Best Practices for Florida's Trial Courts (Florida State Courts Alternative Dispute Resolution website, 2011). Mediation is conducted using similar processes including an opening statement, discussion, caucus, and memorialization of an agreement. According to Lakoff and Johnson (1980), metaphors, whether cultural or personal, are partially preserved in ritual. These rituals form an indispensable part of the experiential basis for culturally based metaphorical systems. This generated the second important research question: RQ2: *What metaphors do family court mediators use to describe mediation?* The questionnaire asked mediators to state their metaphors for *mediation* and *conflict*, as well as, one possible outcome of mediation, *forgiveness*. It was important to consider the meanings situated in these mediator experiences (Lawley & Tompkins, 2000). Meaning making is a critical component of how we learn in relationship with others, producing the third research question, RQ3: *What meanings and metaphors do family court mediators use to describe parties and conflict?* As a qualitative study, theories were not included in the design process. We allowed questions to be based on the goals of this study, but the resulting data was discussed using the lenses of four interpretive theories.
CRITIQUE OF PAST METHODS

Studies by Irving and Benjamin (1995) and Kressel (2000) indicated that the organizational setting, may have an influence on mediator orientation. According to their studies, private mediators’ used more passive tools such as active listening, whereas, court mediators focused on facts and issues. Debra Kolb’s (1994) book, *When Talk Works: Profiles of Mediators* used extensive qualitative interviews to examine the practice of mediation across several different industries. These in-depth interviews were some of the most revealing insights into the variation of styles and world views among mediators. Kolb did not however fully address how these styles evolved from basic understandings such as metaphors.

The Denver Mediation Custody Project (Pearson & Thoennes, 1986) was a three year comprehensive study of mediation comparing mediation and adjudication using metaphorical analysis. Although mediation is based on the parties’ self-determination, divorce mediators were often found to *prod* and *bulldoze*. They observed that lawyer mediators tended to prefer structured, task-oriented approaches and mediators with a mental health professional background tended to be more attentive to emotional issues. Gulliver’s (1979) portrayal of mediator roles showed a continuum ranging from passive to leader. Yet, Lang and Taylor (2000) suggested that many mediators are not clearly aware of how their metaphorical orientations impact their work. Kolb (1994) also cited a disparity between mediators’ espoused orientations and actual practice. Shen and Balaban (1999) did not find evidence regarding coherence, or logical connection, to root metaphors when looking at scripts based on natural discourse. However, metaphorical analysis is a worthwhile methodological tool and has been used to understand the complex nature of phenomena, as in Finneran’s (2006) study of metaphors used by students in their approaches to using computer software.
RATIONALE FOR A QUALITATIVE CONTENT ANALYSIS

According to Krippendorf (2004) content analysis is the systematic coding of recorded text. It is an appropriate approach to use when the goal is to deepen awareness and understanding of particular phenomena, such as mediator metaphorical concepts. Qualitative content analysis has been defined as a “qualitative data reduction and sense-making effort that takes a volume of qualitative material and attempts to identify core consistencies and meanings” (Patton, 2002, p. 453).

Content analysis has been used since the 18th century in Scandinavia to make sense of complex information (Rosengren, 1981), and in the United States as an analytic technique since the beginning of the 20th century (Barcus, 1959). The methodology’s greatest strength is that it is unobtrusive and nonreactive (Marshall & Rossman, 1999). In this study qualitative content analysis allowed metaphors and patterns to emerge freely, resulting in a truthful understanding (Denzin & Lincoln, 2003; Guba & Lincoln, 1994; Holloway, 1997; Kvale & Brinkman, 2009). It also supported the use of theories in the discussion of results without attempting to fit data into theoretical structures (Elo & Kyngå, 2008; Krippendorff, 1980; Morgan, 1993). Our analysis included an *openness* to whatever meanings emerged (Sandelowski, 1995; Huberman, 2002).

Qualitative content analysis required an honest reflection and disclosure of researcher biases, which allowed for deeper understanding of the meanings generated (Elo & Kyngå, 2008; Krippendorff, 1980; Morgan, 1993). This provided a more complex knowing of how this group of mediators experienced family mediation, and a richer understanding than what could have been provided through quantitative methods (Marshall & Rossman, 1999).
METHODOLOGY

From all 2,173 family mediators certified by the Florida Supreme Court, 500 mediators were randomly selected and received questionnaires by email. Additionally, 100 questionnaires were sent by US Mail to the 20 judicial circuit court mediation programs. These 600 questionnaires, producing 85 completed questionnaires, a 14% response rate. This is somewhat below average e-mail response rates found to approximate 25% to 30% without follow-up e-mail and reinforcements (Yun & Trumbo, 2000). We used the online mediator search function of the Dispute Resolution Center, the entity which manages Florida Supreme Court certified mediation (Florida Dispute Resolution Center, 2011). The anonymous questionnaire consisted of seven questions regarding the metaphors: mediation, mediator, conflict, parties in conflict, divorce, anger, and forgiveness. Analysis revealed themes which were discussed in terms of extant theory.

Participants

Participants included 85 Florida Supreme Court certified family mediators. Random sampling provided a group of Florida mediators presumably similar to the entire population of Florida Supreme Court certified family mediators. According to the Dispute Resolution Center’s online mediator search (Florida State Courts Alternative Dispute Resolution Center, 2011), Florida Supreme Court family certified mediators self-reported as 8% Hispanic and 6% African American, 72% Caucasian, and 2% other. Demographics questions were not included on the questionnaires since mediators were not selected for the purpose of generalizing to others of the
same types of groups, however, it provided a variety of information, based on a randomized group of Florida family court mediators.

Site Selection

The state of Florida was an appropriate site for this research due to the state’s institutionalization of mediation. It was possible to consider diverse mediator responses within an organized system. As researchers who also practice mediation in Florida, we had accessibility and richer culture context to effectively design and implement the questionnaire.

ANALYSIS

Metaphors were first analyzed as having positive, negative, or neutral connotations. After determining general themes, the frequency of particular types of metaphors was identified. All data was coded and moved into categories and subcategories. Examples for each subcategory along with the major categories and subcategory are noted in Table 1. Common themes began to emerge and metaphors were categorized, a process called reduction, which allowed for identification of patterns and core meanings. We tried to produce a complete analysis, fully abstracting the data, and not including too many metaphors within a single category (Dey, 1993; Hickey & Kipping 1996). Developing linkages between outstanding metaphors required painstaking consideration after the more common concepts were identified. When multiple related items saturated a category, it was labeled as a major category. The items that supported the major category were referred to as subcategories, so each major category could potentially hold a number of subcategories. Double coding, or use of two independent co-
researchers, provided a level of trustworthiness to the process (Shenton, 2004). The qualitative approach allowed for our reflexivity to contribute to analysis (Denzin & Lincoln, 2003).

**Researchers’ Roles**

The two researchers were Florida Supreme Court Family Mediators and were active in the field of conflict resolution. My experience as a mediator and mediation program manager and the second author’s interest as a primary trainer for the Florida Supreme Court Certification Family Mediation Program grounded our desire to better understand family mediators in Florida. As a researcher, Kolb (1994) repeatedly stated her possible biases throughout her discussion and interviews with mediators, thereby increasing credibility of her own research. Our experiences, social group identities, and biases were clearly stated and critically considered throughout our process.

A qualitative approach to the study of mediators’ experiences allowed us to utilize our experiences as mediation professionals. Since the researcher is the main instrument for obtaining knowledge in qualitative work (Marshall & Rossman, 1999), it was imperative to maintain the scientific quality of the study by using accurate and representative information (Kvale, 2009, p. 85). It is only another human being who can be an appropriate instrument to learn about the complexity of human existence (Lave & Kvale, 1995). We fully disclosed our subjective biases in determining the what, why, and how of the topic studied (Fink, 2000). This process, called thematising, was followed by a rigorous design methodology. In order for the research to be trustworthy, we needed to examine the phenomenon intended for study. Data analysis was the most time consuming activity, given the complexity and volume of the data requiring an effective analysis strategy and interpretation (Denzin & Lincoln, 2003).
Collection of Mediator Data

Statewide Questionnaire

Data was derived from a statewide seven-question questionnaire of Florida Supreme Court certified family mediators’ conflict metaphors. The anonymous and self-reporting questionnaire included questions regarding mediation, mediators, conflict, people in conflict, divorce, anger, and forgiveness. Answers were single word metaphors or short phrases. The questionnaire, study information, and a self-addressed stamped envelope were sent to court staff mediators and private mediators.

Data Management and Metaphorical Analysis Strategy

Double coding and summative content analysis were used to organize stated metaphors. Repeating words were identified while giving equal weight to all responses. After identifying the repeating words, we explored their context and usage, referred to as manifest content analysis (Potter & Levine-Donnerstein, 1999). There was a further interpretation of the data which included possible latent meanings of the data. After all themes were grouped, the resulting information was discussed between researchers and with some participants. This provided an objective approach to study the phenomenon (Babbie, 1995). Kvale (2009) referred to the metaphor of a traveler when conducting research. While no two mediators or family mediations were alike, there were some common essential metaphorical structures to the experiences.

ANALYSIS
Metaphorical analysis included six phases: (a) organizing the data, (b) generating categories, (c) searching for alternative explanations, (d) testing of emergent understandings, (e) searching for alternative explanations, and (f) writing of the report (Marshall & Rossman, 1999). As researchers, we functioned as coders separately placing items in categories. Most items were placed in the same categories; however, when ambiguity surrounded the placement of an item in a category, we discussed the item in order to reach an agreement on its placement. In order for an item to be moved, the coder who disagreed with the position of an item provided a rationale for the change. After listening to the coder’s rationale, a consensus was reached on the placement of the item. Thus, items were not viewed as static as they were in flux in relation to meanings developed in relation to the set as a whole. Kvale (1996) indicated that coders increase the reliability and indicated that two coders may be sufficient for establishing intersubjective agreement. From the recommendations of Miles and Huberman (1984) an interrater reliability coefficient was calculated by dividing the number of agreements by total number of agreements plus disagreements. This process yielded a reliability coefficient of .97.

FINDINGS

The findings of this study included a number of categories, resulting in “positive” metaphors for forgiveness, mediation and mediators, and “negative” ones for parties, parties in conflict, anger, and divorce. See Figure 1 for the positive, negative, and neutral metaphors for the seven questions. Figure 1 shows the responses received from the 85 questionnaires received. General color coding of responses determined whether they were positive, negative, or neutral in nature.

![Figure 1. Chart of Positive, Negative, and Neutral Metaphors](image-url)
Although subjectivity raised potential for errors, assessment of positive and negative metaphors was confirmed by the Stage Two, concurrent study using a similar population; this second Stage of the study was conducted using interviews (Storrow & Georgakopoulos, 2012) and provided additional context for determining what metaphors were positive, negative, or neutral. We defined positive (blue) to include any metaphors that were generally considered good things, such as “hope,” “opportunity,” and “peace.” Metaphors that were generally considered bad things, such as “war,” “pain,” “injury,” and “destruction” were included as negative (red). Metaphors that were not necessarily positive or negative, such as “parting of ways,” a “seed,” a “wave” or “current,” and “two sides of a street” were grouped as neutral (green).

*Forgiveness* was the most positively regarded concept, followed by *mediation* and *mediators*. The four remaining concepts, *conflict, people in conflict, divorce,* and *anger* were more frequently assigned negative metaphors. These initial results seemed to indicate that this group of
mediators viewed themselves and their work as positive concepts and held a more negative perspective of people in conflict, divorce, anger, and conflict. This was similar to the concurrent mediator interview study in which mediators saw themselves as experts and used negative metaphors for people in conflict (Storrow & Georgakopoulos, 2012).

1. Family mediation is like (a/an) _____________________________________
2. A mediator is like (a/an) ___________________________________________
3. Conflict is like (a/an) _____________________________________________
4. People in conflict are like (a/an) ____________________________________
5. Divorce is like (a/an) _____________________________________________
6. Anger is like (a/an) _______________________________________________
7. Forgiveness is like (a/an) __________________________________________

Table 1 shows 16 major categories, 28 subcategories, and examples of conflict metaphors. The major categories and associated items generated by participants were: (1) mediation resulted in “opportunity” (8 items), (2) mediator resulted in “referee” (10 items), (3) conflict resulted in “battle/war” (10 items) and “animals” (10 items), (4) people in conflict resulted in “child(ren)/kids” (14 items) and “animals” (8 items), (5) divorce resulted in “death” (14 items), (6) anger resulted in “destructive acts of nature” (18 items) and “fire/flame” (11 items), and (7) forgiveness resulted in “soothing acts of nature” (5 items).

### Table 1: Metaphorical Content Analysis: Categories, subcategories and examples

<table>
<thead>
<tr>
<th>Categories</th>
<th>Sub-category</th>
<th>Example(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Opportunity</td>
<td>Personal agency</td>
<td>Opportunity to take control of your life</td>
</tr>
<tr>
<td></td>
<td></td>
<td>An excellent opportunity to stop conflict</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Opportunity to get it done, all done</td>
</tr>
<tr>
<td></td>
<td></td>
<td>An opportunity to participate in the solution</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Opportunity in your life to show grace and mercy</td>
</tr>
<tr>
<td>Journey</td>
<td>Water/river/sea</td>
<td>Flowing river</td>
</tr>
</tbody>
</table>
Metaphorical Analysis of Mediators 17 of 36

Your first canoe ride
Entering an uncharted sea with the hope of a calm safe harbor at the end of the journey
Journey on the open sea in a small sailboat

Mediator is like...

