

Timothy Hedeem: *Ensuring Self-Determination Throughout Mediation: Ethical and Effective Practices in Screening Cases, Preparing Clients, and Avoiding Coercion*
Breakout Session Transcript

TIMOTHY HEDEEM: So as you'll note, the title *Ensuring Self-determination through Mediation: Ethical and Effective Practices in Screening Cases, Preparing Clients, and Avoiding Coercion*. I offer to you the idea that these are actually -- they hang together fairly well. At the end of our hour, hour and a half's time, you can let me know if that's actually true in your view as well. So the bill of goods you were sold in a program is that disputes and mediators together determines a mediation's success sometimes only in retrospect. This interactive plenary, you'll note this was once a three-hour plenary, will explore opportunities prior to and during a session when mediators may support, hopefully even enhance, parties' abilities to make the most of their experience. Just to preview what's there for you, the client preparation comes out of the fact that over my 20 years of being a mediator, I have found that I think one of the areas that we underservice clients is we don't effectively prepare them to make best use of the time together. And because I also get the good luck of teaching negotiation at a law school in St. Paul and down at my university in Atlanta, there's a lot of good stuff in the negotiation literature about how to make best use of your time at the table. And I said, well, if we think of mediation as a facilitated negotiation, why don't we tell people before they come, you know, "Prepare this worksheet, answer these questions, be thoughtful." And so that's what's behind door number two, which we won't see today. Let me go forward a bit then and speak about some of the angle or what got me interested in this topic. I used to direct a mediation program in upstate New York and, at one point, one of the cases that came my way from the district attorney's office involved two couples who had a myriad of complaints and cross-complaints, right. And what I found in doing the case workup, what we used to call case intake and development, is that it was very hard to get things scheduled. There wasn't really a conception of time in the way that most of us might relate to time and scheduling. Once we got into the mediation session, there were some clear breakdowns between cause and effect, just some very different understandings. And it led myself and a co-author, Pat Koi, to reflect on this in an article. And what we were trying to figure out is where is this -- how do we speak about this idea of fitness between parties and process? And I want to note here for the first time and probably not the last, my emphasis is not to say there's a certain threshold by which parties have to fit the process. I'd like to think this goes the other way just as much, if not more so, that the process, the accessibility, is going to be the emphasis for me as well. So in what ways might we enhance or broaden access? What might we do to adapt or tinker with whatever we usually do to make as broad a framework as possible? So a quick review of the literature. Going back to 1984, some of the earliest practitioners whom I got to know, Albie Davis and Dick Salem writing about their experience with mediators and clients. And they say, "Look, probably what we should do is terminate a mediation when a party doesn't know what's happening in the process or they lack the ability to identify his or her interests." Right, this was suggested as a point to terminate.

And mind you, that's a -- I don't know if it's a quick trigger, but it's sort of deciding that, you know, this isn't going well, we're done. So luckily, I think the field has moved forward. Jump forward 15 years, 16 years here, we have guidelines. The Americans with Disabilities Act. There was a working group that came up with mediation guidelines. In order for the mediation process to work, the parties have to be able to understand the process, the options, and give voluntary and informed consent to any agreement reached. These sound like pretty good baseline expectations. And again, the question becomes how do we ensure this, what do we do to support this element? The evaluation of whether a party can do this is based on several factors. Do they understand the role of the mediator, the party's relationship to the mediator, the issues at hand? Susan Crawford and some colleagues at Keybridge back in 2003 published an article in Conflict Resolution Quarterly that spoke about facilitating competencies. They really sought in the same direction that I was speaking of to try to ensure that parties, as many parties as possible, could make the best use possible of the mediation process. What would that look like? Well, they set this up by noting that capacity connotes a one-dimensional ability or failure to measure up to a norm, whereas competencies suggest a variety of proficiencies. So they're trying to emphasize if you think about asset-based responses or social services, they're playing in that direction. And they also note that competencies may shift over time. This is dynamic. There may be periods in which a party is not well-suited or well-prepared to make use of mediation, however we provide it, and maybe that will shift over time. So this requires constant and ongoing engagement on the part of the mediator. Facilitating competencies results in exposing a variety of opportunities that parties, including the mediator, can consider in order to meet their needs in the problem solving process. So if you would, picture a self-correcting, continually responsive process in which the practitioner is working with parties to ensure this is still fitting or working with or for the parties involved. Come forward a few more years, colleagues at Arizona and in Texas proposed a model statute, if you will, around competency or capacity to participate in family mediation. This is the divorce mediation realm, so Linda Frosting, Connie Beck. A person's incompetent to participate in mediation if she or he has functional impairments that severely limit understanding the situation, the ability to consider options and make decisions, ability to conform behavior to the ground rules of mediation. So again, they've gone the other way here, they've established a threshold. They're saying, "This is the line. Those who can meet these standards should proceed to mediation. Those who may not are incompetent to participate." And competence has a basis in the law in other sections, like we've seen when you are competent to contract, et cetera. So this led Pat and myself to write about the idea that maybe there's some minimal criteria where we're trying to find some blend between parties and process. Where do we get to here? And if we have to focus at first on the parties, what might this look like? So we've got a broad screen here. One, can parties see how issues are related and connected to each other? Two, can we focus our conversation on one issue at a time? Three, can we understand cause and effect, which includes matching actions and consequences, tie behavior and its effect on others? Fourth, can one take responsibility for one's own actions? Fifth, can we conceive of, use, and respond

