

# New Ways for Mediation® A Structured Process



**By Bill Eddy, LCSW, Esq.**

Mediating high-conflict disputes requires a more structured process than that used in most ordinary conflicts. This is especially true when disputes involve ongoing relationships, such as parenting issues in divorce, elder law decision-making, business conflicts, workplace disputes and neighbor disputes. When these relationship disputes become “high-conflict” (extremely intense or prolonged), it is usually because one or more individuals lack conflict self-management skills, because of being temporarily overwhelmed or having a long-standing high-conflict personality pattern. This article explains New Ways for Mediation, a new, highly-structured method I have been developing in my professional family mediation practice over the past five years. It is specifically designed for mediating high-conflict disputes by guiding the parties in using simple self-management skills to their maximum ability, but can be used with any clients.

## **Mediation Self-Management Skills**

People engaged in high-conflict disputes appear to lack the four key skills that are listed in the chart below on the left, and their resulting high-conflict behaviors are on the right.

<b>Self-Management Skills:</b>	<b>High-Conflict Behaviors:</b>
Reflecting on one’s own behavior	Preoccupation with blaming others
Flexible thinking and solutions	All-or-nothing thinking and solutions
Moderate negotiation behaviors	Extreme negotiation behaviors
Managed emotions	Unmanaged emotions

Everyone gets upset sometimes and may display some of these high-conflict behaviors. However, some people appear to have high-conflict personalities, so that they repeat these behaviors over and over again in their lives *because* they lack these self-management skills. I believe it is helpful to think of them as high-conflict people (HCPs) so that your expectations for conflict resolution are not based on them managing themselves.

Therefore, mediators need to provide a more structured process for them, rather than operating on the assumption they can manage themselves if they just try hard enough or are reprimanded or are allowed to speak until they get it off their chests.

**Important Note:** Mediators don't need to determine whether someone's lack of skills is personality-based or just situational in using the New Ways for Mediation method. (In fact, it may be harmful to tell someone you think he or she has a high-conflict personality.) The New Ways for Mediation method can be applied with anyone in any case. The principles involved in this method are intended to be in addition to the mediator's toolbox of methods and skills, rather than a replacement. If the parties manage well, the structure can be easily loosened. It's easier to start with too much structure than it is to tighten up when there has been too little structure.

The focus of the New Ways for Mediation method is on the working relationship with the parties, rather than on the actual outcome – the decisions – of the dispute. By letting go of the outcome, mediators avoid the power struggles of trying to drive the parties toward a quick settlement – or any settlement – just to get them out of the mediator's office. High-conflict people pick up on this frustration and quickly develop adversarial relationships with mediators (and other professionals) who push them in directions they don't want to go. This method avoids fighting with high-conflict clients by giving them clearer responsibility for making their own decisions, while the mediator focuses more clearly on maintaining a positive and productive relationship with the clients at all times.

## **Structured Steps**

The basic steps for New Ways for Mediation are common to many mediation methods. The main difference is the structure *within* each step, which guides the parties in using simple self-management skills and blocking the use of high-conflict behaviors.

## **Pre-Mediation Coaching**

The parties need to be oriented to the “structure and skills” approach of New Ways for Mediation in advance, for it to be most successful. This can be done in separate sessions by the mediator, by an intake staff member, by a lawyer for each party, by a counselor or by a conflict coach. For a more detailed description of this pre-mediation step see the article: **[Pre-Mediation Coaching](#)** by Bill Eddy (2012).

## **Step 1: Signing Your Agreement to Mediate**

This step generally takes longer than in other mediation formats, as the mediator is bonding with the parties through the process of questions and explanations, as well as establishing that the mediator has tight control of the process. For example:

“Welcome to mediation. Before we get started I want to emphasize three key aspects of the mediation process. #1: You folks are the decision-makers. I won't make decisions for you, I won't pressure you to make decisions and you don't have to persuade me of anything. #2: I may have information on the subjects you are trying to decide today, and I am happy to share what knowledge I have about how other people have handled similar issues – but it is all information and not advice. #3: If you are dealing with a court case, it is helpful to know that the courts encourage mediation and will accept almost any out-of-court agreements you make, because you have more flexibility than a judge has so long as you both agree. Do you have any questions about these key aspects of mediation before we proceed?”