<table>
<thead>
<tr>
<th>Categories</th>
<th>Sub-category</th>
<th>Example(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Skilled Expert</td>
<td>Judging</td>
<td>Referee</td>
</tr>
<tr>
<td></td>
<td></td>
<td>A make sense individual</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Arbitrator</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Teacher</td>
</tr>
<tr>
<td></td>
<td>Non judging</td>
<td>Facilitator</td>
</tr>
<tr>
<td></td>
<td>Peacemaker</td>
<td>Maker of peace</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Diplomat</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Pastor</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Henry Kissinger</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Interested observer who asks questions that help people find a place of peace</td>
</tr>
<tr>
<td>Leader</td>
<td>Director</td>
<td>Orchestra conductor</td>
</tr>
<tr>
<td></td>
<td></td>
<td>A film director</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Circus ringmaster</td>
</tr>
<tr>
<td></td>
<td>Guide</td>
<td>A guide in a labyrinth</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Tour guide</td>
</tr>
</tbody>
</table>

Conflict is like...

<table>
<thead>
<tr>
<th>Categories</th>
<th>Sub-category</th>
<th>Example(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Destructive force</td>
<td>Battle/war</td>
<td>War</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Battle</td>
</tr>
<tr>
<td></td>
<td></td>
<td>A sword fight</td>
</tr>
<tr>
<td></td>
<td>Act of nature</td>
<td>Earthquake</td>
</tr>
<tr>
<td></td>
<td></td>
<td>A wave-big-small-tidal</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Fire/flame</td>
</tr>
<tr>
<td>Unhealthy</td>
<td>Cancer/disease</td>
<td>Sickness</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Cancer</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Disease</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Headache</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Poison</td>
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</tbody>
</table>

People in conflict are like...

<table>
<thead>
<tr>
<th>Categories</th>
<th>Sub-category</th>
<th>Example(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wild/irrational beings</td>
<td>Wild/irrational people</td>
<td>Angry children</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Children fighting</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Angry warriors who don't think clearly</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Angry mob</td>
</tr>
<tr>
<td></td>
<td>Wild/irrational animals</td>
<td>Scared animals</td>
</tr>
</tbody>
</table>
### Metaphorical Analysis of Mediators

#### Scared rabbits or corner rats
- Pack of dogs
- Wounded animals
- Dogs biting their own ass

#### Act of nature
- Storm that must pass
- Surf crashing ashore
- Volcanoes not at rest

#### Lost/Searching
- People stuck in a maze
- Helen Keller before Anne Sullivan
- Sad souls wondering like Odysseus
- Children lost in the scary woods

#### Divorce is like...

<table>
<thead>
<tr>
<th>Categories</th>
<th>Sub-category</th>
<th>Example(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Destruction</td>
<td>Death</td>
<td>Death without a dead person</td>
</tr>
<tr>
<td></td>
<td></td>
<td>A death but also a new beginning</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Ending and a new beginning</td>
</tr>
<tr>
<td>Violence</td>
<td>Battle</td>
<td></td>
</tr>
<tr>
<td></td>
<td>War</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Torture</td>
<td>Ripping apart the fabric of the world</td>
</tr>
<tr>
<td>Act of nature</td>
<td>Tsunami</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Parting of the sea</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Tornado</td>
<td></td>
</tr>
<tr>
<td>Loss</td>
<td></td>
<td>A deeply grieved loss of fantasy</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Amputation, you survive it, but there’s less of you</td>
</tr>
<tr>
<td>Positive change</td>
<td>Opportunity to start fresh</td>
<td></td>
</tr>
<tr>
<td></td>
<td>End of drama</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The hope for the future</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Clearing the table</td>
<td></td>
</tr>
</tbody>
</table>

#### Anger is like...

<table>
<thead>
<tr>
<th>Categories</th>
<th>Sub-category</th>
<th>Example(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Destructive force</td>
<td>Act of nature</td>
<td>An erupting volcano</td>
</tr>
<tr>
<td></td>
<td></td>
<td>A tornado</td>
</tr>
<tr>
<td></td>
<td></td>
<td>A category IV hurricane</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Fire/flame</td>
</tr>
<tr>
<td>Unhealthy</td>
<td>Poison</td>
<td>Drinking a poison and expecting someone else to die</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Serpent striking nonstop</td>
</tr>
<tr>
<td>Disease/Pain</td>
<td>Poke in the eye</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Hurting yourself</td>
<td></td>
</tr>
<tr>
<td></td>
<td>An emotion which may injure the individual in which it is stored</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Cancer</td>
<td></td>
</tr>
</tbody>
</table>
Forgiveness is like...

<table>
<thead>
<tr>
<th>Categories</th>
<th>Sub-category</th>
<th>Example(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comforting</td>
<td>Act of nature</td>
<td>Cool rain on a hot day</td>
</tr>
<tr>
<td></td>
<td></td>
<td>A flowing river of peace</td>
</tr>
<tr>
<td>Force/Change</td>
<td>Heat/warmth</td>
<td>Warm blanket</td>
</tr>
<tr>
<td></td>
<td></td>
<td>A warm - soothing feeling</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Warm water</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Sunshine</td>
</tr>
<tr>
<td></td>
<td>Change</td>
<td>Moving on</td>
</tr>
<tr>
<td></td>
<td></td>
<td>The change in direction</td>
</tr>
<tr>
<td></td>
<td>Beginning</td>
<td>A relief and a new beginning</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Starting over</td>
</tr>
<tr>
<td></td>
<td>Ending</td>
<td>Paying a bill off</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Final resolution</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Conclusion</td>
</tr>
<tr>
<td></td>
<td>Water/river/sea</td>
<td>Taking a soothing bath</td>
</tr>
<tr>
<td></td>
<td></td>
<td>A waterfall</td>
</tr>
<tr>
<td>Freedom</td>
<td>Healing</td>
<td>Balm on poison ivy</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Healing salve or ointment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Letting go to the current</td>
</tr>
<tr>
<td></td>
<td>Cleansing/cathartic</td>
<td>Future relief</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Gift to yourself that gives you freedom to think clearly</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Letting go of blame</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Weight being lifted from your shoulders</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Exhaling after holding one's breath for a long time</td>
</tr>
<tr>
<td></td>
<td>Spiritual</td>
<td>Blessing, enabling one to start anew</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Relief is heavenly</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Miracle</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Soul release</td>
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</tbody>
</table>

**RQ1. What are the perceptions of the family court mediators themselves?**

Mediators used predominantly positive, powerful metaphors to describe themselves, such as a “skilled expert,” “leader,” “referee,” “peacemaker,” or provider of “opportunity.” Mediators often were credited with a special *skill* or *knowledge*. Some of the more intriguing metaphors were, “Sparkle in the diamond with all its reflective properties,” “A force that calms a troubled
sea,” “Whipping boy,” “Cat in a china shop,” “A friend to all,” “Informed parent,” “Friend leading you out of the firefight,” “The good witch of the north,” “Sales manager at a car dealership,” “Circus ringmaster,” “Agent of reality on steroids,” and “Game show host.”

Habitus and field theory helped us to consider the origin of these metaphors and the relationships that might support them. Habitus and field theory was initially established by Marcel Mauss (1936), and further elaborated by Max Weber (1947), Edmund Husserl (trans., 1983), and Pierre Bourdieu (1985). Bourdieu’s theory of habitus and field explains the foundations of worldview. Habitus is the mental model people use to deal with the world. Field is the web of social relations and forces in a particular social strata or situation. These relationships reinforce metaphors and determine access to gatekeepers, influencing the culture of an institutionalized system (McEwen & Milburn, 2007). Responses to questionnaires demonstrated patterns of metaphorical understandings that may, in part, reflect the shared understandings the middle class, predominantly American, mediator field. According to a mediator search conducted using the Dispute Resolution Center’s website (Florida State Courts Alternative Dispute Resolution Center, 2011), Florida Supreme Court family certified mediators seem to not be as diverse a population as the parties they mediate.

<table>
<thead>
<tr>
<th>Table 2. Comparison of Florida Population and Florida Supreme Court Family Certified Mediators</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida Population</td>
</tr>
<tr>
<td>White</td>
</tr>
<tr>
<td>African American</td>
</tr>
<tr>
<td>Hispanic</td>
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<tr>
<td>Reported Other</td>
</tr>
</tbody>
</table>

Florida family certified mediators were shown to have self-reported fewer Hispanics and African Americans than reported by Florida’s 2010 Census. Certified mediator homogeneity may support particular mental models. According to habitus and field theory, each mediator has a particular worldview which may influence mediation style. Mediators’ metaphorical constructs are influenced through fields of relationships, life experiences, culture, gender, program reinforcement, or levels of resources.

**RQ2. What metaphors do family court mediators use to describe mediation?**

Mediation was generally stated as a positive metaphor. It was described as an *opportunity* or *journey*, which might be facilitated by the mediator since these mediators often described themselves as a type of “guide.” This implies mediator expertise that might be needed or desired by the parties. Figure 3 shows metaphors for mediation as an “opportunity,” which begs the question, “opportunity for what?” Of the eleven references to mediation as an “opportunity,” the six stated below qualified the meanings of “opportunity” as a step towards resolution of conflict. The first four specifically demonstrated personal agency.
Since anger was overwhelmingly described as a negative metaphor, an interesting clarifying question would have been regarding how anger affects the “journey” or “opportunity.” And, if parties reject the “opportunity” being provided by the “guide,” how does the mediator react?

Structuration theory speaks to mediators’ repeated tasks, strengthening perceptions and metaphorical concepts. Mediators often regarded personal agency and self-determination as the predominant types of opportunities for parties in mediation. In institutionalized mediation systems there is a power in repeated processes conducted by many mediators. Structuration theory states that “all structural properties of social systems … are the medium and outcome of the contingently accomplished activities of situated actors” (Giddens, 1984, p. 191). Mediators are situated in history, repeating activities, such as opening statements, caucus, and techniques. According to Lakoff and Johnson (1980), metaphors, whether cultural or personal, are partially preserved in ritual, such as the mediator guiding parties on a journey toward an opportunity.

RQ3. What meanings and metaphors do family court mediators use to describe conflict and parties in conflict?
Mediators used mostly negative metaphors for conflict and parties in conflict, such as “war,” “battle,” “tsunami,” or “disease.” There was very little recognition of conflict’s potential for change, catharsis, or learning. Mediators often described mediators with a positive metaphor, whereas parties were described as “lost or fighting children,” “fighting animals,” “dogs chasing their own tails,” or a “destructive act of nature.” These negative metaphors may have substantial effects on the process since they embody an almost hopeless discord unless there is some intervening action. The strikingly positive attitudes toward mediators, mediation, and forgiveness, stood in stark contrast to the negative metaphors for conflict, parties, and divorce.

The making of meanings constitutes the significant learning that occurs in mediation. George Herbert Mead’s (1956) theory of symbolic interactionism emphasizes the meanings that people assign toward things, including mediation parties. Mead stated people are, in essence, products of their social environment, but also have the ability to be creative and purposeful.

**DISCUSSION**

Interesting results of this research included the predominantly negative metaphors mediators assigned for conflict, people in conflict, anger, and divorce, with only a few exceptions. Positive benefits can result from conflict including catharsis, personal growth, disclosure of deeply held feelings, and deepening of relationships (Baron, 1991; Amato, Booth, & Loomis, 1995). Cloke (1993, p. 68) stated that anger “points, through metaphor, not only at the problem but also at the solution.” Mediator training should repeatedly remind mediators of these positive characteristics of conflict and include critical reflection of metaphorical concepts. As structuration theory reveals, repeated experiences reaffirm process structures. Mediator training should increase focus on emotional intelligence and empathy for parties (Moore, 2003). A basic tenet of mediation is to empower parties to do their own decision making. Mediators who see parties as
“fighting children,” “pack of dogs,” or “wild animals,” may find it more difficult to empathize with and empower parties.

Other interesting results of this research included the predominance of positive metaphors for mediation, mediators and forgiveness. These positive metaphors may be a result of mediators’ appreciation of the very tangible positive results of their work. These results indicate that more research is needed regarding mediators’ self-concepts. There may be ethical implications associated with mediators who have very positive metaphors for mediation and themselves and very negative perceptions of parties.

Family stress and coping theory (Hill, 1949; McCubbin & Patterson, 1983; Plunkett, Sanchez, Henry, & Robinson, 1997) and general stress theory (Pearlin, Menaghan, Lieberman, & Mullan, 1981; Thoits, 1995) have contributed to an appreciation of the difficult stages that divorcing parties can experience. Since mediation was described frequently as an “opportunity” for parties, those who are not able to achieve personal agency may reaffirm negative metaphors for parties. Results of this research reaffirms the importance of party surveys and their availability to mediators for debriefing.

Mediators who described themselves as “referees” may have a different approach from those who described themselves as “peacemakers.” A referee may allow parties to fight and only intervene when necessary, whereas a peacemaker may have a more defined goal. “Death” was a metaphor for divorce that seemed particularly rich in symbolism. Whether death is conceived as a loss or a transition may have interesting effects on mediation style and ability to recognize the benefits of conflict. According to Silbey and Merry’s (1986) interviews and observations, mediator strategies grow out of assumptions about the nature of conflict, conflict resolution, and their own particular capacities and skills.
It was also interesting that *anger* was described using metaphors such as “destructive acts of nature” and “fire” or “flame,” whereas *forgiveness* was described with metaphors such as “a cool refreshing breeze” and “calm after the storm.” Acts of nature are inherently outside human control, whereas in questionnaires, mediators frequently defined themselves as experts and guides. It would be interesting to know if mediators see themselves as the agents of parties’ forgiveness, or if they see other factors facilitating it.

Mediation communication for people in divorce can involve unstructured, emotional discussion (Schreier, 2002). According to Umbreit (1997), most conflicts develop within a larger emotional and relational context characterized by powerful feelings of disrespect, betrayal, and abuse. This can be in contrast with the logical, structured process of certified mediation. As structuration theory suggests, as mediators *experience* a difference between the positive metaphors for mediation and the negative concepts of people in conflict, a sense of “otherness” may be reaffirmed if there is little opportunity for critical reflection.

Habitus and field theory posits that mediators may have particular mental models regarding language and communication which may not be similar to those of parties. If a mediator prefers calm, structured communication and has a negative perspective of the chaos of people in conflict, anger, and divorce, it would be of interest to learn the level of guidance these mediators give to parties about the level of emotionality that is acceptable.