to common measures of time? Sixth, comprehend the nature of behavioral commitment. Seven, identify your own desired outcomes. And then eighth, understand the mediator's role. Each of these eight, I must say, came out of that one case. This case was in development and in process in multiple meetings over the course of probably three month's time, but each of these were areas in which we thought, "Boy, this might suggest to us that these parties, we either have to adjust what we're doing to serve them differently. Or without, you know, these elements, then I'm not sure we can proceed or make good use of this." So this article also, I should tell you, this experience also led to my center getting much better, thorough, deeper connections with our local mental health services, right. We were able to hand off back and forth a little bit and say, "We'll work better with these clients after they've gotten other services as well." And the last thing I'll say about these criteria, though, is that they aren't meant to be, you know, the tall -- this is not the little figure that stands in an amusement park, you're either as tall as this figure or you can't ride the ride. These are sort of red flags blowing in the wind, right. They signal that, golly, I want to be aware and thoughtful about how I'm going to design or, hopefully with the clients, co-design an effective process, right. And so then we are required under the mediation guidelines to determine, you know, is there an accommodation that will enable the party to participate effectively? What might that look like? So if you would, take just a quick couple minutes here and think about if you're confronted with or if you find yourself working at the table with individuals for whom some of those measures may not align the way we would hope, what might you do? How might you tweak, adapt, adjust your mediation services to best accommodate folks who, in some other ways, might not make good use of the process? If you would, just take a moment and think about what might we do, how might we change the process, the service delivery, any other items that might broaden the accommodation, the opportunity for access? Let's come back together and feel free to point up ideas or put forth ideas that you had a chance to discuss or didn't in our constrained time there. I've thrown up an awkward label here about adaptations, innovations, adjustments, but what I'm seeking is almost the brainstorming around what might we do to be responsive to parties for whom what I've listed or any others might be difficulties or might problematize the experience of mediation. What might you do to work with folks to increase accessibility of mediation?

AUDIENCE MEMBER: I had a mediation last year that we were just discussing, and the parents and the district were not represented by attorneys [inaudible]. And it became apparent immediately that the parents expected me to decide, to actually rule, and that they were using mediation as a hearing. And I broke them into two groups and spoke to the parents at length and explained the process and explained what they could expect, what they couldn't expect. And we wound up actually with a very successful mediation once they understood the process. They were prepared to pack up and go home. And I said, "I'm sorry, I can't make a decision."

TIMOTHY HEDEEN: Got you. Okay, so it sounds like there were two elements here. One was to have a caucus, or

at least as I think of the term caucus, separate meeting, and then during which there was a re-explanation of the mediator's role or re-clarification. Allow me a moment to take off from that point. One of the elements that strikes me every time I'm involved in mediation and something like this occurs, which is one in four cases in my experience, right, I've mailed people these nice forms that I speak about them in advance, explaining, "Here's the process. When you come, please be prepared to think and talk about these things." And then at the outset, I do my opening statement, and I say, "My role is not that of a judge or an arbitrator or a hearing officer. What I'll be here to do is duh, duh, duh, duh," right. It turns out either nobody reads what I send or no one listens to what I say because, at day's end, what I think was happening, at least at the outset of mediation, is people were sort of like cleaning up their weapons. They're like they're arming themselves. Opening statement time, right. So what comes forward, it seems, isn't about me as facilitator or, you know, any sort of a mediator role. There's an expectation that they're making a case to me. The first hint is often when you get called judge, right. This has happened a few times. "So judge, what's important are these things." Thank you for that promotion, but no. So re-clarification of the role would be one. Okay, thank you. Others? Who else thought of ways we might adjust, tweak, improve, innovate around mediation that might be responsive to a greater client base?

AUDIENCE MEMBER: I think it's important -- I work with the parent population. Often it's clear to me that the parents themselves have some processing or learning issues. It's very difficult for them to understand. And finding ways to use appropriate language so people understand the principles in special education, what the obligations of school districts are, and what kinds of things can be discussed in this forum, but using different language than maybe a person who's a special educator or a SpEd director might use. Just really finding ways to do some teaching about -- not about the case in particular, but about the issues that can be addressed.

TIMOTHY HEDEEN: Got you. So there's both -- there's clarification. It sounds like you're doing essentially the important work of creating accessible or appropriate language. You want to speak so that I can be understood, instead of speaking, you know, broadly or formally. And then it sounds like there's also some presentation of what is the -- what's the realm of what we might accomplish here? There's some realistic staging.

AUDIENCE MEMBER: Boundaries, yeah.

TIMOTHY HEDEEN: Yeah, okay, so providing some sense of what the boundaries of this process might be. I, in fact, work with a community of attorneys for whom it's -- these are folks who I think are actually quite effective at using mediation well. And one of the things they note is that it helps their clients sometimes to get a greater sense that, you know, it's not going to be all, nor will it be nothing, right. And they don't rely on me as mediator to sort of impress that, but through my open-ended questions, I'm inviting some reassessment of let's consider, you know, the known realm. I don't seek to substitute my judgment for theirs, but they'll come and say afterwards, "Well, I'd worked with this client for a couple of weeks, and these parents really expected the moon." And so it was helpful in the room that we all had an understanding of the range of possible outcomes.

And so I usually don't frame that myself so much as I'll try to elicit it from others in the room. Thank you very much. Others? What else might we do? Or what else have you done? Parties aren't sort of hitting on all cylinders, things aren't going at the clip you might have expected? What do you do with your sessions? Well, I'll speak. So some of the ideas that come quickly to mind for me, or at least in my experience, ones that I've at least proposed, one of them is structuring the timing of mediation around a few ideas, one of which is -- well, I won't even put them up here, they'll show up in a slide I think here. One is taking pretty frequent breaks. Frankly, I've found with a number of different groups with whom I work, there's some processing time desired, needed in fact. Sometimes there's a limited ability to focus for an extended period. We have mediations sometimes within our district courts where it's expected that if it's referred on this date, a report to the court is due the next day. And so you've sort of got that day. You start at 9:30 in the morning, good for you, but something is supposed to be done. And so if you get to the, you know, two or three hour mark, personally three hours is about as long as I would prefer to have people sit in a room together, I think we start to limit ourselves, I limit my own ability. But then we frame it and say, "Okay, how about an hour for lunch and we'll come back together?" And if we go another two hours after that, I insist on, you know, a half-hour break. I'll encourage we'll go for a walk across the street, there's a park there. Change things up. So you might think about how you structure the time is at least a large factor in some of the work I do. A second one I've sort of borrowed or appropriated from colleagues who are medical professionals who often advise that when a client, a patient's going to receive a difficult diagnosis, that you bring a support person. Right, and the support person isn't necessarily an advocate, but they're at least there for support. They're known, they're trusted, they're another set of eyes and ears. They can take notes, right, and so the role of support person is one which is sometimes conflated with the role of attorney, but often isn't. So at least in much of the work I do, I've come to encourage folks to say, "You might wish to bring someone else who can help think with you. They aren't going to sit there in the role as your mouthpiece, but they're your sounding board. And if and when during the process you find it might be useful, you might ask for a break. And the two of you can go, you know, to another room and confer for five or ten minutes time." And that's actually, I think, been very helpful in a number of cases. In fact, just in the last few months I've noted that to be of good use. So a number of possibilities. Here's a list from a recent workshop. Postponement, referral to counseling, invite folks back after they had a chance to clarify elements for themselves, a series of caucuses. At least in Atlanta, this is sort of the major civil model. Perhaps this is true in other places. It's true in Cincinnati as well, that the expectation for a million-dollar and plus civil cases is that parties come together in a big conference room, shake hands, the game is now on, and then retreat to different rooms. And the mediator sort of walks back and forth between rooms, carrying offers, introducing skepticism, and otherwise. It's not a very fulfilling process, frankly, for my vantage as mediator. I don't take advantage of it. I know someone who claims they do and that when parties are separated, they take a lot of extra time walking between the rooms. They'll sort of go outside and come back in. But allowing parties to sit and think and reflect