This introduction reinforces the importance of the parties as decision-makers and the mediator's role as not that of the ultimate decision-maker. Most parties don't have any questions at this point and say they like these aspects of mediation. But if they do have questions about these three aspects, they can be thoroughly discussed. Some high-conflict participants are very anxious, so that discussing and resolving their concerns at this very fundamental level of the process can be kept simple.

Next, the mediator should have the parties review and sign the Agreement to Mediate together, which clarifies specific issues, such as confidentiality, how the mediator is to be paid, communication between sessions and so forth. This often raises concerns for clients and discussing these procedural matters allows further opportunity for questions and answers – additional opportunities for the mediator to connect with the parties.

Up to this point, the mediator has redirected complaints, proposals, questions about their specific cases and so forth for later discussion. This reinforces that the mediator is in charge of the process and has a plan to really hear from each party at the appropriate time.

After signing the Agreement to Mediate, the mediator explains the general process of the mediation, such as the following:

“The focus of mediation is on the future, so that we will spend most of our time on each of you making proposals and refining your proposals until they can become agreements. I will help you with this process and explain more about this as we go. Also, when you hear a proposal, try to focus on responding simply with a ‘Yes,’ ‘No,’ or ‘I’ll think about.’ Again, I will help you with this process. Think of me as responsible for the process and the two of you as responsible for making your decisions. Any questions about any of this?”

There can be more explanation of the process, including ground rules for communicating (trying not to interrupt, taking breaks and so forth) and other house-keeping matters (such as note pads for writing ideas while others are speaking and so forth). Usually the parties – even high-conflict parties – are mostly listening by now, because the mediator has made it clear that their concerns will be respectfully listened to momentarily, but these introductory explanations will help them be more effective.

If high-conflict parties (one or both parties) are insisting that the mediator vary his or her process by moving forward more quickly or making evaluative comments or deviating in some other way, the mediator can calmly reaffirm that this is what he or she has learned is most effective in helping people manage their disputes and that the structure will free them to focus on their concerns in a step by step manner towards resolution. This step does not need to take a long time (it can be as short as 5 minutes or up to half an hour). It just needs to be used to demonstrate that the mediator is in control of the process, is very interested in working with the parties and is happy to answer questions and provide guidance and information that may help along the way as they focus on making proposals to resolve their dispute.

## **Step 2: Making Your Agenda**

This step puts the responsibility directly on the parties to raise issues and agree on which issues they will discuss, including the order in which they will discuss them. By keeping this

responsibility on the parties, rather than on the mediator, it builds momentum for them making proposals and agreements. Each step of this process reinforces practicing small skills of communication and decision-making. This is especially important with people with high-conflict personalities, because they tend to demand that professionals take responsibility for their problems and decisions – then blame them for doing it wrong. By instead emphasizing that it is the parties' dispute and decisions to be made, the mediator reinforces the expectation that they will be responsible for the outcome, not the mediator.

Within this step is the mediator's opportunity for listening to each party's concerns and questions. The mediator encourages each party to look at and speak to the mediator (in the presence of the other party), so the mediator can really concentrate on the party who is speaking. This also discourages sniping comments back and forth, as the parties are not looking at each other and simply reacting to each other. This further trains the parties to take turns and listen without interrupting throughout the process. It is also a time to predict and normalize disagreement – and that disagreements can be resolved. The mediator can introduce this as follows:

“Now is when you can each tell me the concerns you wish to discuss today and any questions you may have for me about them. This is often the hardest part of the process because you may hear points of view that you disagree with. That's fine and normal at this stage, as most people start out disagreeing and most people eventually reach agreements in mediation. So if you have a reaction or idea while the other person is talking, feel free to make a note of anything you wish, so that you can just listen without interrupting. After I hear from each of you, we will make our agenda of what you jointly agree you wish to discuss. You can raise any issue for discussion, and you can say “no” to any issue you do not wish to discuss. Who wants to go first?”