According to symbolic interactionism, constructed meanings influence interactions with the world. *Anger* was described as an “act of nature,” inevitable and controllable. *Conflict* however, was described as a “battle” or “war” which would generally be considered a proactive and manmade event. It would follow that *anger* is a natural uncontrollable element, but the *expression of anger* might be controlled or eliminated. Additional research is needed to learn if
mediators believe conflict is predominantly resolved by parties, the mediator, or some other force.

**Theoretical Integrative Model of Systems (TIMS)**

**for Understanding Phenomena:**

**Being a Family Mediator within an Institutionalized System**

In considering the resulting metaphorical data from both stages of this study, four interpretive theories organically arose as being both applicable and instructive. These four interpretive theories included symbolic interactionism, habitus and field, structuration, and systems theories. Each theory identified possible training intervention points in a series of layers in mediation programs. These layers ranged from generalized, structural shaping to specific, individualized meaning making. There may also be a confirming influence on significant learning when metaphors are coherent across these layers. Development of a synergistic layered model was not a goal of this study, but emerged out of the repeated discovery of metaphors residing in layers of mediator experience. The resulting model in Figure 3, the Theoretical Integrative Model of Systems (TIMS) gives a visual model for understanding the phenomenon, a graphic representation of the layers of metaphorical concepts that may influence mediation style.
Systems theory is the most externalized layer, including institutional rules, symbols, goals, and values. This creates the environment which cultivates structuration theory’s “natural” redundant actions such as standard operating procedures or best practices. Ritualized actions are rewarded by the system and, in turn, consistent performance of these actions by many mediators strengthens the system. For family mediators, this might include the conducting of opening statements, discussion, caucus, and memorializing agreements in compliance in accordance with accepted ethical standards. Habitus and field theory identifies the mental models which emerge from the language and behaviors that are valued in the field of mediation. These mental models, such as use of communication, become accepted reality and a lens through which mediation is perceived. Mediators do continual meaning making as they practice. Each mediation brings new
metaphorical concepts which must be interpreted and either assimilated or rejected, depending on their coherence with existing concepts and value added. Symbolic interactionism theory reveals the most personalized form of meaning making, in terms of a stimulus, followed by mediator interpretation, and finally a response to the stimulus. The TIMS model portrays the four intervention points at which there may be training, assessment, and support opportunities. Quality assurance may be supported through achieving the goals in this study - understanding the essential experience of being a mediator, developing self-reflective practice, and supporting mediator learning. Although the results of this study cannot be extended to other groups, the TIMS model may facilitate the exploration of similar phenomena in which there are institutionalized layers of metaphorical concepts shaping practice, such as nurses or teachers.

CONCLUSION AND IMPLICATIONS OF THE RESEARCH

Divorce creates many new relational dynamics for families (Amato, 2000). There is increasing risk to children in divorce, with greater responsibility for restructuring families falling to the courts. This group of mediators’ predominantly negative perceptions stated for conflict and parties in conflict may indicate a void in continuing mediation education. Mediators would benefit from increased understanding of their metaphorical concepts of conflict and its positive potential. According to Lakoff and Johnson (1980), gatekeepers of resources are instituted through metaphorical constructs. When opportunity in mediation is equated solely with settlement, focus on mediation activities that do not directly support settlement may devalued. This study has identified some complex concepts in mediation assessment which support mediator training in emotional intelligence, empathy, and connection with parties. Lund (2000) has shown that training to understand and manage strong emotions helps a mediator build
tolerance for expression of emotion, reduce stress, increase patience and promote conflict resolution. Continued mediation training should include discourse regarding the cultural and experiential causes as to why a mediator might view emotionality in communication negatively. Observation of other mediators should be an ongoing requirement for mediator training, fostering discourse and debriefing between mediators. There should be ongoing qualitative assessment of mediation which identifies the complex nature of mediation, in addition to quantitative assessment. With increasing social pressures that arise from a challenging economy, increased global interactions, increased standardization and institutionalization, and changes in traditional social structures, it is important that mediators are equipped with all the essential tools for deeply reflective practice.

**Future Directions**

Qualitative content analysis with a larger sample size and demographic information might allow for generalizations beyond this set of mediators. Additional forms of metaphors could be explored in future studies so as to present a comprehensive set of metaphors within their relative categories related to this area. Extensions to this study could spawn theoretical development towards understanding family mediators and their experiences. Comparative studies across various states and countries would present another type of extension to the current study so comparisons could be made between mediators as this study was limited to family mediators within the Florida Family Courts. Also, it is recommended that future studies explore the metaphors used by court connected and private mediators. Ultimately, the study calls for future research utilizing metaphorical analysis in exploring phenomena in the complex field of conflict resolution.
REFERENCES


Mediators and Metaphorical Analysis: Qualitative Content Analysis of Family Court Mediators
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by

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ABSTRACT

Florida family court mediation programs are assessed predominantly with quantitative statistics. A phenomenological approach using metaphorical analysis of conflict concepts, couched in relevant theories, has provided insight into the experiences of a group of family court mediators. Metaphors are considered to be representations of the mental models with which we see the world. This article describes the Stage Two interviews of 22 family mediators, expanding on the Stage One questionnaire in a two part study. This qualitative study revealed that the mediators often described their approaches as being “unique” and many private mediators expressed negative metaphors regarding court staff mediators. Six metaphorical themes emerged including (1) control, (2) cognition / logic, (3) movement / change, (4) balance, (5) communication, and (6) gender.

INTRODUCTION

The state of Florida has a comprehensive system for certifying family mediators for court appointed cases (Florida State Courts Dispute Resolution Center, 2011). Florida Supreme Court family mediation certification includes training, observation, adherence to ethical standards and rules, and continuing education. This paper describes Stage Two of a two phase dissertation study regarding the conflict metaphors of a group of mediators. The reader is encouraged to review the Stage One complementary study, a content analysis of 85 statewide questionnaires and foundation for the 22 phenomenological interviews in this paper (Storrow & Georgakopoulos, 2012). Interviews helped us gain a richer insight into the way these mediators experienced mediation.

The metaphor is a fundamental way of making sense of life (Lawley & Tompkins, 2000). Debra Kolb’s (1994) book, “When Talk Works: Profiles of Mediators,” used interviews to understand mediation styles across mediation fields. In this study, we limited the scope to court-based family mediators. Interviews captured the richness of individual mediators’ lived experiences,
or what Dilthey described as the immediate, pre-reflective-consciousness of life (1985). Van Manen (1990) explained lived experience as, for example, when a teacher stands in front of a class it may be difficult for them to forget that children are “looking at them.” However, eventually the teacher “forgets” the presence of an audience and becomes more immediately and naturally present in the activity. We created a comfortable, informal interview environment and used a hermeneutical approach to analyze metaphors, defining themes within the contexts of the mediators’ experiences.

**Origins of Phenomenology**

The origins of phenomenology can be traced back to Immanuel Kant (1781) and Georg Wilhelm Friedrich Hegel (1807). The word *phenomena* comes from the Greek meaning to *become illuminated* or *appearance* (Groenwald, 2004). Metaphors are not only linguistic tools used to describe, but they structure future perception and action (Lakoff & Johnson, 1980). In this study, the phenomenon of being a Florida family mediator was envisioned through each mediator’s “life world” or human experience (Kvale & Brinkmann, 2009). We conducted interviews, reflective debriefing, and metaphorical analysis to reveal the mediators’ orientations (Costelloe, 1996; Porter, 1995). In phenomenology, the process of analysis also resides in the concept of *epoch*. Epoch requires the elimination of suppositions, basing knowledge on intuition and essence, as opposed to empirical knowledge (Moustakas, 1994). We separated out the mediators’ experiences from our own biases as practitioners by openly documenting our personal perspectives.

**Metaphorical Coherence**

Metaphorical coherence is defined as perceptions that fit into existing metaphorical concepts (Lakoff & Johnson, 1980). There is a *systematicity* which, according to Lakoff and Johnson (1980), relates to the idea that metaphorical expressions are linked together through underlying concepts.
Shen and Balaban (2000) demonstrated that in natural language there is little apparent coherence, but metaphorical coherence may be identified within a single discussion topic such as mediation.

In the book *Metaphors We Live By*, metaphors are seen as structuring our perceptions and understanding of the world, guiding our actions and decision making (Lakoff & Johnson, 1980). For example, as an infant we may see liquid or formula poured into a bottle, associating the rising level of liquid as being good. Metaphors are reaffirmed each time we see an increase producing a good result, developing circuitry in the brain. This meta-metaphor is applied to a variety of areas such as emotions, as in feeling *on top of the world* or being *down in the dumps*. According to Lakoff and Johnson (1980), world views are built upon the conscious and unconscious concepts we hold, such as *conflict is a war between two opposing sides* or *successful mediation ends in settlement*.

### Reasons to Conduct a Phenomenological Study

Phenomenology reveals the complexity of experience. Judges increasingly refer difficult cases to family mediation to achieve consensual, cost effective, and timely resolution (Phillips, 2001; Moore, 2003; Fisher, 1991). Like mediation, divorce is a complex process. There has been research comparing divorce stages to the Kubler-Ross (1969) stages of grief, though psycho-social stages of divorce recovery have not been confirmed by current research (Gastil, 1996). Conversely, more complex factors such as gender, locus of control, and social involvement have been identified as having an impact on the divorce experience.

### Goals of this Study

The three goals of this study were to (1) understand the mediators’ essential natures, (2) appreciate their experiences as practitioners within an institutionalized system, and (3) explore how they learn and integrate new concepts. As an existential phenomenological study, there was no
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attempt to fit data into existing theoretical concepts. However, four interpretive lenses added to the discussion phase regarding institutionalized family mediation metaphors - systems theory, structuration theory, habitus and field theory, and symbolic interactionism.

LITERATURE REVIEW

Phenomenological Research Design

Institutionalized forms of mediation have been criticized for fostering a less personal approach which could dehumanize the process (Alfini, et al, 1994). Phenomenology’s ability to examine essential human experience generated the first research question, RQ1: What is the essential nature of the family court mediators themselves? Buber (1970) stated that when a culture is no longer centered on living relational processes, it freezes into the It-world. It is broken only by “intermittently eruptive, glowing deeds of solitary spirits” (Buber, 1970, p. 103). Research question two was, RQ2: What is the essence of how family court mediators practice?

Patterns of metaphorical coherence mirror structures of relationships, organizations, and society (Turner, 1996). Since cultural assumptions, values, and attitudes are not always concepts of which we are consciously aware (Lakoff & Johnson, 1980), research question three was, RQ3: How do family court-based mediators perceive, predict, interpret, and apply their experiences to their personal and professional lives? These culturally influenced metaphors build coherent systems used to conceptualize experience (Lakoff & Johnson, 1980), so understanding how mediators interact with their environment supported the question, RQ4: What metaphors do family mediators use for the mediation process and the system(s) within which they practice?
Family Mediation Styles and Models

The study of family mediation styles has been historically difficult to measure and conceptualize. Kressel (2000) stated that a mediator’s style “refers to a cohesive set of strategies that characterize the conduct of a case” (p. 535). Two dimensions used to define mediator style are a mediator’s neutrality and normative style (Greenhouse, 1985). Interestingly, although child-focused (CF) mediation is common in court based family mediation, child-inclusive (CI) family mediation is not. McIntosh, et al. (2008) found that in a study of CF and CI family mediations, agreements reached by the CI group were significantly more durable and half as likely to instigate new litigation. According to Silbey and Merry (1986), mediator strategies grow out of systemic assumptions about the nature of conflict, conflict resolution processes, and mediators’ particular capacities and skills. These interactive influences led to the question, *Do the mediators have ethical dilemmas or internal conflicts/challenges? (RQ5).*

Critique of Past Methods

In a twelve year study by Emery, et al. (2005), comparing 35 mediation families and 36 litigation families, family mediation was shown to help parents see the need for cooperation regarding their children, even if this was not possible during the time of separation. Family mediation’s most important contribution is that already contentious relationships can avoid further adversarial conditions, such as going to court (Emery, et al., 2005). It is important to learn why mediators are able to affect such change.

Studies by Irving and Benjamin (1995) and Kressel, et al. (1994), indicated that the organizational setting, private or public, had a profound influence on mediator orientation. According to these studies, private mediators’ used more passive tools such as active listening, whereas, court mediators focused on facts and issues. Debra Kolb’s (1994) book, *When Talk Works: Profiles of Mediators* used extensive qualitative interviews to examine the practice of mediation
across several different industries. These in-depth interviews were some of the most revealing insights into the variation of mediator styles and world views. Kolb did not however address how these styles might be related to individual or systemic metaphors as lenses.

Phenomenological Methodology and Rationale

Phenomenological research is rooted in the philosophical perspectives of Edmund Husserl (1983), as well as Heidegger (1962), Sartre (1958), and Merleau-Ponty (as cited in Creswell, 1998). Researchers have searched for essential, invariant structure or “essences,” which comprise the underlying meaning of experience (Denzin & Lincoln, 2003; Cresswell, 1992). Our study was based on Heidegger’s existential phenomenological approach and acknowledged the concept of mediator being as a relational one. Court mediation may not be as one mediator described, “a candy in a box of chocolates” – one of several equal process choices. The mediator may more likely exist in relationship with systems that influence perception and practice style.