on, "Gee, I'm sitting here, the clock is running, my intransigence may be in the way, so I'll make some adjustments there." Individualized coaching. So when there's opportunities perhaps in caucus, I have a couple colleagues who speak about the fact that they do sort of a negotiation coach role. One of my friends is an institutional ombuds, works at a university, and so she's very attuned at working with individuals. And if you're familiar with the field of conflict coaching, there are opportunities to have folks in what's called a mediation for one model. You essentially take them through the stages of mediation, but you only have one party present. But is that value added? Does that set them up? Does that prepare them for a better experience back in the room? That's at least her finding. And then there's a coordinated approach with other helping professionals or advocates. And this is also brings up, for me, and the issue of boundaries again, though. At some level, the role of mediator isn't to bleed over there. And the coordinations, the hand offs, if you will, the referrals have to be quite clean and thoughtful. I don't seek information about these matters. I seek to provide the good service at my end of what I'm supposed to do here. How do we fit together? So next slide's moving onto the question of ethics. So there's what could we do and then there's the question of what should we do. So Mary Radford writing about -- and she's looking here at the issue of mediation in cases involving dementia or parties for whom dementia may play a role. The mediator is to ensure that all parties have the capacity to participate in the process. Determining capacity is not an easy one to make. So what might we do? And this is now where Pat and I concluded our article is that we suggest that the mediators might develop and employ respectful screening processes and instruments. What are the appropriate ways with which you might speak to parties, prospective clients before you convene to figure out will we -- might we benefit from a less than typical process off the shelf? Secondly, work with disputants to develop a mediation process that fits the dispute and the parties. Right, at some level, for me, one of the distinguishing characteristics of mediation is the opportunity to share decision making power over the process as well as the outcome with the parties. I certainly have no role in the outcome, but I think also in terms of thinking of the process. Unless I'm going to ask the parties and work with them about what's a way to move forward together, then I'm just guessing. Let me go try this process. Didn't work, hold on, I got more, right. So why not invite parties in to say, "What might we do differently now? How's this going for you? What ideas do you have?" I'm a big fan of the approach that I learned from John Haines many, many years ago, an eminent family mediator, where John was quite good at working with parties in a couple of ways. One of them is he gave me the best line I've ever used in mediation. I share it with you now. It may not fit for you, but for me, when the conversation's going off the rails in a less than productive fashion, John used to say, "I'm sorry, I'm sorry, I think I asked the wrong question. What I meant to ask is this." And it's a very elegant way in my mind to sort of, you know, wear the egg on your face for only a moment, but it's functional for the parties. No one's being told, "I'm sorry, that's not helpful. What we need to talk about is over here." Instead, John was very delicate about that. And the second thing that John would occasionally do is that when you reach impasse, share it with the parties. How did we get here? What do we want to do differently?

Clearly we have to change direction. We aren't you know, this isn't powering us forward too much here. But instead of him taking it all on himself to guess what's next, he would say, "What would you all like to do? What ideas do we have? This is our time together." And then the third quick check mark, bear in mind that mediation is not a panacea, right. There are many cases, many clients, many issues for which mediation just may not be the fitting process. Right, it's one among many. You're hopefully probably familiar with CADRE's continuum of dispute resolution processes. We call that the piano keys because it has that look a little bit there. Consider that on that, there are something in the neighborhood of 20 different processes, right, and within narrow bands, the different stages of conflict, there are probably four or five, but consider that mediation is but one. So we have to recognize, again, this falls in a continuum, a context of other available processes as well. Mediation is not the be all, end all. There's other recommendations. This came out, an article recently where I was debriefing a case we had in Georgia that reached our state supreme court. Anyone that was in here earlier before lunch, Michael Moffitt was speaking about the fact that you know a good accountant because they're the ones whose names don't get in the paper. Right, well, contrary to the idea that mediation -- contrary to the idea that all press is good press, it was not welcome news for us in the mediation community in Atlanta to have a case make the Supreme Court around issues concerning, well, capacity among them. But saving the details of that case for you for a moment here, the output -- my recommendations growing out of that case that were in an article last year. So one is to encourage mediators to be thoughtful about an ongoing assessment of the tone of the room, disputants' abilities to make use of the process, right. This isn't perhaps a screen at the front end that says now whatever happens is good. I, for one, believe that parties' ability to maneuver and effectively negotiate for themselves changes over time, right. And in fact, the case that brought this on was one of those classics. Parties were in separate rooms in caucus and it went to like the seven-hour mark. And one of the parties later tried to get out of the agreement, saying, "I would have signed anything to get out of there." He had other complications as well. He had a medication he was supposed to have taken two hours before, and, you know, wasn't available to get to him. And he had no prior notice that was going to happen, that he was going to be there possibly for seven hours. Secondly, we've already spoken of the idea of a support person. Third, as I mentioned to you earlier, I think an enhanced preparation process might have helped. I'm not sure what that looks like. It might depend on your practice. But for the case like the one that happened here in Georgia, I suggested, well, maybe we go back to the days of labor management negotiation where you tell parties, "Bring your toothbrush. Right, we're going to start this mediation at noon, but we don't have a reasonable expectation that we'll be done, you know, by dinner or by midnight or otherwise." But parties I think have every right to know and in order to make fully informed choices. I think they'll be better off perhaps taking a break or otherwise figuring that out. And lastly, there's an issue about speaking straight to the judge about how this case went and that called for mediation guidelines we don't need now. So if we had a lot more time, I'd invite you to jot down implications for practice, but you'll just have to do that now. Thank you. Questions, comments,