Then, the mediator really takes time to focus on each person's concerns and understanding them, while still having good “eye contact” with each party, rather than focusing exclusively on the person speaking. If the mediator tends to say something like “Okay” as he or she listens to a person, it helps to mention to both parties that saying “Okay” just means that the mediator hears what you are each saying, without agreeing or disagreeing.

With high-conflict people there will be a lot of interrupting during this step, even though they have been instructed not to interrupt. (Remember, unmanaged emotions are common for some.) It is helpful at this point to show comfort with managing the process and calmly reinforce the benefit of each person speaking thoroughly, so that the mediator can really understand each one's point of view. “This helps me think more effectively of ways that I might help the two of you resolve the problems you want to address today.” It's important not to show anger or irritation with the interrupter, but rather to take an educational approach to explaining how important this step is in the process. “It's normal to feel frustrated at this stage of the process, yet it usually helps each of you in thinking about the proposals that you're going to make and most people eventually reach agreement in this process.”

After each party has had an opportunity to state their concerns and questions, the mediator can take a turn at summarizing what each party said and/or educating the parties on standards that relate to the issues they have raised. For example, in divorce mediation, the mediator can explain the basics of parenting plans, property division, child support and other issues, so that

the parties narrow their expectations and get to ask more questions. By focusing on issues, questions and answers, the process itself blocks sniping back and forth over each other's past behavior or angry positions about the future – replacing these with information.

Rather than getting angry with the parties, the mediator can simply interrupt at such times and say: "You've raised an important subject and here's how it is commonly handled..." By focusing on explanations of standards and options *before* the parties make their proposals, it saves them embarrassment and unrealistic expectations. It also helps the mediator avoid appearing to take sides.

For example, if a mediator says that community property laws state that spouses shall share any retirement benefits earned during the marriage, then it makes it slightly less likely that an employee-spouse will demand sole ownership of the retirement benefits and slightly less likely that the employee-spouse will claim that the mediator has taken the other person's "side" by sharing this information. It helps to know that such information will often have to be repeated several times before an upset party absorbs it.

Don't let these issues become power struggles. Instead, say that you are simply sharing information you believe will help them understand their options and make proposals that can become agreements. Encourage them to seek the advice of separate lawyers to get more detailed information on what you are generally telling them.

### **Step 3: Making Your Proposals**

Once there has been a discussion of issues and standards, and the parties have set their agenda priorities, it is time for making proposals. This may seem premature to many mediators who are used to spending a lot of time on discussing each party's feelings about the dispute or identifying their interests. However, the New Ways for Mediation reverses somewhat these other approaches, based on the realities of high-conflict people. HCPs usually start out with a clear idea of what they want and don't want. They are usually too upset to manage discussions of feelings productively (they just get more flooded with emotion) and too rigid to recognize both parties' interests. Therefore, this method lets them present their proposals, but then the mediator assists them with understanding the underlying parts (essentially "interests") to the extent that the parties disagree.

A structured way to do this is for the mediator to really focus on understanding a proposal before allowing the other person to officially respond. For example:

"Hang on, Dan. Don't respond yet to Emily's proposal until I really understand it. I want to make sure I'm absorbing all the parts of her proposal, which may help me help you two refine your proposals until you are ready to reach an agreement. Sometimes a proposal itself is not agreed to, but it helps us find another solution that will work for you both. So, Emily, tell me what it would look like if your proposal was put into action. What would your picture be? What you would do, what would Dan would do and anyone else involved."