METHODS AND PROCEDURES

An “anti-method” approach with an emphasis on the researcher as the instrument is the core of phenomenological study (Kvale & Brinkmann, 2009). According to Van Manen (1990), phenomenology cannot be used to prove that one method is more effective than another, nor allow for demonstration of functional relationships. Therefore, our goal for this research was merely to transform the lived experience of this group of mediators into a textual representation of its essence (Van Manen, 1990). A clearly stated methodology supported truthfulness, but allowed for flexibility, stating how and why deviations were necessary.
Site and Participant Selection

Florida’s certification environment, its multiculturalism, and our experiences as local mediation practitioners made the state an appropriate research site. Participants were Florida Supreme Court family certified mediators with substantive experience in court based family mediation. Of the 22 participants, thirteen were female and nine were male, a ratio similar to the demographics of all Florida Supreme Court certified mediators (Florida State Courts Alternative Dispute Resolution Center, 2011). There were 20 Caucasians born in the United States and two Hispanics born outside of the United States. Fourteen were married, three were divorced, one was single, and four were of an unknown marital status. The group’s age range was approximately 33 to 80. This sample was advantageous since participants had some similar characteristics and life events, and it allowed for in-depth analysis (Baker, et al., 1992). Mediators were not selected for the purpose of generalizing to others, but for the variation which exists in all Florida mediators, to capture their range of experiences (Cannon, Higginbotham, & Leung, 1988).

Data Collection Methods

Interviews

Data collection included approximately half hour, informal interviews in person or by phone. We recorded or took field notes and transcribed the data. We used a denaturalized process, focusing on metaphors and content rather than accents or involuntary vocalization (MacLean, et al, 2004). Determining the number of interviews depended upon the quality and saturation of the metaphorical themes that emerged in analysis.
ANALYSIS

Analysis included a double coding approach, a process in which two independent researchers identified themes separately and then compared results. Battle (2008) used interview transcriptions to gain an insider perspective in the coping mechanisms of adolescent mothers. We utilized Clark Moustakas’ (1994) modification of the van Kaam method of analysis to explore our set of transcriptions. Analysis began with 22 original transcripts, with the goal of understanding the mediators’ essential experiences. We “horizontalized” the data, meaning that every relevant expression was listed and assigned equal value (Moustakas, 1994). After all meanings were exhausted, we identified recurring meanings or “invariant constituents” in spreadsheet columns. Finally, the invariant constituents and their overarching themes were checked against the whole set of transcripts to see if they were compatible and relevant. Continually returning to the original transcripts prevented our being overwhelmed by information (Kvale, 2000). As co-researchers, we independently followed these steps, concluding with separate structural and textural descriptions and conclusions.

RESULTS AND ANALYSIS

Uniqueness

Many of the mediators stated in interviews that they had “unique” approaches that came from their distinctive sets of life experiences. This was often based on their own divorce experiences, though a few credited their successful marriages. It was unclear how mediators concluded their approaches were unique, as they generally stated they had not observed other mediators. Two experienced mediators described techniques that included settling small issues first, and then moving to larger ones. They stated it allowed them to build momentum based on small agreements.
This is an approach used commonly in narrative mediation (Winslade & Monk, 2000; Fisher & Ury, 1983), but both mediators described it as a singularly unique process which they had developed based on long time practice. One mediator called it his “ra ra” approach, stating he was a “kind of cheerleader for the process.” Unique approaches were described as tools that were a direct result of many years of trial and error.

Private and Court Staff Mediators

Another common theme was private mediators used unfavorable metaphors regarding court staff mediators. Each admitted however, that their observation of court staff mediators was limited or in the distant past. One private mediator compared court program mediation to “public transportation…you get a ride on the bus,” whereas private mediation is like “Hertz Rent-a-Car ... you get a working vehicle to get you from here to there.” This was explained as being due to court staff mediators having to complete mediations within two hours and their lack of mediation skills. She continued, “… it’s like public transportation; you get a ride on the bus; it just doesn’t work if you’ve got a lot of baggage. It’s okay if it’s all you can get.” These private mediators did not know whether court staff mediators could adjourn and continue or do multiple sessions in a day. When we asked another private mediator if they thought there was an incentive for parties to cut mediation short due to hourly fees in private mediation, she acknowledged that parties may curtail their discussion to reduce cost.

Fields of relationships within private practice groups, may reinforce the “rightness” of similar practice styles, relegating mediators in different systems to being inferior or even unethical. Florida family court staff and private mediators exist in slightly different relationship fields and systems, though both practice under the same rules, statutes, and certification.
Six Invariant Constituents

After horizontalizing the data, giving equal weight to all metaphors, we identified six invariant constituents – (1) control, (2) cognition / logic, (3) movement / change, (4) balance, (5) communication, and (6) gender. To a lesser degree, we found the themes of collaboration and emotion. One mediator, who was also a program manager, expressed many of these themes within an overarching context of safety and security.

1. Control

A very experienced private mediator stated, “I try to keep people here…I wouldn’t want to adjourn because it’s difficult to get them back.” Although this statement was initially surprising, many private mediators believed it was their responsibilities to do whatever they could to achieve settlement. Another private mediator stated, “… that is what the parties came for.” This supposition may be similar to the understanding that an agreement is good and no agreement is bad. It also may be associated with a problem solving approach, fostering a preconception regarding the parties’ goal of settlement. Though these statements came predominantly from private mediators, it has been traditionally court mediators who have been associated with settlement focused styles (Alfini, 1994). Settlement focused processes that are repeated over time become institutionalized and may affect how mediators’ process disconfirming information.

Control was also expressed as a dislike of animalistic or regressive behavior. Several mediators described mediation parties as “fighting animals” or “spoiled children.” There was a preference among problem solving mediators for logical, calm discourse over regressive, emotional behavior. These mediators framed animalistic or childish behavior as being an obstacle to rational, effective dialogue and resolution. Control of emotion was cited most frequently by private mediators and
highly experienced mediators in metaphorical concepts such as “pulling” and “pushing.” Mediators who were most experienced asserted greater control of their interviews, requesting longer story telling opportunities and occasionally attempting to interview the researchers. Only very experienced mediators asked to make statements regarding their mediation approaches prior to beginning the interview questions and were more likely to use control metaphors throughout.

2. Cognition / Logic

Another invariant constituent was cognition and logic. Mediators spoke of parties “learning” or “seeing beyond their own interests.” This theme was especially common to mediators who used a “business” metaphor for mediation, focusing on logical motivations with outcomes based on each party’s best interest. The problem solving approach frequently stated by these mediators as an effective way to get to settlement. They used statements such as “structuring the process” or “generating possible solutions.” These mediators indicated a more active role using targeted questions to help parties understand new concepts. They did not favor emotionality as it was seen as an obstacle to “productive” discussion. Some mediators openly acknowledged their discomfort with emotionality in mediation, with one stating, “If you want the warm and fuzzies, you need a different kind of mediator.”

Mediators who cited a learning or education based approach to practice often discussed their own learning. They described their transformation as practitioners as “I don’t do that anymore” and “I’ve learned through time...” Revelation through experience over time was expressed frequently by mediators who focused on cognition and logic.
3. **Movement / Change**

*Movement* or *change* was often characterized as a journey. These mediators perceived themselves as a guide, such as a “miner with a lighted hat” or “tour guide.” Some were more likely to discount the value of being overly sympathetic or “dealing with sensitive issues.” A preference for moving forward seemed less compatible with the time needed for catharsis and emotional issues which might slow progression toward settlement. Phrases such as “cut and run, or “buck up and move forward” described a process in which emotional issues were secondary to “getting to the other side” or moving towards a goal.

Divorce mediation was described by one court staff mediator as “people in a boat on the water who must row together, working together to get to shore.” Other metaphors were, “there’s some end in sight” and “the light at the end of the tunnel.” The mediator was often the person who was to help the parties “navigate to the other side of the water” and “reach solid ground.” One mediator suggested divorce mediation was more like “… miners in a dark mine shaft. The mediator has the lighted safety hat and can help light the way for parties to find their way out of darkness.” The mediator was the “giver of light or direction” and parties were often “lost” or “adrift.” We as researchers were not confident that the mediator could know the lives of the parties as well as the parties themselves, but we did acknowledge that parties look to mediators for direction and support.

The mediators who used guide metaphors for the parties’ journey often perceived themselves as “experts” in conflict resolution and that parties could benefit from their experience. As researchers and mediators, we became consciously aware of our own beliefs that a mediator should not see themselves so much as an expert, but as more of a skilled facilitator of the parties’ learning and potential resolution. We felt somewhat uncomfortable in interviews hearing some mediators discuss at great length their expert ability to guide parties. Our personal beliefs as phenomenological
researchers were that parties were the experts in their own lives, but they could benefit from new skills and fresh perspectives to manage conflict.

4. Balance

Balance was expressed through metaphors such as being “neutral,” dichotomy such as “yin and yang,” “circles” or “cycles,” “harmony,” and even “juggling.” Balance seemed to be a likely concept to encounter since mediators must balance issues of impartiality. Different metaphorical concepts emerged, such as cyclical balance which was revealed in metaphors such as “bring things back to whole,” “wholeness is up to the parties,” and “it just spirals.” A mediator who said she continually has to “juggle” activities particularly stressed having both balance and agility. We considered that if someone juggles or handles many tasks, they may not spend a great deal of time with any one thing, but may pass items through their hands quickly. She stated she may “bring something up” multiple times, and this repeating and directionality of the statement reaffirmed the juggling metaphor. We would have been interested in observing her in mediation, as we wondered if she moved through issues equally in a circular fashion, as opposed to settling each issue sequentially. Balance oriented mediators said they had an exceptional ability to multitask, but accident metaphors such as “missed our meeting” and “I missed an email.”

5. Communication

Communication was described as a “tool” that empowered parties. One mediator liked to use humor to “keep it light.” Several mediators stated they were “active listeners” and used reframing techniques often. Communication oriented mediators said they used caucus early and often, with two private mediators saying that they usually conduct the entire mediation in this way. One mediator who liked to use this shuttle diplomacy approach cited communication as an important
skill to have. It was not clear to us how that skill was imparted to parents, other than drafting a
parenting plan which identified communication strategies.

6. Gender

There were four mediators who identified gender as very significant. An older male mediator
and two Hispanic female mediators discussed a desire to protect their female parties. They gave
examples where a husband might try to take advantage of his wife. Two in this subgroup said that
they found themselves wanting to help the wife and going into advocate position for the wife. One
Hispanic female mediator stated that since women “give birth and do most of the work regarding
children, they (women) tend to expect more rights,” adding that this was a Latina concept. The
older male mediator said that “nowadays women are resentful if they have to support their
husbands for a while.” He said he found himself “leaning toward the female.” Two male mediators
also stated that women are generally the weaker negotiators in mediation and often need “special
attention” to balance power.

Research Questions and Results

1. Research Question One: What is the essential nature of the family court mediators?

(RQ1)

Mediators described similar approaches between the way they addressed conflict in their
personal and professional lives. They generally cited communication as an important way to
resolve conflict. One of the most commonly used metaphors was a mediator as a guide for the
parties’ journey which requires their effort and work. This reminded us of the metaphor of the
“American dream” – work hard and you will get “there.”
Interviews revealed two distinctive fields of relationships, court staff and private practice mediators, with some individuals having practiced in both fields. Habitus and field theory was initially established by Marcel Mauss (1936), and further elaborated by Max Weber (1947), Edmund Husserl (trans., 1983), and Pierre Bourdieu (1985). Habitus is the mental model people use to deal with the world. Field is the web of social relations and forces that exist in a particular social strata or situation. Fields of relationships not only reinforce common metaphors, but determine access to gatekeepers, and influence levels of diversity in a system (McEwen & Milburn, 2007).

According to a mediator search conducted using the Dispute Resolution Center’s website (Florida State Courts Alternative Dispute Resolution Center, 2011), Florida Supreme Court family certified mediators are not as diverse a population as Florida’s population. Florida family certified mediators were shown to have self-reported fewer Hispanics and African Americans. Certified mediator demographics may support particular mental models and fields of relationships as seen through habitus and field theory.

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<tr>
<th></th>
<th>Florida Population</th>
<th>Florida Supreme Court Family Certified Mediators</th>
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<tr>
<td>White</td>
<td>75</td>
<td>72</td>
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<tr>
<td>African American</td>
<td>16</td>
<td>6</td>
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<td>Hispanic</td>
<td>22.5</td>
<td>9</td>
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http://quickfacts.census.gov/qfd/states/12000.html; does not include all categories reported
http://www.flcourts.org/gen_public/adr/index.shtml; does not include all categories reported
Mediators often described themselves as “mediators”. When using this description, mediators tended to look down or smile in a way that seemed as though they were embarrassed by the description. We asked one mediator why she was smiling, and she said she thought it was an “almost grandiose concept,” but that she believed it fit. We asked another mediator to what famous or well-known mediators he would compare himself. He said he wasn’t “MLK or Jesus,” but kind of like the mediators he had known in his own life – his mother, and his brother. An interesting future study might include mediators’ first experiences with conflict and its resolution.

Many described themselves in terms of an “energy force,” such as the “the consummate juggler.” This mediator said she has juggled at least a dozen things and “rarely drops anything.” This mediator spoke with great energy and using journey metaphors. Another mediator said she was “calm, yet explosive” – “a match that is ready to ignite.”

2. **Research Question Two: What is the essence of how family court mediators practice?** (RQ2)

One theme that emerged was sound. Some especially intuitive mediators described family mediation as an orchestra. “Each party plays an instrument” and the “mediator is the conductor.” The music ranged from soft and pleasant, to abrasive and dissonant. One eloquent court staff mediator likened mediation to “the gentle, quiet voice of reason in a world of cacophony.” In each of the sound metaphors, it was the mediator who was the “conductor” or “producer of harmony.” We wondered if there were ever times where parties had the ability to conduct, with the mediator being a player or audience. As researchers, we also began to consider dynamics of the beginning, middle crescendo, and end of mediation as a metaphorical “composition.”

Another common type of practice metaphor was that of a journey. One mediator described family mediation as “people in a row boat in the middle of a lake. They are trying to row to shore,
and are not working together, but against each other. There are waves crashing into the boat and murky sea monsters under the water.” Mediators described mediation as moving “through a tunnel” or “down a road.” We wondered if these mediators might move through mediation in a linear fashion and how much focus would be given to getting to the destination.