concerns while I click forward? Please, Marshall.

AUDIENCE MEMBER: So is there -- is it the responsibility of the mediator in situations where there's a real gulf in capacity to assist the parties to most capably represent their positions?

TIMOTHY HEDEEN: Help me out with the first part again? Is it the mediator's responsibility?

AUDIENCE MEMBER: Imagine that, for example in a special education mediation where you have school people who've been to multiple mediations, they're smart, they're verbal, they're technical, and they may be somewhat unemotional, cold, dispassionate. And at the same time, a parent who may not be particularly well-educated is emotionally -- is having a really hard time, isn't tracking, isn't seeing opportunities. Is it -- in balancing, is it your job to bring both of the parties to ultimate capacity to effectively deliver their position?

TIMOTHY HEDEEN: You've landed on the 64 bazillion dollar question because it's changed since the \$64,000 question, I think. I guess I'm going to give the unsatisfying answer, the first of many, to say that I'm not sure and that there's a yes and a no to it. The no comes from the fact that, A, balancing never quite fully happens, but the yes is more informed from a speaker this morning. Michelle LeBaron mentioned the work of Jim Laue. Jim's a guy with whom I got to study 20 years ago or so, but Jim writes an article, there's an article that I hand to every mediator I've ever trained in 20 years. It's from a 1982 journal called *Peace and Change*, and it's called *Ethical Considerations of Third-Party Intervention*. And what he writes in here is he says, "Listen, anytime you intercede or intervene in someone else's conflict, this is a value-laden move. Right, there are no non-value-laden moves, but, you know, dash the idea of neutrality." But what Jim really impresses upon the reader is the concept that you want to be thoughtful about which role you might take, and if you choose to be a mediator, what that might involve. He then goes forward to explicate, "Listen, I offer mediation based on three values. Justice is, you know, number one. The second is there's got to be some element of fairness to those present and not present," which is what Michelle highlighted earlier today. But third is the concept of proportional empowerment, the idea that when there's a great imbalance or a difference in capacity or capability, that whomever is not able to function as fully as the other is to be assisted. And we have some -- he doesn't define parity. But when we're close enough, then we move forward. So in response, Marshall, I might say that I think that it's the mediator's role to hopefully identify and work with this. Is it his or her role to actually do the empowering, help the party get either more comfortable, more stable, more thoughtful, more aware of what actually happens? I don't know. It may be the mediator's role to say, "Before we proceed, it dawns on me that you've not participated in mediation before, that your child's interests are very important to you, and you'd probably want to avail yourself of more information to make this useful. You may also wish to consider bringing a support person with whom you can bounce off ideas that make you nervous or otherwise." Something to that effect, because at some level, especially as you described it there, there's a repeat player issue. A representative perhaps from the school district who has been in this process multiple times, our colleague from

Massachusetts was speaking about that idea. So what do you do? Maybe that's part of the preparation process. Maybe that's part of a -- at the outset of the mediation, you see folks are a little antsy or not, as you say, tracking well. Maybe you take a break, take a pause at some level and try to instill that. Mind you, we don't want to disrupt the whole process each time for those opportunities, so what do we do to front-load it for success? How might we equip folks with that? Again, I don't offer a recipe and I don't know. I haven't seen that yet, but I think it's an important recognition that we very often will have folks who are differently invested in this. Right, as you mentioned, highly passionate about it, cares a great deal about, you know, their son or daughter's schooling, but doesn't know what the heck's going to happen here in a room of professionals who've done this 20 times over. As we spoken of it before, I think there are also elements of perhaps there's acute periods where you might have a lot of distress. "I don't know what I'm going to do. I haven't heard any good solutions yet, but I don't like this IEP or I don't like the school's proposed approach to these issues or not getting appropriate accommodations. I'm at wit's end. I tried to consult an attorney, but I didn't have the \$500 to start the conversation or otherwise." So this might be a role for working with parent centers. This might be a role for other -- directing people to the CADRE website, right. So maybe part of a preparation process is to say where are there good preparation materials? Are there videos online folks might watch before they come? Are there worksheets they might conduct? Is there even a quick note about how to center yourself to have a good conversation? As you'll see in the coming slides, I care a lot about this topic of coercion, about, you know, infringing on someone's capacity to really self-determine. And we have a very high-dollar mediator in Atlanta who, upon hearing me present this work six or seven years ago, raised his hand. Terrance said, "You know what, Tim? Mediation's not a stress-free environment." I appreciated his point, but I would note, therefore, that for some players, if you will, some clients, some disputants, mediation may never be the right environment. Right, if you are too distressed, if you're at wit's end, you're probably not able to be thoughtful about what interests you have and what the real effects of the agreement you're trying to sign might be. So whom do we help by going through that charade, anyway? All right, so again, I promised unsatisfying, you got it. Okay, allow me to quickly check in. Are there thoughts on the issue of capacity, competency? Let me roll forward then to the coercion tidbit here and then we'll have more time for conversation if I can keep this on track. Where are we at on time? Okay, so this goes into -- I'll frame it as ethical issue, although I think labeling something as ethical sort of overlooks the fact that ethical practice is quality practice. There's really no difference there. So to be good and effective at any professional role, you're ethical. They aren't distinct, right? So it's often odd that we put concerns about ethics at the end of the training or we wedge them in somewhere. If you're doing effective and appropriate work, you're doing ethical work. So maybe we're just looking at what is -- what might be good mediation as understood. So one of the starting points for me around this conversation comes from the joint model standards of conduct for mediators as promulgated by the American Arbitration Association, the American Bar Association, and the Association of Conflict Resolution. Perhaps you know these, perhaps you