Then, after hearing Emily's proposal in depth and making some notes about it, the mediator can turn to Dan and say:

“Do you have any questions for Emily about her proposal? Do you think you understand it pretty clearly? Ok, then what are your thoughts about it? Would this be a ‘Yes, I can do it!’ ‘No, I won’t do it.’ or ‘I’ll think about it.’ And if you want to think about it, when do you think you’ll have an answer for her? And if your answer is a “No,” then of course I’ll be asking you next what your proposal would be.”

By making this process go so thoroughly, each party learns that what is important is making proposals and responding to proposals slowly and respectfully. By being confident in this structure, the mediator helps the parties grow more confident that their proposals will be taken seriously and that sniping at each other just doesn’t fit. By ignoring interruptions and negative comments, and focusing on this proposal process, the mediator can manage the parties’ conversations without having to reprimand them or feel responsible for solving their problems.

In the New Ways for Mediation method, the mediator is clearly managing the process with a very direct approach, while not taking any responsibility for the outcome. That belongs to the parties. Ironically, by taking this highly-structure approach, the mediator actually makes the process simply and more user friendly for the parties, while also protecting them from each other’s (and their own) negative impulses.

#### **Step 4: Finalizing Your Agreements**

This step often feels like the easy part, but it can take as long as the whole mediation process leading up to it in high-conflict cases. This is often a written process and may involve several edits and several people involved in the editing process, such as lawyers and other advisers.

It is important for the mediator to remain calm and steady throughout this final step. Reminding oneself that “the mediator is responsible for the process and not responsible for the outcome” can be helpful. High-conflict people can resolve most of their disputes, but we have learned that they often take twice as long – if not longer– to reach final agreements. In a sense, they have two conflict resolution processes: one is focused on logical problem-solving and the other is focused on relationship defensiveness. These seem to be associated with different parts of the brain.

Therefore, after they have done logical problem-solving with professionals, they often go home and start thinking alone about relationship defensiveness and become upset again as they interpret their agreement negatively in terms of the relationship (feeling abandoned, disrespected, ignored, dominated, etc.). Then, when they are around their reasonable advisers again, their tentative agreements look reasonable again. But then, on their own again, they feel a personal loss again.

This process sometimes has to go round and round several times before both parties will actually sign a settlement of their dispute.

#### **Conclusion**

Using this highly-structured – yet simple – four-step process, mediators can help even high-conflict parties (or any parties) reach agreement. By making it repeatedly clear that the mediator is responsible only for the process and that the parties are responsible for making

decisions, everyone involved can be more effective and less frustrated. In many ways, this process is an educational one in which the parties' interactions are focused on answering questions, asking questions, gathering information, discussing options, considering consequences – and then repeating and repeating this process until there is a resolution. Efforts to blame and criticize each other, and to focus too heavily on the past, are blocked by simply re-directing the parties into making proposals and gathering more information to make more refined proposals.

In some cases, it is helpful to ask the parties to bring in outside advisers, including lawyers, financial advisers, parenting experts and others to the mediation sessions. This teamwork can add to the momentum of settling the disputes, even though it continues to be up to the parties to make the final decisions. Sometimes with high conflict cases, it is necessary to have a more thorough, collaborative process, before the parties feel comfortable reaching resolution. Fortunately, as mediators and collaborative professionals become more comfortable working with each other, some high-conflict clients are able to stay completely out of court with cases that looked impossible for settlement in the past.

In some ways, New Ways for Mediation may seem like nothing new. In other ways, this may be a huge paradigm shift for mediators. New Ways for Mediation is focused on the mediator's relationship with the parties, rather than on the outcome of their dispute. By letting go of the outcome, mediators focus more strongly on the process and how they communicate with the parties. When a mediator can effectively structure and manage this relationship with high-conflict clients, the parties themselves can use their skills to make the decisions they need to move forward in their lives – and get the credit for their success. Ironically, the less the mediator focuses on the outcome, the more positive and lasting the outcome.

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