Metaphorical concepts such as conducting music, facilitating a journey, a force of energy, and juggling were considered in terms of the process choices they support. Stucturation theory states that repetition of an approach may create an accepted reality. It may be beneficial for mediators to observe each other to see how differing metaphorical concepts can influence the process. Court staff tended to describe their mediation styles in terms of “harmony,” “music,” or “emotion.” Private mediators more often described their style as a “business,” “problem solving,” “rational discussion,” or “a journey.”

3. **Research Question Three**: How do family court-based mediators perceive parties and apply their experiences to people in their personal and professional lives?

Some mediators described parties as being “hostile,” “like animals,” “blaming,” and “battling.” Some stated there is “so much anxiety and hatred” and “vindictiveness.” One mediator said, “Parents are like children.” Another stated, “Most often they are like spoiled children, fighting over foolish things that symbolize some kind of power or control. People regress when they are feeling threatened and hurt. There’s a sense of loss during divorce that causes relationships to deteriorate.”

The meanings of regression, loss, and power can be seen through George Herbert Mead’s (1956) symbolic interactionism theory. It was derived from American pragmatism, in which people are products of their social environment, but also have the ability to be creative and purposeful. A focus on the making of meaning has special importance in this discussion
because symbolic interactionism indicates that mediators who perceive parties as animals or children will interpret events through a particular lens.

Mediators predominantly said they used the same approaches to resolving conflict in their personal lives. They had learned important skills in mediation that were helpful in resolving disputes with family and friends. Several initially responded saying, “I don’t have any conflicts with friends, family, or coworkers.” However, after some consideration they recalled at least one example. Solutions were generally discussion-based, following accommodation of the other person’s comfort level with discourse. Several mediators preferred conflict avoidance, especially with co-workers or people they did not know well.

4. **Research Question Four**: What metaphors do family court mediators use for the systems within which they practice? (RQ4).

Staff mediators tended to describe their programs as being a “structure,” “family,” or “ship.” Private contract mediators who did some work for court programs, tended to describe programs as “a tree with many branches” or “a mixed bowl of fruit.” For a mediator to see themselves as part of a coherent structure with interdependent parts may indicate a greater sense of association. Identifying the self-organizing tendencies through systems theory helped identify, analyze, and explain the phenomenon of family court mediation (Ritzer & Goodman, 2004). It revealed an environment which has cultivated structuration theory’s “natural” redundant actions through rules and best practices.

Mediators are situated in history, repeating activities, reinforcing social structures, and connecting themselves to each other through redundant acts. Structuration theory states that “all structural properties of social systems … are the medium and outcome of the contingently accomplished activities of situated actors” (Giddens, 1984, p. 91). The family mediation process has
a repeated structure that may vary, but contains many of the same elements – intake, opening statement, parties’ opening statements, discussion, possibly caucus, and writing of the agreement. According to Lakoff and Johnson (1980), the metaphors we live by, whether cultural or personal, are partially preserved in ritual.

5. **Research Question Five**: What are some of the ethical dilemmas or internal conflicts/challenges mediators have? (RQ5)

Mediators indicated a variety of ethical challenges, ranging from confidentiality to empowering parties without giving legal advice. This research question, more so than any other question, generated *journey* metaphors. For example, mediators stated, “we run into ethical problems,” “an issue we’ve been confronted with,” and “redirecting conversation to facts and fact patterns.” Some ethics metaphors also had the element of delineation such as, “blurs the line between confidentiality and the administrative part of it.” There was almost a reluctance to stay in the same place as the ethical dilemma, which caused the mediator to want to “move away” from it.

Ethical dilemmas based on cultural contexts were elaborated by both Hispanic mediators. One mediator described a Latin couple fighting over back alimony and child support. The mother conceded and the mediator had to fight the urge to push the mother to go after the money she believed the woman was owed. This mediator then began to explain aspects of motherhood and being a Latina. She explained that in the Latin culture, women tend to do most of the household work and take care of the men. She further explained that children live at home longer and the mother takes care of them until they leave home. There was a specific understanding that arose from the mediator’s cultural experiences, grounded in the relationships between mothers and children, and especially sons. In terms of symbolic interactionism theory, it was interesting to learn how the making of meaning drew from cultural experience, and then influenced expectations.
Three themes or meta-metaphors emerged:

1. Mediator as Educator

One education theme that arose was the concept that parties were at a disadvantage due to not “being in the field (of conflict resolution).” Problem solving mediators tended to use statements related to *learning* and *understanding*. Also, business model mediators included educating parties so they could make “good business decisions.” Mediators who strongly stated the educative metaphors reported their own learning that arose from their professional practice. Mediators used statements such as, “I see the world much differently” and that they have “evolved over the years.” Mediators used terms such as “getting them to learn how to deal with these problems,” “teach,” “train people and educate them,” and “their way of thinking.” They identified aspects of *otherness* of the parties which resulted from their lack of knowledge.

2. The Journey Metaphor

There were a variety of *journey* metaphors such as a “road” or “path,” “rowing a boat,” and “running away or toward something.” Some of the most contentious issues is transporting children, where they will live, and who will move from the marital home. Mediators who used a *boat* metaphor stated the parties “want to get to shore,” but they “have trouble rowing together.” They fight each other and “sometimes even hit each other with the oars.” The “future is on solid ground, they’re moving forward” and “they’re gonna get somewhere that it’s gonna be safe again.” These are coherent metaphors regarding a journey in which the future is a solid and positive place to be. It is hopeful, but requires work and personal agency.
3. Otherness

*Otherness* was expressed in terms of the private versus court staff mediators, mediators being different from the parties, separation between the parties, and the differences between mediation and the court. Mediators who used *otherness* metaphors tended to value and see mediation as an educative tool, also recognizing their own learning obtained through their practice. “Boundaries” and “crossing lines” were frequent metaphors difference of ethical concepts.

We were concerned with the apparent disconnect between private and court staff mediators. Court mediators tended more often to be mental health professionals or have social service backgrounds, whereas the private mediators were more often attorneys or business people. Some of this *otherness* may have been due to different professional fields, sociocentrism, or competition over market resources. Habitus and field theory revealed that particular perspectives developed based on fields of relationships. The sense of *otherness* might be reduced through combined private and court staff mediator training or joint discussion forums.

**DISCUSSION**

Most family mediators in this study provided a valuable service to their parties that served as a better option than litigation. However, family mediators work frequently with people who may be experiencing difficult phases in their lives. This, according to several theories, this may have contributed to the predominance of negative metaphors in this study regarding parties in conflict. Private mediators often stated negative metaphors for court staff mediators. Without disconfirming experiences, there may be an entrenchment or predisposition regarding parties and “other” mediators. It may be helpful for mediator training to increase focus on emotional intelligence and empathy (Moore, 2003). As structuration theory demonstrated, repeated experiences can reaffirm process
structures. We recommend more joint training sessions and networking for private and court staff mediators.

Mediation communication for people in divorce can involve unstructured, emotional discussion (Schreier, 2002). According to Umbreit (1997), most conflicts develop within a larger emotional and relational context characterized by powerful feelings of disrespect, betrayal, and abuse. This is in contrast with the productive, logical approach of mediation as a business or journey. Without critical reflection being consciously added as part of program processes, differences between mediators and mediation participants may continue to be reinforced. Training should also include greater focus on the benefits of conflict, such as disclosure and transformation.

Habitus and field theory posits that mediators may have communication norms that are different from those of parties. With predominantly negative metaphors for people in conflict, anger, and divorce, it would have been interesting to observe how mediators set ground rules regarding communication. More research is needed to see how family mediators’ threshold of comfort with emotional expression affects communication. Lund (2000) has shown that training to understand and manage strong emotions helps a mediator build tolerance for expression of emotion, reduce stress, increase patience and promote settlement.

This phenomenological study of mediators explored how mediators chose approaches on more than a mere logical strategic choice, but on pre-existing concepts and external social systems. Applying Lakoff and Johnson’s (1980) concepts to systems theory, mediation was seen as influenced by systemically reinforced metaphorical constructs. They grew from the mediators’ previous personal experiences, world view, mediation experience, belief systems, values, status, systems, program structures, and spiritual concepts. It is essential that mediators have the opportunity to have ongoing training that supports good critical reflection, discourse between mediator groups, and observation of other family mediators. Observation might be most beneficial
as a mandatory part of continuing education. According to Lakoff and Johnson (1980), gatekeepers of resources are also instituted through metaphorical constructs. With complex divorce processes, it is important to ensure that structurally, mediators have enough time in mediation or feel comfortable in adjourning mediation to meet again to resolve issues.

**Theoretical Integrative Model of Systems (TIMS)**

*for Understanding Phenomena: Being a Family Mediator within an Institutionalized System*

This research of Florida Supreme Court certified family mediators was part of a two stage study (Storrow & Georgakopoulos, 2012). Stage one was conducted using qualitative content analysis and stage two interviews described in this article were conducted using an existential phenomenological approach. In considering the two resulting sets of metaphorical data, four interpretive theories organically arose as being instructive. These four interpretive theories included symbolic interactionism, habitus and field, structuration, and systems theories. Each of these theories identified a series of coherent layers of influence that ranged from generalized, structural forces to specific, individualized shaping (see figure 1). According to metaphorical coherence, there is a confirming influence on significant learning when metaphors are similar across these layers or a disconfirming influence when metaphors are not. Development of a synergistic layered model was not a goal of this study, but it emerged from the repeated discovery of metaphors residing in layers of mediator experience. The resulting model in figure 1, the Theoretical Integrative Model of Systems (TIMS), gives a visual model for understanding the phenomenon of being a family mediator, a graphic representation of the layers of metaphorical concepts influencing mediation style.
Systems theory (4) includes external and structural influences including processes, rules, and statutes, as demonstrated through institutional symbols, goals, and values. This constitutes the environment supporting structuration theory’s (3) “natural” redundant actions. These recurring actions follow rules and best practices. Ritualized actions are rewarded by the system and strengthen it. This might include opening statements, discussion, caucus, and memorialization of agreements.

Habitus and field theory (2) identifies the mental models which emerge from the language and behavior valued in the field of practice. These mental models become accepted reality and a lens through which mediation is perceived. Mediators do continual meaning making as they practice and interact with others. Each mediation brings new metaphorical concepts which must be interpreted and either assimilated or rejected, depending on their coherence and value added. Symbolic interactionism theory (1) reveals the most personalized form of meaning making. It is the mediator experience of a stimulus, followed by interpretation, which generates a response to the stimulus. It
constitutes the observed behaviors or “style” of the mediator. The TIMS model identifies four points at which training and support may be most effective.

Although the results of this study cannot be extended to other groups, the TIMS model can facilitate other qualitative researchers to understand similar phenomena in which there are institutionalized layers of metaphorical concepts shaping practice, such as nurses or teachers. Each layer can produce coherent metaphorical understandings that lead to broadly accepted reality. Quality assurance in mediation programs can be further enhanced through metaphorical analysis and pursuit of the goals in this study – better understanding of mediators’ essential experiences, practice systems, and education needs.

**Ethics**

Confidentiality was addressed in both the consent forms given to mediators and secure record keeping. All questions and concerns of the participants were answered before their participation in the study. In terms of reciprocity, there was important information that resulted from this study, benefitting mediation managers and mediators. We hope to have given voice to the mediators that participated in the study. Informed consent included a complete understanding by participants as to what would happen in the study and how information would be communicated.

**CONTRIBUTIONS OF THE RESEARCH**

Divorce and separation of parents has created generations of American children who grow up in a very different environment than in previous decades. There is increasing demand for mediation to assist families in restructuring after divorce. Knowing the essential nature of mediators and the process of mediation is an important part of designing better programs and training. Mediator metaphors guide perceptions of ethical dilemmas, burnout, and other challenges. Each mediation program has variance in processes so it is important to understand the impact of length of
mediation session, frequency of adjournment, training, and observation of other mediators. We recommend more experience-based training, more survey feedback to mediators, and required observation or co-mediation with facilitated debriefing. There should be ongoing qualitative assessment of mediation which identifies the complex nature of mediation, in addition to quantitative assessment.

**FUTURE DIRECTIONS**

Existential phenomenological research should be conducted beyond this set of mediators. Additional forms of metaphors could be explored in future studies so as to present a comprehensive set of metaphors within their relative categories related to this area. Extensions to this study could spawn theoretical development towards understanding family mediators and their experiences. Also, it is recommended that future studies further explore and investigate the metaphors used by court connected mediators and private mediators. Ultimately, the study calls for future research utilizing metaphorical analysis in exploring phenomena in the field of conflict resolution.
REFERENCES


Storrow, R. & Georgakopoulos, A. "Mediators and Metaphorical Coherence: A Phenomenological Study of Family Court Mediators." Nova Southeastern University, Florida.


Mediation: An Informal and Effective Approach to Settlement
Practical Guidelines and Steps for Getting Started
Introduction

The American Arbitration Association (AAA) is the world’s leading provider of alternative dispute resolution (ADR) services. AAA Resolution Services, which consists of conflict management processes, neutrals and client assistance, is part of a continuum of dispute resolution options, including mediation, arbitration, fact-finding, and early neutral evaluation), available through the AAA. AAA Resolution Services assists parties to minimize the impact of disputes by resolving them earlier. This guide outlines the Mediation process, including the steps involved from the time a Request for Mediation is submitted through resolution, and covers the procedures used in Mediation cases.

An Overview of the Mediation Process

A Request for Mediation

- The AAA can assist parties in selecting a mediator who may be appointed immediately or later based on the needs of the parties. Alternatively, parties may review detailed profiles of mediators at www.aaamediation.com and mutually agree to a mediator prior to submitting a Request for Mediation.

- May include a pre-mediation telephone conference call, pre-mediation briefs, reports, narratives, pleadings, caselaw—anything that will help explain your position to the mediator. Thorough preparation is key to a successful mediation.

- Generally held within 30 days of mediator selection and often sooner, but always based on the needs of the parties.