don't, but here's the nine of the here: self-determination, impartiality, conflict of interests, competence, confidentiality, quality of process, advertising, fees, and then obligations to the field or the process. And over here, don't know if you'll recall Mel Brooks, *History of the World, Part I*. Comes down the mountain with his 15 - ten, ten commandments. So these are the nine commandments of the mediation process for us here. And I'll look at for a moment here the self-determination. And I'm not sure we get a lot of assistance from the commentary. But in the write-up model standards, we get some explication. Self-determination, mediators don't recognize mediation's based on the principle of self-determination by the parties. This is a circular, tautological presentation of what this might mean. What does he note at the top here? It therefore qualifies, for me, it's reminiscent of Justice Potter Stewart in the famous case about Jacobellis, where he, you know, spoke, "I shall not attempt to define pornography, but I like it when I see it." Sorry, thank you very much. That's what Potter Stewart said. Thank you very much. Okay, moving forward then, what is self-determination? The fundamental principle of mediation. Mediation process relies on the ability of parties to reach a voluntary uncoerced agreement. Party may withdraw at any time. So if you recall a mediation or two, I'll ask you a few questions about that. So place yourself now at a case you've handled or know of recently. Did you witness any pressure tactics? Were these done by a disputant unto another disputant? Were these exercised by an attorney? Were they exercised by the mediator? So to be clear, did you employ any coercive actions? Now before you answer, we're going to do this on a worksheet in sort of a safer form and format, but I'll invite you to consider that, like many other words we use, coercion needs some unpacking. Right, I don't know if this is how you practice, but my role as mediator, I have some trigger words that always make me think, "This needs clarification." And those are justice, fairness, and respect. Those are the big three, at least for me. I do a lot of workplace mediation these days, and I would say in every other case, respect is huge and it's often a turning point in the mediation when I can say to someone, "Tell me, what does respect mean to you?" And that person speaks about it. And often at that point, the party across the table says, "Oh, I had no idea." Right, we have these different conceptions, right. And for example, in a case last month, respect to one party was that, you know, you call me by my first name. That would be appropriate and polite and feel familiar, but you never do. And the other party says, "Oh, well, what I learned in graduate school is that you always use formal titles in a workplace, and so I was showing you respect by calling you Dr. Blah blah blah." And there was this fundamental disagreement. These are -- this is a cultural dimension, if you will, about formality and hierarchy, but they had very different views of it. But that was actually the biggest thing that turned our time together. It's kind of remarkable to me. So in the same way, returning to our copy here, coercion I believe needs some unpacking. So in these mediations where you may or may not have done these things, let's just think about what might qualify as pressure and then we'll figure out when pressure is appropriate or not. So exerting some influence, predicting how a judge might rule in a case, providing information at all, engaging in arm-twisting, threatening to declare an impasse, offering suggestions for outcomes, pointing out the negative consequences of not

resolving the case in mediation. These are all elements that have come forth in different discussions and conversations, CD trainings I've attended, that count as pressure. And so the task to us coming up here is trying to figure out how these array or how these align against one another, how would I put these in order? So a quick lesson, though, in Latin. I suffered through five years of Latin, so now you will suffer through two minutes of Latin. So quickly, the term coercion comes from *coercere*, which means to surround or control or restrain. It comes, somewhat morbidly I guess, from *arcere*, to enclose and confine, which comes from *arca*, which is a box or a coffin. So coercion is the act of compelling another through pressure or intimidation. And so the literature distinguishes between a coercion into and within mediation. As a quick aside, the reason this came to my attention and my concern is you've met -- you've seen Phil Moses' work here at the conference a bit and so Phil and I each had the experience at one time working in a district attorney's office doing mediation work. And when I followed Phil in that role, I found this remarkable change. I had been to the community-based mediation center, where I'd send out invitation letters to mediation, and some people would come. And then I got to work in the DA's office. And when you send out an invitation letter on DA letterhead, people really want to come. It's awesome. And so I said, "There's something to this." So my doctoral dissertation, 15, 10 years ago, was really a study of coercion into mediation. What's going on that draws people in, and what effect does it have, right? When the police officer says, "I don't want to come back to this address again until you go call the mediation center," versus when, you know, the helpful person at the community center says, "You know, you guys ought to think about mediating," to when the judge says, "I expect this to go to mediation. I want a progress report in 30 days." What's heard, how does that play? What I found is that it plays out very distinctly based on who does the referring. And just to -- we'll start with the judge there at the end. In fact, that's why I'll summarize. That basically what happens is that people -- referral agents can't shake the mantle of the role. So when the judge encourages you, even though I know judges who encourage you gently and lightly, people don't hear that. What people hear is, "If I don't go to mediation, then I'm going to lose bad." That's the interpretation. What it leads to is higher rates of participation, by the way, and slightly diminished rates of settlement, the higher the coercion into mediation. But that won't be focus for today. Our focus today will be within mediation, what do we see, what do we know? So there are various conceptions of what this looks like in the literature. There's pressure to accept or enter, as we've spoken of, pressure to continue with mediation, pressure to settle in mediation. Sorry. So our emphasis here is going to be on these following two, what happens in the room within a session. Our ethical standards down in Georgia start to point to these ideas here, but they say, look, a mediator must guard against any coercion. At some point, persistence becomes coercion. So there's clarifying language that struck me when I moved to Georgia about ten years ago, and it said, you should be persistent. Right, it is a mediator's role to help parties slog through where they can, when they can, push through the difficulty when available, and move forward. But at some point, too much persistence is bad. So then we go into the literature and I find this nice article from the early '80s suggesting that, well, a line might be crossed at some point. Living down in

Atlanta, lines matter a lot. So here we are. This is an article, let me go back here, David Matz writing in 1994 about party autonomy. In the cases where a mediator can become the tool of the dominant party or the mediator out of excessive zeal for putting another notch in her settlement belt, might push a hapless party around. In either these cases, the concern's that a line has been crossed. So as I was saying, down in Atlanta, unfortunately, we have to drive a lot. And so this made me think about what you see in front of you every day, your speedometer. So if we think about the speedometer and sort of moving up along these dimensions, the third party control the process, we're going to study that, in fact, what we're focusing on here is mediation. By the way, that took me 15 minutes. So all right, so we're looking at mediation here therefore. So we don't have very high control of the process, not as high as some of our colleagues on the continuum, but there's still quite a bit invested there. So what do we do, though, about approach? Some of you are familiar with probably Len Riskin's work, where he detailed different continua along which you might locate mediators from the facilitative or elicitive approach, to evaluative and directive. And I suggest that way over here somewhere, if this is your tachometer, your engine's revving really high, there's a red line. Right, and that red line tells you if you have your car driving there for too long, you're going to harm your engine. Things are not good. So the question becomes, though, where is this line? How much pressure might we employ? In the language in the study of coercion, there's laid forth a continuum of tactics that are likely to induce someone else's change or influence their behavior. So that goes from suggestion, persuasion, enticement, duress, coercive persuasion, and coercion. And what we find -- sorry, I'm not good with my timing here, what we find in the literature is an important element here, which is that coercion is typically understood not as the intention of the coercer. Coercion is defined as if through reception theory. It's does the person perceive they're being coerced? Right, so when we talk about autonomy or self-determination, we speak about it from the role of the party. In the same way, coercion or, you know, inappropriate levels of pressure are those which are received or perceived by the party. All right, it may not be intended, so we also have to be thoughtful about the extent to which intention isn't what we're speaking to here. We're trying to develop an awareness, though, as to how our actions might be received. So here we go. A handout that you have before you. Thank you, Kara, for distributing those. A handout that you have before you is going to help us think about what goes on this continuum. When have we gotten to the point of too much pressure? And so what you'll find on the handout, which didn't quite reproduce the way I designed or dreamt up, but so it goes, what you'll find there is a list of interventions. So we're going to start with solo efforts and then move to a group effort. So if you would, review that list of interventions there. I think we got about 20 on that list, and feel free to add others that you've employed or observed. Place the interventions in order from least to most pressuring. That's your task, your central task. For some folks, trying to rank order 20 different items, though, is a bit difficult in our compressed time, so instead you might indicate where you believe the level of pressure reaches coercion. Others will take this exercise and look over it and say yes or no. Which of the interventions proposed there are ones that you would do and which ones are over the

line for you? Once you've had a chance to walk through those, I'd like you please to turn to a colleague or two at your table, a nearby table, and try to figure out where are there points of distinction between those strategies you find appropriate or acceptable levels of pressure? And then which ones did you think differently about as being acceptable or appropriate. Is that almost clear?

AUDIENCE MEMBER: So you want us to tell you which of these are appropriate in terms of whether you're encouraging or coercing?

TIMOTHY HEDEEN: Yes, I'd like to know -- or even easier question, would you do that? So it's a yes or no, but then the ultimate task will be at what point do you or a colleague, you know, find difference over the idea that this is okay, this is an acceptable level of pressure, or this is not an acceptable level of pressure. This is over the line. Allow me to note that I'll put up a few other debriefing questions. You can only take your pick among my invited request there a moment ago, or my request that you come up with one or two that stood out for you. You might also look over the list briefly and touch base about were there interventions that were missing? Are there things that you have seen in practice or you've done that you might add at the bottom of the list there? You might also note which of these interventions are common in your practice, and then where do they fall? Are they non-coercive, are they a little coercive, are they heavily pressured? A fundamental approach to this exercise that someone once mentioned to me was, "Why don't you just ask which of these are outside of bounds?" Right, because we can certainly look at these and say, you know, when you look down this list, if any of these are things you would never do, that probably highlights or speaks to an issue of your ethics or professional stance. And then there are issues about where the lines might be if we were able to have the time to put all 20 in a row. So who would like to speak about any of these items or others? Deadly question.

Marshall?

AUDIENCE MEMBER: We had, for me, a very interesting discussion about whether the rules change depending on whether these behaviors are done in the presence of both parties or whether they're done in a caucus.

TIMOTHY HEDEEN: Certainly, so context may matter a good deal here, right. And some of these which might not be appropriate in joint session may become more appropriate in caucus, or vice versa, although I'm guessing that most of it would go the other way there. So say more? Were there some of these that stood out for you as being more appropriate for caucus then?

AUDIENCE MEMBER: Well for me, the possibility of sitting with someone privately and saying that I believe that they -- that they're looking at an extremely good and generous offer feels very different than it does if I say that to the person in the presence of the other party. Although I think we talked a little bit about whether it's really my role at all to form an opinion about the quality of an offer, which then so complicates the whole discussion. And I would describe myself as being extremely evaluative, and so that's behavior that I would comfortably engage in that may be --

TIMOTHY HEDEEN: Others might not, sure, sure. And is that true among your colleagues? Are you --

AUDIENCE MEMBER: It's not.