- When a mutually satisfactory resolution is reached, parties execute a written agreement disposing of the dispute.

- Parties may agree to arbitrate any remaining issues.
Mediation is a voluntary, confidential extension of the negotiation process. When two or more disputing parties are not negotiating effectively or are at a stalemate, they invite a neutral mediator to help them move toward a negotiated settlement of their own making. A mediator has no authority to impose a settlement and generally will not recommend specific terms of settlement. Mediation is prospective rather than retrospective. Rather than looking back to the past in order to find fault, assess blame, and impose a resolution, mediation looks to the future to determine how the parties can work together for their mutual benefit.

Mediation is a particularly well-suited process for those who want to play an active role in deciding the outcome of a dispute because it provides an opportunity for parties and their representatives to work through issues with the assistance of an impartial third person trained to facilitate resolution.

Mediation may be provided for by either joint submission after a dispute arises or by including the AAA’s standard pre-dispute mediation provision in a contract:

* If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by Mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

Getting Started with Mediation

Finding the right mediator is, in many respects, the single most important part of the mediation process. That’s why the AAA’s Panel of Mediators is the first choice for many parties and their representatives who rely on it when it comes to selecting a mediator. Detailed profiles of all AAA mediators are available at www.aaamediation.com.

Initiating and scheduling a mediation with the AAA is easy. Any party or parties to a dispute may initiate a mediation by either contacting any of the AAA’s regional offices or case management centers via telephone, email, regular mail or fax, or by submitting a Request for Mediation directly online from their selected mediator’s profile (if a mediator has been mutually selected). Requests for Mediation or general inquiries about mediation may also be sent to mediationservices@adr.org.

The Mediation Process

Mediation generally consists of five phases:

- Preparation
- Initial Joint Session
- Initial Private Sessions
- Subsequent Joint and Caucus Sessions
- Closing and Formalizing the Settlement

At the beginning of a mediation conference, mediators will often start with all parties in a joint session. At a certain point in the joint session, the mediator may decide that caucusing with each party would be helpful. A caucus is a private, confidential meeting held by the mediator with each party separately.

The balance of the mediation conference involves a series of caucuses and joint sessions in which the mediator works with the parties to generate options for settlement.

When a settlement is reached, the mediator will review the terms with the parties to verify and re-state the specifics of the parties’ agreement.

The Benefits of Mediation

The benefits of mediation vary depending on the needs and interests of the parties.

Common benefits are:

- Parties can control the outcome;
- Parties are directly engaged in the negotiation of the settlement;
- The mediator, as a neutral third party, can view the dispute objectively and can assist the parties in exploring alternatives which they might not have considered on their own;
- Since a mediation can be scheduled at an early stage in the dispute, a settlement can be reached much more quickly than in litigation;
- Parties generally save money through reduced legal costs and less staff time;
- Parties enhance the likelihood of continuing their business relationship; and
- Creative solutions or accommodations to special needs of the parties can become a part of the settlement.
M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association (AAA) or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA’s auspices by making a request for mediation to any of the AAA’s regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via AAA WebFile at www.adr.org.

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

(i) A copy of the mediation provision of the parties’ contract or the parties’ stipulation to mediate.

(ii) The names, regular mail addresses, email addresses and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.

(iii) A brief statement of the nature of the dispute and the relief requested.

(iv) Any specific qualifications the mediator should possess.

Where there is no preexisting stipulation or contract by which the parties have provided for mediation of existing or future disputes under the auspices of the AAA, a party may request the AAA to invite another party to participate in “mediation by voluntary submission.” Upon receipt of such a request, the AAA will contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party’s choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator

Parties may search the online profiles of the AAA’s Panel of Mediators at www.aaa mediation.com in an effort to agree on a mediator. If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

(i) Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA’s Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.

(ii) If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.

(iii) If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator’s Impartiality and Duty to Disclose

AAA mediators are required to abide by the Model Standards of Conduct for Mediators in effect at the time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator’s impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties’ dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator’s conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-7. Duties and Responsibilities of the Mediator

(i) The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

(ii) The mediator is authorized to conduct separate or ex parte meetings and other communications with the parties and/or their representatives, before, during and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

(iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and
the history of the parties’ negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

(iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

(v) In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

(vi) The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s), the parties and their representatives shall, as appropriate to each party’s circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-1 0. Confidentiality

Subject to applicable law or the parties’ agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding the following, unless agreed to by the parties or required by applicable law:

(i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute,

(ii) Admissions made by a party or other participant in the course of the mediation proceedings,

(iii) Proposals made or views expressed by the mediator or

(v) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-1 1. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-1 2. Termination of Mediation

The mediation shall be terminated:

(i) By the execution of a settlement agreement by the parties; or

(ii) By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties’ dispute; or

(iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or

(iv) When there has been no communication between the mediator and any party or party’s representative for 21 days following the conclusion of the mediation conference.

M-1 3. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-1 4. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures as they relate to the mediator’s duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-1 5. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-1 6. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-1 7. Cost of the Mediation

There is no filing fee to initiate a mediation or a fee to request the AAA to invite parties to mediate. The cost of mediation is based on the hourly mediation rate published on the mediator’s AAA profile. This rate covers both mediator compensation and an allocated portion for the AAA’s services. There is a four-hour minimum charge for a mediation conference. Expenses referenced in section M-16 may also apply. If a matter submitted for mediation is withdrawn or cancelled or results in a settlement prior to the mediation conference, the cost is $250 plus any mediator time and charges incurred.

The parties will be billed equally for all costs unless they agree otherwise.

If you have questions about mediation costs or services visit our website at www.adr.org or contact your local AAA office for availability and rates.

Conference Room Rental

The costs described do not include the use of AAA conference rooms. Conference rooms are available on a rental basis. Please contact your local AAA office for availability and rates.
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A Guide to Mediation and Arbitration for Business People

Introduction

In the normal course of day-to-day business affairs, disputes are often inevitable. Parties might disagree as to their individual rights and obligations no matter how carefully a contract is written. This can lead to delayed shipments, complaints about the quality of merchandise, claims of nonperformance, and similar misunderstandings. The resolution of such disputes, however, need not be costly and acrimonious. Alternative means of dispute resolution can save time and money, and can help to put the dispute behind you while preserving valuable business relationships.

The American Arbitration Association (AAA) administers a broad range of dispute resolution services, which address the needs of businesses and individuals mired in conflict. These services include:

Mediation

Mediation is a meeting among disputants, their representatives, and a mediator to discuss settlement. The mediator’s role is to help the disputants explore issues, needs, and settlement options. The mediator may offer suggestions and point out issues that the disputants may have overlooked, but resolution of the dispute rests with the disputants themselves. A mediation conference can be scheduled very quickly and requires a relatively small amount of preparation time. The conference usually begins with a joint discussion of the case, followed by the mediator working with the disputants both together and separately, if appropriate, to resolve the case. Many cases are resolved within a few hours. Perhaps most important is, mediation works! Statistics show that 85% of commercial matters and 95% of personal injury matters end in written settlement agreements.
Arbitration

Arbitration is referral of a dispute to one or more impartial persons for final and binding determination. Private and confidential, it is designed for quick, practical, and economical settlements. Parties can exercise additional control over the arbitration process by adding specific provisions to their contracts’ arbitration clauses or, when a dispute arises, through the modification of certain aspects of the arbitration rules to suit a particular dispute. Stipulations may be made regarding confidentiality of proprietary information used; evidence, locale, number of arbitrators; and issues subject to arbitration, for example. The parties may also provide for expedited arbitration procedures, including the time limit for rendering an award, if they anticipate a need for hearings to be scheduled on short notice. All such mutual agreements will be binding on the American Arbitration Association as well as the arbitrator. The AAA has also developed special Procedures for Large, Complex Disputes for cases in which the disclosed claim of any party is at least $500,000.

Prior to the initial hearing in a case, the AAA may schedule either an administrative conference with the parties or a preliminary hearing with the arbitrator(s) and the parties to arrange for such matters as the production of relevant documents and the identification of witnesses, and for discussion of and agreement by the parties to any desired rule modifications. AAA administration is guided by those decisions that the parties make as to how to handle such sensitive issues as privacy of proceedings, confidentiality, trade secrets, evidence, proprietary information, and injunctive relief.
The National Roster of Neutrals

To serve the community with mediators and arbitrators representing all fields of specialization, the AAA maintains a national roster of approximately 8,000 trained experts throughout the United States and the rest of the world.

The AAA requires that applicants have a minimum of ten years of senior level business or professional expertise or legal practice prior to being considered for the roster.

Selected qualities in arbitrators and mediators for which the AAA looks are:

> commitment to impartiality and objectivity;
> dispute management skills;
> judicious temperament: impartiality, patience, and courtesy;
> respect of bar or business community for integrity, patience, and courtesy; and
> strong academic background and professional or business credentials.

The American Arbitration Association is committed to maintaining an ongoing review of the quality of its roster of neutrals. Current panelists and new applicants are evaluated by regional office committees to guarantee neutrals’ possession of superior management skills, commitment, ethics, training, and suitability to the caseload. Then, external review committees evaluate the neutrals according to a number of criteria including substantive expertise, preeminence in the field, fairness, and the manner in which they conduct proceedings. A final internal review by the Association monitors the integrity of the process, the quality of roster composition, and balance in terms of gender, racial, and ethnic diversity. The bottom line is a roster of neutrals crafted to meet the needs of the parties.
An AAA Glossary of Dispute Resolution Terms

Some of the commonly used terms follow.

**Arbitration** is submission of a dispute to one or more impartial persons for a final and binding decision.

**Awards** are the decisions of arbitrators. Awards are made in writing and are enforceable in court under state and federal statutes. Enforcement actions, when necessary, are brought by the parties to the arbitration.

**Case managers** are the AAA staff persons assigned to administer cases. The case manager is responsible for the general management of a particular case, including panel selection, scheduling and exchange of information among the parties, and all of the other administrative details involved in moving cases through the system.

**Caucuses** are meetings in which a mediator talks with the parties individually to discuss the issues.

**Claimants** are filing parties, also known as plaintiffs.

**Counterclaims** are counter demands made by a respondent in his or her favor against a claimant. They are not mere answers or denials of the claimant’s allegations.

**Demands for Arbitration** are unilateral filings of claims in arbitration, based on a contractual or statutory right; also, the forms used.

**Fact finding** is a process by which parties present the arguments and evidence to a neutral person who then issues a nonbinding report on the findings, usually recommending a basis for settlement.

**Hearing** is a proceeding in which evidence is taken for the purpose of determining the facts of a dispute and reaching a decision based on evidence.

**Mediation** is a process in which a neutral assists the parties in reaching their own settlement but does not have the authority to make a binding decision.
**Mini-trial** is a confidential, nonbinding exchange of information, intended to facilitate settlement. The goal of mini-trial is to encourage prompt, cost-effective resolution of complex litigation. Mini-trial seeks to narrow the areas of controversy, dispose of collateral issues, and encourage a fair and equitable settlement.

**Negotiation** is a process in which disputants communicate their differences to one another and with this knowledge try to resolve them.

**Parties** are the disputants.

**Respondents** are responding parties, also known as defendants.

**Submission** is the filing of a dispute by all parties to a dispute resolution process after it arises.
How Does Mediation Differ From Arbitration?

Arbitration is less formal than litigation, and mediation is even less formal than arbitration. Unlike an arbitrator, a mediator does not have the power to render a binding decision. A mediator does not hold evidentiary hearings as would an arbitrator but instead conducts informal joint and separate meetings with the parties to understand the issues, facts, and positions of the parties. The separate meetings are known as caucuses. In contrast, arbitrators hear testimony and receive evidence in a joint hearing, on which they render a final and binding decision known as an award.

In joint sessions or caucuses with each side, a mediator tries to obtain a candid discussion of the issues and priorities of each party. Gaining certain knowledge or facts from these meetings, a mediator can selectively use the information derived from each side to:

> reduce the hostility between the parties and help them to engage in a meaningful dialogue on the issues at hand;
> open discussions into areas not previously considered or inadequately developed;
> communicate positions or proposals in understandable or more palatable terms;
> probe and uncover additional facts and the real interests of parties;
> help each party to better understand the other party’s view and evaluation of a particular issue, without violating confidences;
> narrow the issues and each party’s positions, and deflate extreme demands;
> gauge the receptiveness for a proposal or suggestion;
> explore alternatives and search for solutions;
> identify what is important and what is expendable;
> prevent regression or raising of surprise issues; and
> structure a settlement to resolve current problems and future parties’ needs.
Types of Disputes Resolved by Mediation

Any type of civil dispute can be resolved by mediation. The kinds of conflicts brought to AAA mediations have been as varied as the types of industries and business specialties using the process. Just about any type of dispute that parties want resolved quickly and inexpensively can be submitted to mediation.

The Benefits of Mediation

The benefits of successfully mediating a dispute to settlement vary, depending on the needs and interests of the parties. The most common advantages are that:

> parties are directly engaged in the negotiation of the settlement;

> the mediator, as a neutral third party, can view the dispute objectively and can assist the parties in exploring alternatives which they might not have considered on their own;

> as mediation can be scheduled at an early stage in the dispute, a settlement can be reached much more quickly than in litigation;

> parties generally save money through reduced legal costs and less staff time;

> parties enhance the likelihood of continuing their business relationship; and

> creative solutions or accommodations to special needs of the parties can become a part of the settlement.

In the interest of swift and low-cost dispute resolution, arbitrations pending under the rules of the American Arbitration Association can be submitted to mediation under the applicable mediation rules at no additional administrative fee. The parties are responsible for compensating the mediator at his or her published hourly rate.
Occurrence of Mediation

Mediations can originate in different ways. First, mediation can occur when a dispute initially arises and before a lawsuit is ever filed. Second, mediation can occur as an adjunct procedure to pending litigation. That is, as soon as the parties file a lawsuit, they can use mediation in an effort to resolve the dispute at the inception of litigation or at any time thereafter, but prior to a trial being held. Third, mediation can occur during or immediately after a trial but before a decision is announced by a judge or jury. Fourth, mediation can occur after a judgment has been rendered in litigation. There might be a disagreement over the meaning or manner of carrying out a judgment, or concern about the possibility of lengthy court appeals. The parties can seek the assistance of a mediator to help them resolve these problems.