TIMOTHY HEDEEN: Got you, okay. A couple of head shakes over here. Sure, and this goes to -- I would highlight that not only, as you frame it, these look different whether they're caucus or joint session, there's an element of communities of practice. And I'm going to speak about, this is almost like regional vernacular. When I undertook my first mediation training in 1988, this was in New York and there was a general approach and preference for using caucus when you needed it, but not always, in a broadly facilitative approach, right? Well, in the state of Ohio in the early '90s, attending a training there, they had a process that says you always caucus. In fact, that there are three points during mediation where you always caucus. You'll hear parties together in the outset, then you go to private caucus to hear more. Then you come back together and do some framing of problems and issues, then you go to private caucus and do more. Right, and they had it built into the process there. Right, I had a colleague who was trained in Massachusetts about the same time in the late '80s, and his experience was that caucus was like a boogeyman. It was a no-no. You resort to caucus, you're missing out on the whole idea of why we went to mediation in the first place was the line of thinking. And so I think this whole thing gets overlaid a bit with where we learned our orthodoxy. And I don't know if this is true for anyone else, my personal observation over the years has been that whatever your first training was imprints most deeply. And so that, you know, it's actually with great hazard and peril I go around doing CLEs telling people what mediation should or might look like because if what I say bounces up against something they heard in the first training, it's as though I've spoken heresy. "No, that's never how it is!" And so what I've identified, though, is that in different places, different practices have emerged, which is probably appropriate. Right, we're supposed to be responsive to parties and the folks who are there and that's -- I think that's probably a good thing, but let's note it complicates matters a good deal. So that when you speak about if Marshall self-describes as evaluative, then that's distinct from your style of practice, I'm guessing your sheets don't align very closely. Some of these would be in the more directive evaluative frame than others. Thank you. Other thoughts? What else struck you as you did this exercise? Or the items that you looked at and said, "I never do that."

AUDIENCE MEMBER: I think they're all acceptable with the exception of two, possibly three. In O, when you say propose a few, I would say all the options.

TIMOTHY HEDEEN: All the options. Do you know all the options?

AUDIENCE MEMBER: Well, in the particular situation.

TIMOTHY HEDEEN: Okay, okay. Ah, so you're going to lay out the panoply of -- if we knew if it's a bounded exercise around special education mediation, there's only a range of things that are likely to happen. You're saying you might lay all of them out to say --

AUDIENCE MEMBER: Yeah, including that you don't need to settle, [inaudible] explain what the possible scenarios could be because sometimes, you know, you need to vocalize that so that people could digest it or --

TIMOTHY HEDEEN: Okay, so for O, you might revise that to say propose all options or don't. Okay, and you said there were some that you would never do?

AUDIENCE MEMBER: Yeah. Now in truth, all of them I would never do except for two, J and M.

TIMOTHY HEDEEN: J and M, and those are the ones you would do.

AUDIENCE MEMBER: Yeah, those are the ones that are acceptable. The other ones are completely unacceptable.

TIMOTHY HEDEEN: I see, the whole -- otherwise, the list is completely unacceptable. Okay, very good, very good. So we've got only a few that are acceptable and many that aren't. Others find themselves there? Others have more of them as acceptable?

AUDIENCE MEMBER: I had about the same. I had five that are acceptable, but [inaudible] mostly were O, N, and M. And then I was looking at G and S.

TIMOTHY HEDEEN: So suggesting tradeoffs and then recommending a party accept it. And those became acceptable for you?

AUDIENCE MEMBER: In rare cases. I worked on a cross-cultural case where a wife does not have knowledge of the law and she's getting her settlement. I may be able offer that wife, "Yeah, take the settlement, it's a good settlement." [inaudible]. That is a rare case in which you can suggest, but beyond that --

TIMOTHY HEDEEN: But beyond that, none of these are getting there, okay. How about others? Do I have anyone for whom many of these are there?

AUDIENCE MEMBER: Well, I had five that I would have done, and the rest I wouldn't. But the two that struck me that I had a tossup with was G and O because I never -- well, first of all, let me go back to say that I've done mediations mostly in family mediation and civil mediation. I've never done any special education. I'm about to. So I don't understand when you said that you already know what the outcome is or what the possibilities are. That's different than family. So for G and O, I've never suggested tradeoffs, but in a caucus I would give supposals. Not really propose options, but I would make up a, "Well, suppose you had this," or to get the client to start thinking in a different way. I've done that. So you know, it's kind of --

TIMOTHY HEDEEN: Did you call those supposals?

AUDIENCE MEMBER: Yeah.

TIMOTHY HEDEEN: That's -- I have not heard the term. I like it very much.

AUDIENCE MEMBER: We made it up.

TIMOTHY HEDEEN: Okay, it's a fine one. Okay, so it sounds like you've got then -- but you mentioned G and --

AUDIENCE MEMBER: Because, you know, G says suggest tradeoffs. So I never really suggest, "Well, maybe you should give up the house and take your car," you know, and stuff like that, but --

TIMOTHY HEDEEN: But the language tweak here you might -- if I said invite considerations among tradeoffs, then we're getting closer? Okay, got you. So let me just check in then, and I don't know if this will be alarming to you or not, I've used this exercise now in, I don't know, 15 or 20 trainings around the country. And I have had folks in the room who say all of these are acceptable in the right context. And now, again, that might not be your approach and I don't -- I'm not in any way suggesting it should be, but these are all things that at least I have observed in practice as an observer, because part of my role as managing mediation rosters is to sit in the back of the room very often. Let me just highlight one or two of them that come quickly to mind. One is about the long hours issue. Dear friend, Jim Coben, teaches at Hamline University School of Law up in St. Paul, and Jim was the first one that turned me onto this question. He had asked it at a CLE event. He said, "How many folks use long hours, you know, to get people to settle and sort of wear them down?" And he said that, you know, almost half the room raised their hands. And he was just -- he thought it was going to be a question where a couple people might say I've done that or something. And so he asked sort of indignantly in a later article, he said, "So what is, you know, agreement by acquiescence? What sort of approach is that? Is that what we're doing in this process? Is that what it's about?" And I would note that Jim, as well as many others of us, have therefore put in our support for the idea of a cooling off period. I don't know if you're familiar with these or if you have these in your section, your jurisdictions or your areas, but that people can get out of a mediation agreement after a few days' time. They have a few days' time to think about, "Do I really like it now? After having slept on it and reflected on it, do I wish to still sign onto it or not?" And so in our model court rules in Georgia, all court mediations have this window, this three-day window. Mind you, you have to go to the right place to exercise it. The problematic case I wrote about, the person called the other attorney to say we want out. Well, that's not what the rules provide. You have to go to the case coordinator and tell them you want out. But you might think about if parties feel pressured, maybe the opportunity to have some time away, you know, alleviates the sense of duress or pressure.