The Mediators

AAA mediators are carefully selected attorneys, retired judges, and experts in various professional and business fields. Each candidate has been trained by the AAA in mediation skills and closely evaluated to determine the level of skills attained. Only highly respected and experienced individuals are selected and trained by the AAA to be mediators. The mediators on the panel are chosen to serve on a particular case based on their expertise in the area of the dispute.

Scheduling a Mediation

Once parties have agreed to submit their dispute to mediation and have executed the appropriate forms, a mediation can be conducted on the first mutually available date. Of course, the parties may agree to have their mediation set for an earlier or later date depending on the circumstances of their case.
Stages of a Mediation

I. The Agreement to Mediate

As mediation is a voluntary process, the parties must agree in writing that their dispute will be conducted under the applicable mediation rules of the AAA. This may be accomplished in a number of ways.

Request for Mediation

The parties can provide for the resolution of future disputes by including a mediation clause in their contract. A typical mediation clause reads as follows:

If a dispute arises out of or relates to this contract or the breach thereof and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

The clause may also provide for the qualifications of the mediator, the method of payment, the locale of meetings, and any other item of concern to the parties. When a party files a Request for Mediation, the requesting party must forward a copy of the mediation clause contained in the contract under which the dispute arose. A Request for Mediation form can be found on the Association’s Web site at www.adr.org.

Submission to Mediation

Where the parties did not provide in advance for mediation, they may submit an existing dispute to mediation by the filing of a submission form that has been duly executed by the parties or their authorized representatives. A Submission to Dispute Resolution form can be found on the Association’s Web site at www.adr.org.
II. Selection of the Mediator

Upon receipt of the Request for Mediation or the Submission to Dispute Resolution, the AAA will appoint a qualified mediator to serve on the case. The parties will be provided with a biographical sketch of the mediator. The parties are instructed to review the sketch closely and advise the Association of any objections they may have to the appointment. Since it is essential that the parties have complete confidence in the mediator’s ability to be fair and impartial, the Association will replace any mediator not acceptable to the parties. Parties also may search the online profiles of the AAA’s Panel of Mediators at www.aaamediation.com.

III. Preparation for the Mediation Session

To prepare for mediation:

1. Define and analyze the issues involved in the dispute.
2. Recognize the parameters of the given situation (what you can realistically expect, time constraints, available resources, legal ramifications, business or trade practices, costs, etc.).
3. Identify your needs and interests in settling the dispute.
4. Prioritize the issues in light of your needs.
5. Determine courses of action, positions, and tradeoffs and explore a variety of possible solutions.
6. Seek to make your proposals reasonable and legitimate and be willing to accommodate needs of the other party.
7. Ascertain the strengths and weaknesses of your case.
8. Ready facts, documents, and sound reasoning to support your claims.
9. Anticipate the other party’s needs, demands, strengths and weaknesses, positions, and version of facts.
10. Focus on the interests, not the position, of each party.
11. Develop your strategies and tactics through discussion of issues, presentation of proposals and testing of the other party’s positions.
IV. The Mediation Conference

The parties should come to the mediation conference prepared with all of the evidence and documentation they feel will be necessary to discuss their respective cases. Parties are, of course, entitled to representation by counsel.

At the outset, mediators describe the procedures and ground rules covering each party’s opportunity to talk, order of presentation, decorum, discussion of unresolved issues, use of caucuses, and confidentiality of proceedings.

After these preliminaries, each party describes respective views of the dispute. The initiating party discusses its understanding of the issues, the facts surrounding the dispute, what it wants, and why. The other party then responds and makes similar presentations to the mediator. In this initial session, the mediator gathers as many facts as possible and clarifies discrepancies. The mediator tries to understand the perceptions of each party, their interests, and their positions on the issues.

When joint discussions have reached a stage where no further progress is being made, the mediator often meets with each party in caucuses. While holding separate sessions with each party, the mediator may shuttle back and forth between parties and bring them back to joint sessions at appropriate intervals. During each caucus, the mediator attempts to clarify each party’s version of the facts, priorities, and positions, loosen rigid stances, explore alternative solutions, and seek possible tradeoffs. The mediator probes, tests, and challenges the validity of each party’s positions. The mediator serves not as an advocate but as an “agent of reality.” The mediator must make each party think through demands, priorities, and views, and deal with the other party’s arguments.

An effective mediator knows that demands and priorities shift as ideas meet opposition, different facts are considered, and underlying circumstances change as parties reappraise and modify positions. In effect, the mediator increases the parties’ perceptions of their cases.
in order to construct a settlement range within which the parties can assess the consequences of continuing or resolving the dispute. By having parties focus on the risks and burdens of litigation, the mediator creates in the minds of the parties the idea that there are alternatives to seek. The parties articulate these possibilities by moving toward tradeoffs and acceptable accommodations.

During the final caucuses and joint sessions, the mediator narrows the differences between the parties and obtains agreement on major and minor issues. The mediator reduces a disagreement into a workable solution. At appropriate times, the mediator makes suggestions about a final settlement, stresses the consequences of failure to reach agreement, emphasizes the progress which has been made, and formalizes offers to gain an agreement.

The mediator acts as a facilitator to keep discussions focused and avoid new outbreaks of disagreement. The mediator will often have the parties negotiate the final terms of a settlement in a joint session. The mediator will then verify the specifics of an agreement and make sure that the terms are comprehensive, specific, and clear in the final session.

V. The Settlement

When the parties reach an agreement, they should reduce the terms to writing and exchange releases. They may also request that the agreement be put in the form of a consent award, for which the AAA will make the arrangements.

If the mediation fails to reach a settlement of any or all of the issues, the parties may submit to binding arbitration. Such arbitration would be administered under the appropriate arbitration rules. In accordance with the AAA's Commercial Mediation Procedures, the information offered in mediation may not be used in arbitration (or in subsequent litigation).
Cost of the Mediation

The cost of mediation is based on the mediator’s published hourly rate, which covers both mediator compensation and an allocated portion for the AAA’s services.

All expenses are generally borne equally by the parties. The parties may adjust this arrangement by agreement.

Before the commencement of the mediation, the AAA shall estimate anticipated total expenses. Each party shall pay its portion of that amount as per the agreed upon arrangement. When the mediation has terminated, the AAA shall render an accounting and return any unexpended balance to the parties.
Stages of an Arbitration

I. The Agreement to Arbitrate

The most important step in initiating arbitration is the agreement to arbitrate. This agreement can be of one of two kinds: it can take the form of a future-dispute arbitration clause in a contract or, where the parties did not provide in advance for arbitration, it can take the form of a submission of an existing dispute to arbitration.

The parties can provide for the arbitration of future disputes by inserting the following clause into their contracts.

**Standard Arbitration Clause**

*Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Arbitration of existing disputes may be accomplished by the use of the following:

*We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: (cite briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of the court having jurisdiction may be entered on the award.*

Regardless of how the agreement to arbitrate was reached, filing of a claim with the AAA along with the appropriate filing fee, and serving the defending party are all that is required to set the machinery for arbitration into motion. Upon receiving the initiating papers together with the filing fee, the AAA assigns the case to one of its staff members, whose official title is case manager and who, from that point onward, is at the disposal of the parties, expediting administration and assisting both sides in all procedural matters until the award is rendered.
Pursuant to the rules, the parties and the AAA may use facsimile transmission, telegrams, or other written forms of electronic communication to give the notices required by the rules.

*The American Arbitration Association will supply the form, or a Submission to Dispute Resolution form, free of charge on request but arbitration may also be initiated through ordinary correspondence, provided that all of the essential information is included. These forms can also be obtained through the Association’s Web site located at www.adr.org.*

Special attention is sometimes required to determine in which state and city hearings are to take place. If the place of arbitration has not been designated in the contract or the Submission to Dispute Resolution, or if the parties have not otherwise notified the AAA of their agreement on locale, the AAA will designate the city in accordance with its rules. Among the factors considered are:

> locations of the parties;
> locations of witnesses and documents;
> the location of sites or the place of materials;
> relative costs to the parties;
> the place of performance of the contract;
> laws applicable to the contract;
> places of previous court actions, if any;
> the location of the most appropriate panel of arbitrators; and
> any other reasonable arguments that might affect the locale determination.

Hearings may be held in any geographical area, not just where the AAA maintains regional offices.
Expedited Procedures, outlined in Sections E1 through E10 of the rules, are applied in any case where no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration costs. Those procedures provide for notice of arbitrator appointment and notice of hearing by telephone and for the award of the arbitrator to be rendered no later than 14 days from the date of closing of the hearing.

An Important Note Concerning Consumer-Related Disputes

The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily nonnegotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

For additional information on the AAA and consumer-related disputes, please review the Consumer Due Process Protocol, the Supplementary Procedures for Consumer-Related Disputes, and other material found on our Web site at www.adr.org.
## A Checklist for Initiating Arbitration

<table>
<thead>
<tr>
<th>By Demand for Arbitration</th>
<th>By Submission to Arbitrator</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Original Document</strong></td>
<td>Mail to the respondent.</td>
</tr>
<tr>
<td><strong>Copies Needed by the AAA</strong></td>
<td>Two.</td>
</tr>
<tr>
<td><strong>Copies Retained by the Parties</strong></td>
<td>The demanding party retains one.</td>
</tr>
<tr>
<td><strong>Signatures Required</strong></td>
<td>An authorized person for the demanding party signs and lists his or her title.</td>
</tr>
<tr>
<td><strong>Identification of Parties</strong></td>
<td>The respondent should be clearly identified by official name and address.</td>
</tr>
<tr>
<td><strong>Contract Clauses</strong></td>
<td>Arbitration clauses should be quoted in full (may be attached separately if more convenient). Include date of the document.</td>
</tr>
<tr>
<td><strong>The Filing Fee</strong></td>
<td>A nonrefundable filing fee must be advanced by the demanding party. The arbitrator later apportions the fee.</td>
</tr>
<tr>
<td><strong>The Statement of the Dispute</strong></td>
<td>It should be brief but clear and include the amount claimed, if any, and the relief sought.</td>
</tr>
<tr>
<td><strong>Answering Statements</strong></td>
<td>The respondent may mail the answering statement to the claimant and file two copies with the AAA. If a counterclaim is asserted, a filing fee must be paid.</td>
</tr>
<tr>
<td><strong>Composition of the Arbitration Panel</strong></td>
<td>The AAA will determine the number of arbitrators unless composition is stated in the arbitration clause.</td>
</tr>
<tr>
<td><strong>Locale of Arbitration</strong></td>
<td>If not provided for in the arbitration clause, the demanding party should indicate its preference.</td>
</tr>
</tbody>
</table>
II. Selection of the Arbitrator

To serve the business community with arbitrators representing all fields of specialization, the American Arbitration Association now maintains a National Roster of Neutrals of approximately 8,000 individuals throughout the United States and the rest of the world. Usually nominated by leading figures in their industries, trades, or professions, arbitrators are added to the panel after careful checking of qualifications and reputations.

Arbitrators generally charge a rate consistent with his or her stated rate of compensation, beginning with the first day of hearing. When appointed by the AAA, neutrals serve under its Commercial Arbitration Rules and their conduct is guided by the Code of Ethics for Arbitrators in Commercial Disputes, a copy of which is sent to them upon their appointment to a case. Arbitrators deserve the same respect and courtesy given to all who dedicate themselves to the public good.

Parties can show their appreciation to the arbitrators and at the same time serve their own best interests by presenting their cases in an expeditious and orderly way, thereby facilitating the task of the arbitrator.

Unless the parties have indicated another method, the AAA uses the following simple and effective system for selecting the arbitrator:

1. After the filing of the submission or the answering statement, or upon the expiration of the time within which the answering statement is to be filed, the AAA sends each party a copy of the same specially prepared list of proposed arbitrators to resolve the controversy. In drafting the list, the AAA is guided by the nature of the dispute. Biographical information on each arbitrator accompanies the list.
2. Parties are allowed 15 days to study the list, strike names to which they object, and number the remaining names in the order of preference. *Additional information about the proposed arbitrators is available through the case manager. While the AAA makes every effort to keep its information current, each party is encouraged to do further research on the persons suggested.* If administration is under the Expedited Procedures, the parties are allowed seven days to study the list of five proposed arbitrators, strike two names, and number the remaining names in order of preference.

3. When these lists are returned to the AAA, the case manager compares indicated preferences and makes note of the mutual choices. Where parties are unable to find a mutual choice on a list, the AAA has the power to make the appointment without submitting additional lists, although additional lists may be submitted at the request of both parties.

4. If the parties cannot agree on an arbitrator, the AAA will make an administrative appointment, but in no case will an arbitrator whose name was crossed out by either party be appointed.

**Panels with Party-Appointed Arbitrators**

Under some arbitration clauses in use, each party to a dispute appoints one arbitrator (who might or might not be a member of the AAA's National Roster of Neutrals) and the two select a third arbitrator from the AAA's panels in accordance with procedures just described in steps 2-4. Unless the parties specifically agree in writing that the party-appointed arbitrators are to be non-neutral, arbitrators appointed by the parties in this manner must meet the impartiality and independence standards set forth within the rules.

In cases in which the party-appointed arbitrators are serving as non-neutrals, to avoid the danger that a compromise award might have to be rendered for the sake of a majority, the parties sometimes provide, and the AAA recommends, that the third arbitrator be permitted to render the award alone when a unanimous award is not possible. This may be done by the parties in their agreement to arbitrate or in a later stipulation.
It is also recommended in cases involving non-neutral party-appointed arbitrators that the neutral arbitrator ascertain from the party-appointed arbitrators the nature and extent of any relationship between the arbitrators and the parties that appointed the arbitrators and whether there will be any direct communication between such arbitrators and the parties that appointed them.

Finally, even in cases in which party-appointed arbitrators are serving as non-neutrals, the AAA recommends that parties agree to not communicate ex parte with their party-appointed arbitrator after the appointment procedures in the rules have been completed.

III. Preparation for the Hearing

The case manager consults all parties and arbitrators to determine a mutually convenient day and time for the hearing. If the parties cannot agree, the arbitrator is empowered to set dates.

Note that, in this as in all other administrative matters, the AAA staff manages details and arrangements. This has a two-fold advantage: it relieves the arbitrator of the burden and eliminates the necessity of direct communication between the parties and the arbitrator except at the hearing. By specifically forbidding communication with the arbitrator, except in the presence of both parties, AAA rules avoid the danger that one side will offer arguments or evidence that the other has no opportunity to rebut. Parties may participate in the Accelerated Exchange Program allowing the parties and arbitrators to exchange documents directly, copying the AAA, if the case meets specific program requirements.

At the request of any party or at the discretion of the AAA, an administrative conference with the AAA and the parties and/or their representatives will be scheduled in appropriate cases to expedite the proceedings. There is no additional administrative fee for this service.

In most cases, a preliminary hearing with the parties and/or their representatives and the arbitrator will be scheduled by the arbitrator to specify the issues to be resolved, to stipulate uncontested facts, and to consider other matters that will expedite the arbitration proceedings.
Consistent with the expedited nature of arbitration, the arbitrator may, at the preliminary hearing, establish (i) the extent of and a schedule for the production of relevant documents and other information, (ii) the identification of all witnesses to be called, and (iii) a schedule for further hearings to resolve the dispute. For purposes of arbitrator compensation, the preliminary hearing will be considered the first day of service.

Occasionally, a party needs to postpone a scheduled hearing. When this is necessary, the party seeking postponement should first contact the other party to obtain its consent, as well as alternate hearing dates, before contacting the AAA. If the other party does not consent to the postponement, the AAA should be so advised. The case manager will, in turn, coordinate having the arbitrator decide whether the hearing should be postponed, as the rules provide. In no event should the parties contact the arbitrator directly.

Since the arbitrator will make the award on the basis of the facts and exhibits presented at the hearing, it is essential that the parties or their representatives prepare for arbitration carefully.

1. Assemble all documents and papers that you will need at the hearing. Always make photocopies for the arbitrator and the other party. If documents that are needed are in the possession of the other party, ask that they be brought to the arbitration. Under some state arbitration laws, the arbitrator or another person has authority to subpoena documents and witnesses. A checklist of documents and exhibits will be helpful toward your orderly presentation.

2. If it will be necessary for the arbitrator to visit a building site or warehouse for an on-the-spot investigation, make plans in advance. The arbitrator will have to be accompanied by representatives of both parties, unless they specifically authorize that the investigation be conducted without their presence or unless one party fails to attend after being notified.

3. Interview all of your witnesses. Make certain that each one understands the whole case and particularly the importance of his or her own testimony within it.
4. If there is a possibility that others, not on your regular list of witnesses, might have to appear, alert them to be available on call without delay.

5. Make a written summary of what each witness will prove. This will be useful as a checklist at the hearing and will help you make sure that nothing is overlooked.

6. Study the case from the other side’s point of view. Be prepared to answer the opposition’s evidence.

7. If a transcript of the hearing is needed, the parties are responsible for making the arrangements and notifying the other parties of such arrangements in advance of the hearing.

The right to representation in arbitration by counsel or another authorized person is guaranteed by the rules of the American Arbitration Association. A party who desires to be represented should notify the other side and file a copy of the notice with the AAA at least three days before the hearing. When arbitration is initiated by a representative or when the respondent replies through a representative, however, such notice is deemed to have been given.

**IV. Presentation of the Case**

Arbitration hearings are conducted somewhat like court trials, except that arbitrations are less formal. Arbitrators are not required to follow strict rules of evidence. They must hear all of the evidence material to an issue but they may determine for themselves what is relevant. Arbitrators are therefore inclined to accept evidence that might not be allowed by judges.

This does not mean, however, that all evidence will be considered of equal weight.

*Direct testimony of witnesses is usually more persuasive than hearsay evidence, and facts will be better established by documents and exhibits than by argument only.*
It is customary for the claimant to proceed first with its case, followed by the respondent. This order may be varied, however, when the arbitrator thinks it necessary. In any event, the “burden of proof” is not on one side more than the other; each party must try to convince the arbitrator of the correctness of its position and no hearing is closed until both have had a full opportunity to do so. That is why it is equally the responsibility of the claimant and the respondent to present their cases to the arbitrator in an orderly and logical manner. This includes:

1. An opening statement that clearly but briefly describes the controversy and indicates what is to be proved. Such a statement lays the groundwork and helps the arbitrator understand the relevance of testimony to be presented.

2. A discussion of the remedy sought. This is important because the arbitrator’s power is conferred by the agreement of the parties. Each party should try to show that the relief that it requests is within the arbitrator’s authority to grant.

3. Introduction of witnesses in a systematic order to clarify the nature of the controversy and to identify documents and exhibits. Cross-examination of witnesses is important, but each party should plan to establish its case by its own witnesses.

4. A closing statement that should include a summary of the evidence and arguments and a refutation of points made by the opposition.

Above all, a cooperative attitude is essential for effective arbitration. Overemphasis or exaggeration, concealing of facts, introduction of legal technicalities with the objective of delaying proceedings, or, in general, disregard of ordinary rules of courtesy and decorum can have an adverse effect on arbitrators.

After both sides have had an equal opportunity to present all of their evidence, the arbitrator declares the hearing closed. Under AAA rules, the arbitrator has 30 days from that time within which to render an award, unless the agreement provides otherwise. If the case was administered under the Expedited Procedures in the rules, the arbitrator has 14 days within which to render an award.
The Award

The award is the decision of the arbitrator on the matters submitted to him or her under the arbitration agreement. If the arbitration panel consists of more than one arbitrator, the majority decision, under AAA rules, is binding. The purpose of the award is to dispose of the controversy finally and conclusively. It is made within the limits of the arbitration agreement and it rules on each claim submitted. Arbitrators are not required to write opinions explaining the reasons for their decisions. As a general rule, AAA commercial awards consist of a brief direction to the parties on a single sheet of paper. Written opinions can generate attacks on the award because they identify targets for the losing party. In some cases, both parties will request an opinion or the arbitration agreement provides for one. The AAA then has no objection. Usually, however, the parties look to the arbitrator for a decision, not an explanation.

The power of the arbitrator ends with the making of the award. An award may not be changed by the arbitrator, once it is made, unless the parties agree to restore the power of the arbitrator or unless the law provides otherwise.

When the parties agree to request a clarification or interpretation of a disputed ruling, the agreement must be in writing. Such an agreement is filed with the AAA, which then proceeds to make the necessary arrangements with the arbitrator. In some jurisdictions, the law permits arbitrators to clarify or modify the award upon the request of a party.

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.
# Procedure for Oral Hearings

<table>
<thead>
<tr>
<th>Who Decides</th>
<th>Who Makes Arrangements</th>
<th>Notice</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Time</strong></td>
<td>The arbitrator, at the convenience of the parties.</td>
<td>At least ten days, given by the case manager unless parties agree otherwise.</td>
</tr>
<tr>
<td><strong>Representation by Counsel</strong></td>
<td>The individual party.</td>
<td>Three days notice to other party unless arbitration was initiated by counsel, in which case notice is deemed to have been given.</td>
</tr>
<tr>
<td><strong>Stenographic Records and Interpreters</strong></td>
<td>The requesting party.</td>
<td>The requesting party.</td>
</tr>
<tr>
<td><strong>Attendance at Hearing</strong></td>
<td>Parties attend and bring witnesses. Arbitrators decide which other interested persons may attend and may require withdrawal of witnesses during the testimony of others.</td>
<td>Parties notify their own interested persons.</td>
</tr>
<tr>
<td><strong>Affidavits and Documents</strong></td>
<td>The arbitrator decides whether to receive such evidence when it is presented.</td>
<td>Arbitrator will set a deadline for exchange of documents and affidavits.</td>
</tr>
<tr>
<td><strong>Subpoenas of Witnesses and Documents</strong></td>
<td>The arbitrator issues subpoenas on showing of need by a party. In New York state, attorneys of record may also issue subpoenas.</td>
<td>Subpoenas are served by parties directly on the witness or the custodian of documents.</td>
</tr>
<tr>
<td><strong>Inspection or Investigation</strong></td>
<td>The arbitrator may decide on his or her own initiative or at the request of a party, if the arbitrator deems it necessary.</td>
<td>Parties are notified of time and place of inspection so that they can be present.</td>
</tr>
<tr>
<td><strong>Closing of Oral Hearings</strong></td>
<td>The arbitrator closes the hearing after both sides complete proofs and witnesses. If briefs, investigations, or more data are required, the hearings are kept open.</td>
<td>The case manager notifies parties of all official closing dates.</td>
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Procedures for Large, Complex Disputes

Recognizing that large, complex arbitrations often present unique procedural problems, the AAA, working with attorneys, arbitrators, and industry advisory groups, has developed Procedures for Large, Complex Disputes. The overall purpose of these procedures is to provide for efficient, economical, and speedy resolution of larger disputes. Cases are administered by senior AAA staff. The procedures provide for an early administrative conference with the AAA and a preliminary hearing with the arbitrators, both conducted via telephone conference call. Documentary exchanges and other essential exchanges of information are facilitated, as is preparation of a statement of reasons accompanying the award. The procedures apply when the disclosed claim of any party is at least $500,000. They are meant to complement the applicable rules that the parties have agreed to use and may be modified by the parties.

Optional Rules for Emergency Measures of Protection

If emergency interim relief is required before the panel has been constituted, parties have needed to resort to the courts rather than seek the requisite relief from the arbitrator. To bridge this deficiency and to more fully implement the parties’ intent to arbitrate any future disputes, the AAA has made available Optional Rules for Emergency Measures of Protection.

As the title indicates, these measures are optional. The contracting parties must have agreed to use them either by special agreement or in their arbitration clause. A party seeking such relief prior to the constitution of the panel must notify the AAA and all other parties in writing of the nature of the relief sought, the reasons why such relief is required, and why the party is entitled to such relief on an emergency basis. Within one business day of receipt of the notice, the AAA will appoint a single emergency arbitrator to rule on emergency applications from a special AAA panel of emergency arbitrators designated for that purpose. Of course, the appointment of the emergency arbitrator will be subject to a disclosure and challenge procedure similar to that in the standard commercial rules.
The rules provide an expedited time within which the arbitrator shall establish a schedule for consideration of the application for relief, and shall accordingly review the request. If the arbitrator determines that the party is entitled to the relief, he or she may enter an interim award granting the relief and stating the reasons therefore. Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until such time as the panel is constituted. The emergency arbitrator shall have no further power to act after the panel is constituted, unless the parties agree that the emergency arbitrator is named as a member of the panel. The procedures contain a provision on modification of the interim award and apportionment of costs.

International Cases

In order to best serve the parties in any international dispute resolution proceeding, the AAA has created a separate division called the International Centre for Dispute Resolution™ (ICDR). The ICDR handles all international matters, including the administration of international mediation and arbitration cases. This international administrative system is set apart from the AAA’s domestic administrative services. The key distinction is to provide the international business and legal community confidence in having an award that will be internationally recognized and enforceable.

An international case is generally defined as having either the place of arbitration or performance of the agreement outside the United States, or having an arbitration agreement between parties from different countries. ICDR administration is designed for parties that have differing languages, legal systems and cultural backgrounds. The ICDR maintains specialized administrative facilities supervised by multilingual attorneys in New York, a European office in Dublin and a worldwide panel of more than 400 arbitrators and mediators.
The International Dispute Resolution Procedures of the ICDR are the most frequently used rules, which were specifically drafted to meet the expectations of international business. Among the more interesting features of these rules are provisions that support party control of the process and provide for independent and impartial arbitrators, expedited proceedings and reasoned decisions. As one of the world’s few arbitral institutions that consistently administers international mediations around the globe, the ICDR provides administration of international mediations under the International Mediation Rules of the ICDR. The ICDR also administers cases under Supplementary Procedures for International Commercial Arbitration, which are applied to international proceedings when parties agree to arbitrate in accordance with one of the various AAA arbitration rules. The Supplementary Procedures are used in conjunction with the applicable rules and will incorporate several of the provisions from the international rules. The ICDR also administers cases, as administering or appointing authority, under UNCITRAL arbitration rules. The thrust of all of these rules and procedures is to provide the parties with an expeditious and economic internationally enforceable award.

**Administrative Fees**

As a not-for-profit organization, the AAA prescribes an initial filing fee and a case service fee to compensate for the cost of providing administrative services. The initial filing fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. A case service fee will be incurred for all cases that proceed to their first hearing. Both of these administrative fees are based on the amount of the claim or counterclaim. In addition, filing fees are subject to a refund schedule and case service fees are generally refundable at the conclusion of the case if no hearings occur.
In an effort to make arbitration costs reasonable to consumers, the AAA has a separate fee schedule for disputes arising from arbitration clauses in agreements between individual consumers and businesses, where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily nonnegotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. Please refer to the Supplementary Procedures for Consumer-Related Disputes when filing a consumer-related claim.

Arbitrator compensation is not included in the administrative fee schedule. The parties are responsible for compensating the arbitrator at his or her published rate (hourly or per diem).

As an additional service, the AAA provides hearing rooms, which are available for rental by the parties. Check with the AAA for rates and availability.

For more information concerning the AAA’s administrative fee schedule and refund schedule, please visit our Web site at www.adr.org.
Rules, forms, procedures and guides, as well as information about applying for a fee reduction or deferral, are subject to periodic change and updating. To ensure that you have the most current information, see our Web site at www adr.org.

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