AUDIENCE MEMBER: The resolution meeting in special education includes a three-day recision period.

TIMOTHY HEDEEN: Okay, there it is. Very good, so yeah, so that may be one way we might think about this. And the other thing I'd mention is that it didn't come up in the room today, but we have sort of expressing pleasure or expressing displeasure. I should let you know that when we teach and I train around negotiation issues, we speak about these as being sort of the vaguely inappropriate negotiation moves. But at some level, I have to think about the fact that expressing pleasure at the pace of mediation or at the negotiations is sometimes what we talk about in training, that we say in the many hats of a mediator, one of them is cheerleader. Right, because

sometimes you're the only person in the room who can see the possibility of agreement. And so even if you think it's hopeless, you don't show it. "We're working really hard, just a little bit more, please." Right, this idea of perseverance. And so let's recognize that context, our local region, a lot of things will influence how we receive these ideas. Let me wind down then quickly and note that in the discussion that I was citing earlier from 1994 negotiation journal between Jim Boskey and David Matz. Jim Boskey responded by noting -- and I'll ask it for our exercise here, "What does all of this imply about propriety of the use of mediator power in the form of coercion, therefore? It suggests there's no singular simple solution to the question of to what extent it's appropriate to influence a party or what techniques may be appropriate." Now I want to highlight again, this is now, what, 17 years ago. I'm not sure we've gotten too much further on this question. If you were in this room earlier, speaking with Michael Moffitt or hearing Michael present, you know, we're sort of hamstrung in the field by having limited opportunities to talk about what we really do, and then we have this confidentiality barrier that really limits the opportunity to have open exchanges about it. And so I might suggest to you -- I have colleagues in Virginia who've done this now for five or six years time, the opportunity to meet up with four or five other mediators on a quarterly basis and just talk things through is a really nice way to get some debriefing and to get some feedback about ideas or options that otherwise you just sit in silence on. You do your case, you do your next case. And when you have difficulties, you are confronted with these opportunities or options or ideas, how do you handle them? That may be one way to at least process them a little bit further. So two other dynamics I'll highlight, and then I'll add a third just to be sort of mildly provocative. One, the idea of mediator as tattletale, that when mediators invoke or have an ability to report what happened, that certainly is a form of pressure. In most jurisdictions, in most systems, this is not allowed. Whatever happens in the room, stays in the room, and there's no expectation the mediator offers a report on did the party participate in good faith or who didn't let the agreement happen. But this happens pretty frequently. I still have judges who are big fans, supporters of mediation, who will ask me after an impasse is declared, "Well, so who was -- you know, who wasn't willing to budge?" "Judge, please, this is not a conversation we can have." But it still happens there. So when a mediator has that power, though, I think it's very real.

AUDIENCE MEMBER: In my jurisdiction, Virgin Islands, when we do -- when we get mediations through paternity and child support, you know, whether it's child support, do presentations in that department, they would ask the mediator to give recommendations. Which one of the parents do you think needs parent counseling or parent classes or -- because, you know, we have some parents who are very young, 17-year-old, 18-year-old. And some of these kids, they need -- they don't know what it is to be a parent. So they would ask the mediator to put them in the report, you know, after you have settled or not settled. I recommend that both parties go to parent counseling, or the father needs, you know --

TIMOTHY HEDEEN: Anger management.

AUDIENCE MEMBER: Only in that department, though.

TIMOTHY HEDEEN: Yeah, I was going to say -- well, and at some level I have sympathy and I appreciate it because, hey, you had an opportunity from a dispassionate, professional lens to say, "And see, this might happen." It does -- it changes the role though quite a bit, right, if you have the power to offer that idea. Let me note another dynamic that I observed recently. Well, it was a few years ago, I gave this conference -- gave this talk at a conference and someone said, "Well, yeah, but what about this experience where one of my counselors in my firm was mediating alongside insurance adjustor and they reached impasse. They were only \$50,000 apart on a case worth about, you know, one and a half million dollars. As they're walking down the hall, the adjustor says, 'Well, I had another \$100,000 of settlement authority.' And you know, guy stops, 'Well, why didn't you put it on the table? We could've gotten a settlement.' The adjustor said, 'Well, he didn't beat it out of me,'" speaking about the mediator. The mediator didn't beat it out of me. And so this goes to the idea that maybe there's some desired mediator pressure here, right. They're might be a dynamic. In fact, again, in the early '90s, Josh Stulberg at Ohio State wrote about the idea that sometimes the role of mediator is a scapegoat. You know, let people blame it on the mediator. "Oh, we had to make a deal, the mediator forced us to." This led to my rather provocative announcement this morning that when we were doing metaphors with Michelle LeBaron, what role would you pick for yourself, I decided I would be a mediatrix. And you know, you have to tell people, "How much pressure do you want me to assert? And what's the safety word?" is a whole other question, but we won't dwell on that for now. So the last thing I'd highlight was simply that if ethics issues are of concern to you or your program, I've worked for four years creating this clearinghouse that's now up to about almost 375 grievances around mediators around the country. And while the website just got updated and they've gone and moved on me, you should be able to find it somewhere at the ABA, it's now AmericanBar.org website. But basically you can search by any of the model standards and get all of the mediator opinions or ethics opinions about mediator bad behavior there. And you can look through those. And actually, I find it to be kind of fun because with my students or mediation trainees, I go through and just randomly pick out a case. And we read about it and we try to figure out what would be more appropriate responses. But very often within this, you've got elements here from around the country for at least the last 15 or 20 years, but a good body of what cases have been problematic from the party's point of view. Some of them deal with self-determination and therefore coercion, but they go elsewhere as well. So if you want to know what was behind it, as of April 2009 when I first developed these slides, most concerns around impartiality, perceptions that mediators weren't being impartial. There was a good proportion, though, on self-determination, conflicts of interest, or quality of the process. These are the bases on which people were reporting I don't think my mediator did an effective or appropriate role. So here's what we've come through in our quick hour and a half. I hope it's been useful to you, and I'll stand around if you have any questions, comments, concerns. Enjoy the rest of the

conference.